



DECISION of the FEI TRIBUNAL

Appeal by Ms. Iryna Shulga & the National Federation of Ukraine

dated 30 November 2016

In the matter of

Ms. Iryna Shulga ("Ms. Shulga" or "the Appellant") & the National Federation of Ukraine ("UKR-NF")

together "the Appellants"

represented by Mr. L.M. Schelstraete and Mr. P.M Wawrzyniak of Schelstraete Advocaten, Oisterwijk, The Netherlands

vs.

FÉDÉRATION EQUESTRE INTERNATIONALE ("FEI")

I. COMPOSITION OF PANEL

Mr. Henrik Arle, chair
Mr. Chris Hodson QC, member
Mr. Erik Elstad, member

II. SUMMARY OF THE FACTS

- 1. Case File:** The Tribunal duly took into consideration the Parties' written submissions and communications received to date and the oral argument presented on 25 October 2016.
- 2. Oral Hearing:** 25 October 2016 – Lausanne, Switzerland.

Present:

- The FEI Tribunal Panel
- Ms. Erika Riedl, FEI Tribunal Clerk

For the Appellants:

- Ms. Iryna Shulga, Appellant
- Mr. Luc Schelstraete, Legal Counsel
- Mr. Piotr Wawrzyniak, Legal Counsel
- Mr. Frank Kempermann, Chair FEI Dressage Committee
- Mr. Mykhaylo Parkhomchuk, Chair UKR-NF Dressage
- Ms. Iuliia Parkhomenko, Event Director
- Ms. Mariana Oleksandrivna Gulevych, interpreter

For the FEI:

- Mr. Mikael Rentsch, FEI Legal Director
- Mr. Aine Power, FEI Legal Counsel
- Ms. Anna Thorstenson, FEI Legal Counsel
- Ms. Yuri Yagi, FEI Legal Department Intern

Others:

- Ms. Maria Dzhumadzuk, Appellant Dzhumadzuk Appeal

In order to streamline the proceedings the Tribunal decided, and the Parties accepted, to hold consolidated hearings in the cases of the Appellants and Ms. Dzhumadzuk and the UKR-NF (the "**Dzhumadzuk Appeal**").

III. DESCRIPTION OF THE CASE FROM THE LEGAL VIEWPOINT

1. Articles of the Statutes/Regulations which are applicable or have been infringed:

Statutes 23rd edition, effective 29 April 2014 ("**Statutes**").

General Regulations, 23rd edition, 1 January 2009, updates effective 1 January 2016 ("**GRs**").

Internal Regulations of the FEI Tribunal, 2nd edition, effective 1 January 2012 ("**IRs**").

FEI Dressage Rules, 25th edition, effective 1 January 2014, Including updates effective 1st January 2016 ("**DRs**").

FEI Dressage Olympic Ranking Rules for 2016 Rio Olympic Games, issued on 18 December 2014 ("**Olympic Ranking Rules**")

CODEX for FEI Dressage Judges, 1 January 2011 ("**Codex**")

2. The relevant Legal Provisions

GRs Article 165.1: "An Appeal may be lodged by any person or body with a legitimate interest against any Decision made by any person or body authorised under the Statutes, GRs or Sport Rules, provided it is admissible (see paragraph 2 below):

(...)

1.2 With the FEI Tribunal against Decisions of the Appeal Committee or any other person or body.”

Olympic Ranking Rules: “(....)

Fairness

The FEI has the right to accept reasonable exceptions to these rules, in the interest of the riders and the sport in general.

The FEI Dressage Committee may decide not to include the scores obtained at an event in the rankings, should the event not have been organized in accordance with general principle of fairness. The Executive Board should confirm the decision of the Dressage Committee.”

Codex Article 2: “A Judge must avoid any actual or perceived conflict of interest. A judge must have a neutral, independent and fair position towards riders, owners, trainers, organizers and other officials and integrate well into a team. Financial and/or personal interest must never influence or be perceived to influence his/her way of judging.

Activities which will lead to or may lead to a “conflict of interest” when officiating at a CDI, include but are not limited to:

- Training a horse/rider for more than three days in the twelve month period prior to an event or any training of a horse/rider during a period of nine months before Olympic Games, WEG, Continental Championship or Grand Prix level, or World Cup Final, and three months before any other FEI event.
- Acting as Team chef of National teams at international level or being responsible/co-responsible for selecting teams and/or individuals or training riders within the NF.
- To be owner/part-owner of horses taking part in the event.
- Being in a situation of financial dependence or gaining financial profit from owners, trainers, organizers or other related organisations.
- Having a close personal relationship with a competitor.
- Nationalistic judging.”

A judge has the responsibility to notify the FEI of any of the above or other possible conflicts of interest or situations that may be perceived as such.

Codex Article 7: “The FEI and the FEI Dressage committee have the right to undertake disciplinary actions against judges who do not follow the Codex and FEI rules.

Such disciplinary actions may consist of: 1) Warning letter 2) Temporary Suspension and 3) Removal from the FEI Dressage Judges’ list.”

DRs Article 438: “A Judges Supervisory Panel (JSP) is mandatory for Olympic Games, World Equestrian Games, Continental Championships or Grand Prix level and World Cup Finals. A JSP may be present at all CDIs.

The purpose of the JSP is to ensure fair judging.

(...)

The JSP may correct definite technical mistakes and counting errors. The JSP may not set marks outside the range of the judges' given marks. Corrections may be made both to lower and raise marks. The JSP must inform the judges immediately after the competition which marks have been changed. A signed form with the correction will be added to the normal sheets and made available to the Athletes, and given to the Judge, whose mark has been changed.

If a judge's final score for a Horse/Athlete combination varies (above or below) by six (6)% or more from the average of the scores of the other judges for the same combination, the JSP may, by unanimous decision, change that particular score to be the same as the next closest score.

(...)"

IRs Article 17.1: "In accordance with Article 36 of the FEI Statutes, the FEI Tribunal has the competence to hear and determine any matter properly submitted to it, including, but not limited to, those matters specified in Article 163 (Protests) and Article 165 (Appeals) of the FEI General Regulations and all disputes and procedures arising under the Equine Anti-Doping and Controlled Medication Regulations."

IV. DECISION

Below is a summary of the relevant facts, allegations and arguments based on the Parties' written submissions, pleadings and evidence adduced during the oral hearing. Additional facts and allegations found in the Parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. Although the Tribunal has fully considered all the facts, allegations, legal arguments and evidence in the present proceedings, in its decision it only refers to the submissions and evidence it considers necessary to explain its reasoning.

1. Factual Background

- 1.1 A CDI 3 * Event was held in Lier (BEL) on 1-2 March 2016 (the "**Lier Event**"). The Lier Event consisted of four (4) separate Grand Prix Competitions, including a Grand Prix Special (the "**GP Special Competition**") at which Ms. Shulga judged at Position B.
- 1.2 After the Lier Event, the FEI received complaints/requests to look into the Lier Event and, in particular, to the scores awarded to the Ukrainian athlete Ms. Inna Logutenkova from the Polish National Federation (the "**POL-NF**") and separately from the Portuguese athlete Mr. Goncalo Carvalho.

- 1.3 Consequently, the FEI Dressage Committee was asked to review the Lier Event (and a subsequent CDI-4* event held in Lier on 4-6 March 2016) in order to determine whether or not the events and the competitions were conducted in a fair manner. The FEI Dressage Committee took the following decision at its meeting of 17 March 2016 (the "**FEI Dressage Committee Decision**):

"Regarding the CDI3 Lier held on 1-2 March 2016, the Dressage Committee noted that such event comprised of 4 separate competitions. The Dressage Committee agreed that nationalistic judging in favour of the UKR Athlete, Inna Logutenkova, by two Ukrainian judges occurred during the Grand Prix Special test of the CDI3* Lier on 2 March 2016.*

As a consequence, the majority of the Dressage Committee (5 members in favour, 1 member against) decided that the "Fairness Principle" as outlined in the FEI Olympic & World Ranking Rules for Dressage shall be applied, meaning that the results of the Grand Prix Special at the CDI3 Lier (2 March 2016) shall NOT count towards the Olympic & World Rankings for Dressage.*

The Dressage Committee furthermore agreed that disciplinary actions must be taken against the two Ukrainian judges Mariya Dzhumadzuk and Iryna Shulga as a consequence for their violation of the Codex for FEI Dressage judges (nationalistic judging). The Committee members are aware that the two judges will have the right to be heard in full detail before any sanctions will be imposed on them. At this point in time and based on the evidence currently on hand, the Dressage Committee would consider a temporary suspension as well as a downgrading to a lower judges star level to be an appropriate sanction for the Codex violation.

(...)"

- 1.4 On 28 April 2016, Ms. Shulga was notified of the decision of the FEI (the "**FEI Decision**") to suspend her with immediate effect for a period of three (3) months, *i.e.*, until 27 July 2016, in accordance with the Codex, as the FEI has found that Ms. Shulga has failed to comply with Article 2 of the Codex at the GP Special Competition. Specifically, the reasons for the FEI Decision were set out as follows:

"In your email of 7 April 2016 you referred to the previous performances and "constant progress" of the horse "Fleraro" over the last six months and stated that "Fleraro" previously received a score of 71.6%¹ at a previous competition. You also stated that during the GP Special Competition there was "more impulse" and the horse looked "better than previously".

However, it is the position of the FEI that the past performances and scores of Mrs Loguntenkova and Fleraro are irrelevant to the present case and your familiarity with this particular horse/athlete combination should not have influenced your judging during the GP Special Competition. Mrs Loguntenkova and Fleraro should have been judged based solely on their

¹ You stated your own score was 72.8%

performance at the GP Special Competition and their past performances should not have been a relevant factor for your judging at the GP Special Competition.

You also referred to the "low marks" given by some of your colleagues for Mrs Loguntenkova's performance. There was certainly a significant difference between (a) the scores you awarded to Mrs Loguntenkova, an athlete of the same nationality as you; and (b) the scores awarded by the other judges² to Mrs Loguntenkova. The scores awarded by you to Mrs Loguntenkova, during the GP Special Competition were over 9% higher than the average of the scores awarded by the other judges³ to Mrs Loguntenkova, a difference which you have acknowledged as being "big".

Having reviewed all the scoring, the FEI does not consider that the marks awarded by the other judges to Mrs Loguntenkova were "low" but rather that your marks were unjustifiably high. In arriving at such conclusion, the FEI could not overlook the fact that, according to the official scores of the GP Special Competition, the scores you awarded to the non-Ukrainian athletes in the GP Special Competition did not deviate from the scores awarded by the other judges⁴ by more than 2.016%, on average, in contrast to the over 9% deviation from the average scores for Mrs Loguntenkova.

In summary, the FEI does not consider that the explanations contained in your email of 7 April 2016 adequately explain why there was such a significant difference between (a) the scores you awarded to Mrs Loguntenkova and (b) the scores awarded by the other judges⁵ to Mrs Loguntenkova.

Based on the foregoing, it is the decision of the FEI that, during the GP Special Competition, you judged in such a way as to favour an athlete of the same nationality as you and, thus, your scoring amounted to nationalistic judging and was a breach of the Codex."

- 1.5 Next to Ms. Shulga, another Ukrainian official, Ms. Maria Dzhumadzhuk, has also been suspended by the FEI for three (3) months for the same conduct, *i.e.*, failing to comply with Article 2 of the Codex at the GP Special Competition.

² Please note that the scores of Ms Dzhumadzhuk were excluded when calculating the average of the other judges' scores for Mrs Loguntenkova due to the fact that Ms Dzhumadzhuk's judging during the GP Special Competition was also alleged to be in breach of the FEI Codex for Dressage Judges.

³ As point 2 above.

⁴ Please note that the scores of Ms Dzhumadzhuk were excluded when calculating the average of the other judges' scores for the other athletes (*i.e.* the athletes other than Mrs Loguntenkova) due to the fact that Ms Dzhumadzhuk's judging during the GP Special Competition was also alleged to have been in breach of the FEI Codex for Dressage Judges.

⁵ As point 2 above.

2. Procedural Background

- 2.1 On 24 May 2016, the Appellants lodged an Appeal (“**the Appeal**”) in accordance with Article 38.1 of the Statutes, Article 165 of the GRs and Article 20 of the IRs to the Tribunal.
- 2.2 On 25 May 2016, the FEI Tribunal Chair granted the Appellants the opportunity to supplement their Notice of Appeal.
- 2.3 On 27 May 2016, the Appellants supplemented their Notice of Appeal.
- 2.4 On 27 June 2016, the FEI provided its Response to the Appeal.
- 2.5 On 19 July 2016, the Tribunal provided the Appellants with the opportunity to reply in writing, and limited to the arguments raised in the FEI Response, and furthermore granted the FEI with the opportunity to respond thereafter.

3. Decisions by FEI Tribunal Chair

- 3.1 On 27 May 2016, among others, the Appellants requested the Tribunal to order the FEI to disclose immediately “the entire file” related to the matter at hand, *i.e.*, with regard to the FEI Decision (the “**FEI Case file**”).
- 3.2 On 1 June 2016, the FEI addressed the Appellants’ Request to order the FEI to provide the entire FEI Case file, and requested that aforementioned request be rejected.
- 3.3 On 9 June 2016, the FEI Tribunal Chair – as no Hearing Panel has been constituted at the time in the case at hand – decided to reject the Appellants’ Request to order the FEI to provide the entire FEI Case file. More specifically, the FEI Tribunal Chair found that the Appellants’ Request to order the FEI to provide the entire FEI Case file is not acceptable and goes far beyond what is necessary for the Appellants to argue their case in the proceedings in front of the Tribunal. In summary, the FEI Tribunal Chair found that the Appellants should be provided with all “official” documents, such as meeting minutes with regard to the matter at hand; further disclosing also “private emails” and internal communication is considered as an excessive request. Finally, the FEI Tribunal Chair decided that the Appellants have to clearly specify which “official” documents – within the possession of the FEI – they request to be disclosed, and that the Appellants have to explain to the Tribunal’s satisfaction why disclosure of those documents is important and necessary for them in the present proceedings.
- 3.4 On 24 June 2016, the FEI Tribunal Chair – upon prior request by the Appellants – which request was objected by the FEI – decided to divert from the principle outlined in Article 18.1 of the IRs, *i.e.*, all cases – except matters involving abuse of Horses or violations of the Equine Anti-Doping Rules or the FEI Anti-Doping Rules for Human Athletes – shall be

decided by one member Hearing Panels, and decided to increase the composition from the original panel, *i.e.*, one member, to three members, for reasons that “*there may be a lot at stake not only for the appellants but for the whole dressage sport*”.

4. Appeal by Appellants

- 4.1 In essence, the Appellants requested the Tribunal to nullify/annul the FEI Decision. More specifically, the Appellants submitted that Ms. Shulga explicitly and strongly denied having violated the Codex and having judged in a nationalistic manner. The Appellants argued that Ms. Shulga could not be accused nor suspended on grounds of nationalistic judging, as no legal definition of nationalistic judging as referred to in the Codex existed, and since no person shall be punished based for a conduct that was not specifically punishable at the moment such occurred. In this respect, the Appellants further argued as follows:

“Retrospectively interpreting certain scores, and more in particular, the scores given by Mrs Shulga as “nationalistic judging” clearly violates basic human rights. More particularly such contradicts the rule of fair trial (Article 6 of the European Convention on Human Rights hereinafter referred to as the “Convention”) the nulla poenae sine lege principle (Article 7 of the Convention) with the following sub-variants:

- i) Nulla poena sine lege scripta*
- ii) Nulla poena sine lege certa*
- iii) Nulla poena sine lege stricta”*

- 4.2 That the FEI’s statement that the difference of almost 9% when compared with the other members of the jury panel proved nationalistic judging was not to be deemed a clear, strict and definite regulation. It was merely an interpretation post factum. Furthermore, that until the FEI decision in this matter there had been no (clear) interpretation of the content of “nationalistic judging”. That at this point in time it appeared that in any case a deviation of more than 8%⁶ when compared to the scores of other judges could be deemed “nationalistic”; the further prerequisites had still to be decided.
- 4.3 The Appellants also argued that the FEI was the sole legislator, the sole executor and the sole judge, and had decided the matter in an arbitrary manner. That the FEI, as the legislator, had introduced the term nationalistic judging in the Codex without defining its content. That years later the executive power of the FEI arbitrary decided that nationalistic judging occurred when a score deviated with more than 8% (upwards) from the scores given by the other judges. That the executive power within the FEI set the rule and operated as judiciary, and in that respect it imposed sanctions retrospectively on judges.

⁶ **Note:** The scores of Ms. Dzhumadzuk deviated by more than 8% from the scores given by the remaining judges.

- 4.4 Further, that prior to the Lier Event none of the judges had been informed *"what had been defined by the FEI as punishable conduct and the penalty with sufficient definiteness to allow judges to foresee when a specific action would be punishable, and to conduct themselves accordingly, of course taking into account the freedom of any individual judge to evaluate the performance of a dressage combination."* Further that *"Judging itself is an emotional moment, a snapshot of a very particular moment and one's state of mind at the very particular moment."*
- 4.5 Moreover, that Ms. Shulga's denial to have acted in violation of Article 2 of the Codex had to be deemed decisive. That, even if the scores given by her "slightly varied" from the scores given by the other members of the jury panel, she neither had the knowledge nor the intention to act in a nationalistic manner and to breach the Codex. That the FEI had not respected Ms. Shulga's statement and found her guilty of the violation of the Codex without putting any evidence against her; thus the FEI violated the presumption of innocence in the present case (Article 6 of the European Convention on Human Rights).
- 4.6 The Appellants further argued that Dressage was a jury sport, and as such self-evident that scores obtained by competitors and granted by different judges might vary from each other. Further, that a score was merely a personal opinion of the judge involved. This was inherent to a jury sport. Dressage itself had a completely subjective technical merit score that had been created by the FEI. That *"The FEI itself is therefore fully responsible for the judging."*
- 4.7 Further, that there were many dimensions thinkable when it came to "nationalistic judging". The Appellants suggested that if the FEI wanted to eliminate any biases in judging in Dressage, the entire judging system had to be "reformed, reinvented and redesigned".
- 4.8 The Appellants also claimed that, even though judging at international dressage events frequently caused consternation of the participants and the media, the FEI rarely took steps. That it was therefore extraordinary that the FEI focused on the Lier Event and its judging. In the view of the Appellants, if the events were to be treated equally then not only the Lier Event but also the other events should have been formally investigated, and the FEI should have analysed scores of a vast majority of the events and should have set clear criteria how to determine nationalistic judging, which had not been the case.
- 4.9 The Appellants concluded that Ukraine, Ms. Logutenkova, the UKR-NF, Ms. Shulga and Ms. Dzhumadzuk *"have been arbitrary treated by the FEI and victimized for some unclear reasons, and that they "were publically incriminated before they could even defend themselves"*. More specifically the Appellants argued that the FEI had taken an arbitrary decision before hearing the judges, *i.e.*, Ms. Shulga and Ms. Dzhumadzuk, (no fair trial). That in their opinion the FEI Decision and process around it was a "pure farce". In this respect, the FEI had issued a press release on 22 March 2016, and prior to notifying the judges of a potential breach of the Codex on 1 April 2016.

5. FEI Answer

- 5.1 On 27 June 2016, the FEI provided its Answer to the Appeal. Together with its Answer the FEI provided several documents, among others, the FEI Dressage Handbook – Guidelines for Judging, which under “Assessment of Tests” reads as follows:

“(…)

Judge what is seen on the day, in that test, and that performance. Judge movement after movement according to the classical principles of dressage. This means forgetting all past experiences with that rider and/or horse. No external influences should affect the scoring.

(…)

The responsibility of the dressage judge is to record what takes place in the arena and to be fair in assessing each movement of the test. (…)”

- 5.2 The FEI further provided a Score Sheet from the GP Special Competition, which outlined that Ms. Shulga’s scores differed by +9,249% in comparison to the other judges (the scores of the other Ukrainian judge Ms. Dzhumadzuk have not been included).
- 5.3 Moreover, the FEI provided two emails of 4 and of 5 March 2016, by Ms. Carina Mayer, FEI Head of Dressage and Para-Dressage ad interim, to the Lier Organising Committee requesting to change the composition of the jury in relation to a second CDI3* and 4* event at Lier which was being held on 3 to 6 March 2016. Ms. Mayer’s email of 4 March 2016 reads as follows:

*“(…)*We have received requests to investigate a potential case of nationalistic judging at the CDI in Lier where you are currently officiating as president of the ground jury.

As the investigation is still ongoing we request that a maximum of one Ukrainian judge will be assigned to the ground juries for the Grand Prix, Grand Prix Special and Grand Prix Freestyle competitions scheduled for Saturday and Sunday (..).”

In this respect, the FEI further clarified that Mr. David Hunt, a member of the Judges Supervisory Panel (JSP), was only present on the first day of the Lier Event, *i.e.*, on Tuesday, 1 March 2016. Mr. Hunt was not present at the GP Special Competition held on Wednesday, 2 March 2016, the competition where Ms. Shulga allegedly engaged in nationalistic judging.

- 5.4 Regarding the admissibility of the Appeal, the FEI stated that it accepted the admissibility of the Appeal in accordance with Article 38.1 of the Statutes, Article 165 of the GRs and Article 17 of the IRs, and noted that the deposit payable under Article 166.2 of the GRs has been paid.
- 5.5 Regarding the merits of the Appeal, the FEI in summary argued as follows:

“5.1 In summary, it is the position of the FEI that the scores of the GP

Special Competition at the Lier Event demonstrate clear evidence of nationalistic judging on the part of the Appellant and that the statements made by the Appellant in her defence, either in the course of the disciplinary proceedings or as part of these Appeal proceedings, do not offer any plausible explanation as to why her scoring favoured Mrs Logutenkova/Fleraro so significantly more than any other competitor.

5.2 Therefore the FEI submits that the FEI Decision to find that the Appellant engaged in nationalistic judging at the GP Special Competition at the Lier Event was correct and justified in the circumstances and that the Appellant was afforded due process.

5.2 Based on the above the Fédération Equestre Internationale respectfully requests the FEI Tribunal to:

(a) Dismiss the Appeal on its merits;

(b) Uphold the FEI Decision; and

(c) Determine that the Appellant shall bear the costs of the Appeal proceedings and make a contribution towards the FEI's legal costs."

5.6 More specifically with regard to the disciplinary process the FEI argued that further to the FEI Dressage Committee Decision the FEI sent a notification to the Appellant on 1 April 2016 in which she was informed (i) of the specific allegation that she had breached the Codex; and (ii) that the FEI proposed to impose sanctions in accordance with the alleged breach and that such sanctions could include a warning, temporary suspension and removal from the FEI Dressage Judges' list. In this respect the FEI provided a copy of the Notification letter of 1 April 2016. The FEI further argued that the Appellant was given the opportunity to make a written and oral submission to the FEI and thus afforded a full right to be heard. Moreover, the FEI submitted that it was clear from the Notification letter of 1 April 2016 that the FEI clearly set out the case against the Appellant and the evidence that it was relying on in support of that allegation, namely that her scores deviated from the scores of the other judges by over 9 %. That the Appellant chose not to make an oral submission and instead submitted an email, as referred to in the FEI Decision. That in the absence of any other challenges or requests for clarification from the Appellant prior to the FEI Decision, the FEI submitted that it was entitled to proceed to decide the case based on the Appellant's written submission, the available evidence and in accordance with the provisions of the FEI Dressage Rules, including in particular, the Codex and that there was, therefore, no basis for overturning the decision of the FEI based on procedural grounds. Finally, to the extent that the Tribunal found that there were any flaws in the process undertaken by the FEI, the FEI respectfully submitted that they had been corrected by these appeal proceedings before the Tribunal.

5.7 Furthermore, the FEI argued that the finding that the Appellant engaged in nationalistic judging at the GP Special Competition was correct and the

sanction imposed was justified.

- 5.8 In this respect, the FEI argued that - following the complaints by the POL-NF and also separately from the Portuguese athlete Mr. Goncalo Carvalho - when the official scores of the GP Special Competition were examined, it emerged that the scores awarded by Ms. Shulga to Ms. Logutenkova, an athlete of the same nationality as Ms. Shulga, during the GP Special Competition were over 9% higher than the average of the scores awarded by the other judges (with the exception of the other Ukrainian judge Ms. Dzhumadzuk) to the combination, Ms. Logutenkova/Fleraro. That however the scores awarded by Ms. Shulga to the non-Ukrainian athletes in the GP Special Competition did not deviate from the scores awarded by the other judges by nearly as significant margin as the deviation for Ms. Logutenkova/Fleraro.
- 5.9 The FEI argued that Ms. Shulga had not offered any plausible explanation as to why the deviation in her scoring in relation to Ms. Logutenkova/Fleraro is so much greater than the deviation in favour against the other competitors. That she merely stated that she was "*guided by the recommendations of dressage seminar directors namely that a judge has to be more friendly and evaluate in favour of an athlete*". The FEI submitted that such explanation was unconvincing when one considers that the person who benefitted most from such "friendly" judging was an athlete from the Appellant's own country. The FEI further submitted that this statement was undermined by the fact that for 7 of the 15 competitors, the Appellant's score was less than the average of the other judges' scores. That the Appellant has previously stated that "*it was its 5th test for the last six months that I judged at CDI. From month to month this horse has been showing a constant progress... Despite of the mistakes in some elements the Grand Prix Special was executed way better. There was more impulse and the horse generally looked better than previously.*" And that the Appellant referred to what she describes as the "*low marks*" of some of the judges. The FEI noted that, while the Appellant's scoring ranked Ms. Logutenkova/Fleraro 2nd of the 15 competitors, the Judges at positions E, H, and M ranked Ms. Logutenkova/Fleraro 11th, 14th and 13th respectively. The only other judge that ranked Ms. Logutenkova/Fleraro in the top 10 was the other Ukrainian judge, Ms. Dzhumadzhuk (Ms. Dzhumadzhuk gave Ms. Logutenkova her third highest score overall). That it was the FEI's position that the past performances and scores of Ms Logutenkova and Fleraro should have been judged based solely on their performance at the GP Special Competition and their past performances should not have been a relevant factor for the Appellant's judging at the GP Special Competition. Furthermore, that - in accordance with the FEI Dressage Handbook - Guidelines for Judging - Ms. Logutenkova and Fleraro should have been judged based solely on their performance at the GP Special Competition and their past performances should not have been a relevant factor for judging at the GP Special Competition. That such statements of Ms. Shulga further supported the finding that she engaged in nationalistic judging at the Lier Event. Finally, that the FEI could not agree with the Appellant's contention that the reason for the deviation in her scores was simply because "*tastes differ*". Further, that the Appellant's submission that her scores to Ms. Logutenkova only

"slightly vary" was not supported by the facts. The FEI submitted in this respect that no person, on an objective review of the scoring, could reasonably say that her scores only "slightly vary" from the others. The deviation is simply very significant and serious.

- 5.10 With regard to nationalistic judging the FEI argued that the Codex made it clear that a breach of the Codex, such as engaging in nationalistic judging, was a punishable offence, and that contrary to the Appellants' claim the offence was punishable at the time. Further, that it was not a pre-requisite to an offence being punishable that it is defined, and that there were several examples in the GRs of other disciplinary offences that are not defined. In this respect the FEI further argued as follows:

"It is the submission of the FEI that it is not always possible, or even advisable, to provide a catch-all definition of a particular offence due to the fact that it is not always possible to predict all the various actions/omissions which could be encompassed by the particular offence or to include an exhaustive list of examples. Insisting that every offence must be strictly defined would run the risk of depriving the relevant authority of the ability to punish obvious wrongdoing simply because the conduct in question had not come within the parameters of a fixed definition."

- 5.11 In the view of the FEI, Ms. Shulga had to have been familiar with the concept of the Judges Supervisory Panel (JSP) under the FEI Dressage Rules; she even made a reference to a member of the JSP in the Appeal. The FEI further argued that it was therefore clear from that rule that a deviation of 6 % went beyond the limit of what was regarded as acceptable by the FEI. That thus, when there was a deviation of over 8% and when that deviation was in favour of an athlete of the judge's own nationality, the FEI submitted that it was reasonable for a FEI Dressage judge to know that this was something that went beyond what the FEI would deem to be acceptable and would come within the meaning of "nationalistic judging".
- 5.12 Furthermore, the FEI submitted that the term "nationalistic judging" in the Codex had to be read in the context of the FEI Dressage Rules and the Codex as a whole and particularly in light of the following sentence of paragraph 2 of the Codex: "A Judge must avoid any actual and perceived conflict of interest. A judge must have a neutral, independent and fair position towards riders, owners, trainers, organizers and other officials and integrate well into a team." That this sentence came just before the list of examples of conflict of interest, where "nationalistic judging" was listed. That it was the submission of the FEI that, although the term "nationalistic judging" itself was not defined, it was reasonable to say that a high level 3* judge, such as Ms. Shulga, had to recognise that judging in such a way as to score one athlete over 9 % more than the average of the other judges, when at the same time the scores she awarded to the other athletes only differed less than +/- 2 % (on average) from the other judges on average, fell short of the required standard of judging in a "neutral, independent and fair" manner when the athlete who benefitted from the 9 % deviation shared Ms. Shulga's nationality and had therefore, to be considered as nationalistic judging. That therefore, even if the term "nationalistic judging" was not in the Codex, Ms. Shulga's failure to judge in a neutral,

independent and fair manner would still be a punishable offence under the Codex. That by expanding on the general principles of paragraph 2 of the Codex by listing examples of conflicts of interest (including nationalistic judging), the Codex actually gave more clarity as to what is and is not punishable in accordance to the Codex. That on that basis, the FEI submitted that the Appellants' claim that the FEI's finding that the Appellant engaged in nationalistic judging violated Article 7 of the European Convention on Human Rights were not well founded.

- 5.13 Moreover, the FEI argued that, whereas it acknowledged the subjective nature of the dressage scoring system and that interpretations of performances can vary, this did not give FEI judges "carte blanche" to score a routine entirely as they wished. That each judge had a personal responsibility to judge fairly and in accordance with the FEI Dressage Rules and, in particular, the Codex. The FEI's aim was it that judging levels and criteria were harmonised across all the judges and the FEI invested significantly in its judges' education programme to try to achieve this, and FEI Dressage Judges have to pass written and oral examinations in order to be eligible to judge at the various levels. Further that - in accordance with the FEI Dressage Handbook – Guidelines for Judging - when FEI Judges evaluate a performance they had to evaluate each individual movement with reference to the pre-determined criteria of: precision, rhythm, suppleness, contact, impulsion (activity), straightness, collection (engagement of hind legs), submissiveness.
- 5.14 Finally, the FEI argued that the FEI was not unique in having to address issues of nationalistic judging; by way of analogy, the issue had also recently arisen in another sport based on subjective scoring by judges, namely gymnastics. In this respect, the FEI provided several press releases stating that the disciplinary body of the International Gymnastics Federation (FIG) had warned or suspended several judges for, inter alia "judging that favoured a certain gymnast or country" or for "partisan judging". The FEI argued that the term "partisan judging" was not defined in the FIG rulebook neither was there any specific offence of a judge favouring an athlete from his/her country. That nevertheless sanctions on the judges in question were imposed because "it is crucial for the sport of Gymnastics that judges are at all times acting and seen to be acting in an independent, unbiased and competent manner. This is reflected in the Judges Oath (...)". The FEI argued that such statement could be applied by analogy to the sport of Dressage and to the present case and the Judges Oath that applied to FIG judges was equivalent to the Codex that applied to FEI Dressage judges.
- 5.15 Regarding an alleged victimisation of the Appellants, the FEI rejected that the Appellants had been singled out for special punishment or that the FEI acted arbitrarily. That the decision of the FEI to look into the Lier Event was in response to the receipt of the two complaints from the POL-NF and Mr. Goncalo Carvalho; there were also several media reports regarding the Lier Event which had also called the judging into question. That contrary to the Appellants' claim the Lier Event was not the first time the FEI had looked into the judging at a CDI. That the FEI had prior to the Lier Event – again acting on complaints from National Federations – also looked into the

Olympic qualifier held in Moscow on 26 – 28 February 2016, where the FEI Dressage Committee had found that there had been no violation of conflict of interest provisions of the Dressage Rules and Codex. Furthermore, the very first article of the GRs stated "*(T)he General Regulations (GRs) are established so that individual Athletes and teams of Athletes from different National Federations (NFs) may compete against each other under fair and equal conditions with the welfare of Horse as paramount*". Also the Olympic Ranking Rules, pursuant to which the FEI Dressage Committee undertook its review of the Lier Event, contain the "Fairness Principle" which specifically allowed for such review to take place. That it was not arbitrary on the FEI part to look into the Lier Event but rather it was an entirely proper and correct thing for the FEI, as the governing body of the sport, to do. That just because the FEI had not previously sanctioned judges for nationalistic judging it did not mean that there was something improper or unfair about the decision to do so in relation to the Appellant.

- 5.16 The FEI did not accept that Ms. Shulga received a "trial by media", as she has alleged, and that – as previously argued – Ms. Shulga had been afforded due process. That the FEI press release had been issued to inform the equestrian community of the FEI Dressage Committee's decision to remove the results of the GP Special Competition, and resulting thereof for the National Federations and National Olympic Committees to have the FEI's confirmation of the full list of the allocated individual quota places for Dressage at the 2016 Rio Olympic Games. That therefore, such statement was made in the interest of transparency and good governance.
- 5.17 Finally, the FEI wished to clarify that the National Federations of the FEI, acting collectively as the General Assembly, was the only body vested with the statutory power to approve, amend or remove the FEI Rules. Thus, the provision of the FEI Dressage Rules that confirmed that any violations of the Codex/Rules were subject to sanction by the FEI had, as a matter of fact and law, been duly approved by the FEI General Assembly in accordance with the Statutes. That both arguments by the Appellants - that the executive body "sets the rules", and that "trias politica" (separation of powers) does not operate within the FEI – were thus incorrect. That contrary to the Appellants' claim, the FEI had not acted incorrectly in imposing a sanction upon Ms. Shulga. The Codex confirmed that the FEI had the right to undertake disciplinary actions against judges who did not follow the Codex and that "*such disciplinary action may consist of: 1) Warning letter, 2) Temporary Suspension and 3) Removal from the FEI Dressage Judges' list*". That the FEI initiated that disciplinary process by way of the FEI Secretary General's Notification to Ms. Shulga of 1 April 2016. There was nothing unusual or wrong with the FEI taking such disciplinary actions or imposing a sanction when this was specifically provided for in the relevant rules (as is the case in the Codex and the FEI Dressage Rules).

6. Further submission by Appellants

- 6.1 On 10 August 2016, the Appellants further argued that the FEI acknowledged, or at least did not deny that the European Convention on

Human Rights and Freedoms (the “**ECHR**”) was applicable to disciplinary proceedings before the FEI and the FEI Tribunal. That the FEI, however, violated the relevant fundamental rights of the Appellant in the proceedings, and that the FEI Decision was arbitrary and disproportional.

- 6.2 To start with, the FEI had failed to provide any documents related to the “thorough investigation” into the results of the Lier Event and the alleged nationalistic judging; the FEI had solely produced the score sheet of the Lier Event. Neither did the FEI provide any correspondence related to the alleged complaint of the POL-NF and Mr. Goncalo Carvalho. Further, that Ms. Beata Stremler, *i.e.*, a polish rider, and Mr. Carvalho had been direct competitors of Ms. Logutenkova during the dressage qualification period for the Olympic Games in Rio 2016, and thus their complaints had to be treated with reservation due to their own legal and personal interests. Furthermore, that none of the Polish riders nor Mr. Carvalho had attended the Lier Event, nor seen the test of Ms. Logutenkova, and therefore could not judge upon the quality of the judging during that event.
- 6.3 Furthermore, the Appellants argued that the FEI acknowledged that “nationalistic judging” has not been defined by the FEI Regulations. That the FEI statements - as outlined in Article 5.10 above - clearly contradicted and opposed the *nulla poene sine lege* principle. That the FEI interpreted as the legal basis for penalizing “nationalistic judging” with its statement, that even though nationalistic judging was not defined by the FEI until the case at hand, the term was legally binding as other terms within the FEI Regulations were not defined either. That the FEI further tended to legitimize the conduct of “nationalistic judging” referring to gymnastics. However, the FEI had to rather compare itself with the International Ski Federation (FIS) and the International Skating Union (ISU) that took adequate measures and reforms in the judging system, and tackled the problem at its core. That the FEI Decision had been taken first, and that only later the FEI had come up with its incoherent argumentation. The Appellants therefore believed that the FEI applied the presumption of guilt instead of the presumption of innocence, and that the case at hand, as well as the case of Ms. Dzhumadzuk illustrated that. That the Appellants had only been provided with the opportunity to provide their own explanations after the Ukrainian judges, *i.e.*, Ms. Shulga and Ms. Dzhumadzuk had been found guilty, and only after that had been announced in the media. Further, notwithstanding the appeal, the FEI enforced the sanctions and did not suspend them until the decision of the Tribunal.
- 6.4 Moreover, it had to be noted that Article 438 of the DRs referred to the Judges Supervisory Panel (JSP) and not to regular judges like Ms. Shulga and Ms. Dzhumadzuk. Further it did not refer in any manner to “nationalistic judging”, it merely provided for a mechanism to correct *technical mistakes and counting errors*. That the FEI had not acted in accordance with its own correction mechanism, as thoroughly supervise judging had not taken place, as the JSP had left before the end of the Event in question, and the FEI had failed to send another member of the JSP to supervise the Lier Event. Instead the FEI had annulled the scores and accused the Appellants of and punished them based on “nationalistic

judging”.

- 6.5 In the case at hand, the Appellants explicitly denied both nationalistic judging and any technical mistakes and counting errors. The FEI failed to exhibit any proof related to the alleged incorrect judging during the GP Special Competition. Further that without video footage of the test taken from the various angles (corresponding with the position of the members of the ground jury) it was not possible to make any assessment on the judging. The FEI Dressage Handbook – guidelines for judging – was not sufficient to decide whether there was a technical mistake and/or counting error involved. That no conclusion, that the scores given by Ms. Shulga and Ms. Dzhumadzuk were too high, could be drawn from solely the score sheet of the GP Special Event provided by the FEI. That it was “very probable” that the remaining three judges (the “**remaining three judges**” at the GP Special Competition gave much lower scores to Ms. Logutenkova and Fleraro. The FEI had to investigate the test of Ms. Shulga (for instance based on a video of the test) prior to imposing sanctions on the judges.
- 6.6 Finally, that given the catalogue of the sanction that the FEI could impose, *i.e.*, warning letter, temporary suspension and removal from the FEI Dressage Judge’s list, the FEI Decision was clearly exaggerated and disproportional. Ms. Shulga had never previously been accused of any breach of the Codex and/or the FEI Regulations. The FEI could have sent a “warning letter”.
- 6.7 The Appellants questioned whether the FEI Decision had been taken by the Dressage Committee or by the Secretary General; it was however obvious that the body that had taken the decision violated *trias politica*. In this respect, the Appellants argued as follows:

“It did not only one-sidedly interpret a term in the Codex, but at the same time it used Article 438 of the Dressage Rules, that is solely a basis for a JSP to intervene, as the ground for the FEI Decision at the same time acting contrary to this provision and imposing sanctions not foreseen by the article. The one who took the decision acted therefore at the time as legislator, executive power and judiciary.”

7. Tribunal decisions on procedural matters

- 7.1 On 8 July 2016, - upon previous request by the Appellants to hold a “public physical hearing”, to which the FEI objected – the Tribunal found that, no good cause has been shown pursuant to Article 18.19 of the IRs. Therefore the Tribunal decided that the hearing is conducted on a private and confidential basis, in accordance with the IRs, more specifically Articles 18.17 – 18.25 thereof.
- 7.2 On 15 September 2016, the Tribunal decided to hold a consolidated hearing in the case at hand, and in the case of Ms. Dzhumadzuk.
- 7.3 On 15 September 2016, the Tribunal took note of the list of witnesses –

to which the FEI objected, given that no such witness statements had been provided in the Appeal Brief - to be heard by the Appellants during the hearing. The Appellants list of witnesses included the following:

- Mr. Frank Kempermann, Chair FEI Dressage Committee
- Ms. Carina Mayer, FEI Head of Dressage and Para-Dressage ad interim
- Mr. Mykhaylo Parkhomchuk, Chair UKR-NF Dressage
- Ms. Iuliia Parkhomenko, Event Director at Lier Event

The Tribunal requested the Appellants to submit a list of the specific contents each of the witnesses account for during the hearing. On 5 October 2016, the Appellants provided a list of questions to be asked to the witnesses Ms. Mayer and Mr. Kempermann during the hearing.

- 7.4 Together with the list of questions the Appellants provided a press release – not previously submitted - of eurodressage.com, dated 31 October 2009, reporting that the Princeton Professor and nuclear physicist, Dr. David Stickland, analysed more than 13,000 CDI tests to create an objective to measure judging. Furthermore, that Stickland noticed that there was a 1,6 % difference in the final score between one judge and the average of the four other judges, and that this was ultimately proof of biased judging. That he verified this by creating a “randomized test”, and the results of these randomized tests were that judges were much more accurate in giving scores when they did not know the rider. Moreover, that with his analyses Stickland detected patterns of nationalistic judging. Most judges do not upscore their own or a favourite country, but instead they “downscore” the rival ones.

8. Hearing

- 8.1 At the outset of the hearing, the Parties confirmed that the procedures are to be held in accordance with the IRs, that the Tribunal has jurisdiction in the matter at hand, and that they did not have any objection to the constitution of the Panel. The Parties furthermore agreed that the Appeal is admissible. Moreover, that they have no objection to consolidate the hearing with the hearing in the Dzhumadzuk Appeal.
- 8.2 In accordance with Article 19.34 of the IRs, each person heard by the Tribunal was asked to tell the truth, and was examined and cross-examined by the Parties, if they wished to do so, as well as questioned by the Tribunal. Throughout the proceedings, and following the witness statement by Mr. Kempermann, the Appellants withdraw Ms. Mayer from the list of witnesses to be heard. Subsequent his witness statement, Mr. Parkhomchuk joined the hearing as representative of the UKR-NF.
- 8.3 The Parties had ample opportunity to present their cases, submit their arguments and answer to the questions posed by the Tribunal. After the Parties’ final submissions, the Tribunal closed the hearing and reserved its final decision. The Panel heard carefully and took into consideration in its discussion and subsequent deliberation all the evidence and the arguments presented by the Parties even if they have not been

summarized herein.

- 8.4 At the end of the hearing, the Parties acknowledged that the Panel had respected their right to be heard and their procedural rights.

a) Witness statements during the hearing

- 8.5 Ms. Parkhomenko confirmed that she was the Event Director as well as Show Secretary at the Event, which was organized by Azelhof Horse Events in cooperation with the World Dressage Masters. She further confirmed that she was also Deputy Director of the VIAN Group, which was the title sponsor at the Event, and which was also sponsoring the athlete Ms. Logutenkova. Ms. Parkhomenko explained that the schedule at the Event, including the GP Special Competition, had been approved by the FEI and that she, as Event Organizer, had fulfilled all FEI requests with respect to the Event. That the Event Organizer had tried to "balance" the judging panel, namely to invite different judges from different countries as required by FEI Rules. That following the GP Special Competition, the FEI, *i.e.*, Ms. Mayer, had requested to change the judging panel, namely to assign only 1 (instead of 2) Ukrainian judges, because the FEI investigated a potential case of nationalistic judging. In her view this was a "discrimination" policy by the FEI. Finally, that the reputation of the Event had been damaged and dishonoured, as everyone in the world was associating the Event with the issue at hand, *i.e.*, nationalistic judging.
- 8.6 Mr. Parkhomchuk explained that he was Director of several companies, including the VIAN Group, which has been title sponsor of the World Dressage Masters series, and as such also the Event, for the past two years. He was also Chair of the Dressage Committee of the UKR-NF, and that he has been developing the discipline of dressage in the region, *i.e.*, Ukraine. Upon request he further stated that it was possible that he has also been the President of the Event, as outlined in the official schedule. Mr. Parkhomchuk stated that the athletes were very satisfied with the Event, and that no complains or protests during the Event had been received by any athletes. The Event was held during the last week for athletes to gain quota places for their respective countries for the 2016 Rio Olympic Games. The judging panel was chosen from different countries; in fact all countries of athletes who still had the potential to achieve such quota places, namely Poland, Russia, Finland, Belgium and Ukraine. Furthermore, that the DRs foresaw that two judges from the same nationality were allowed, *i.e.*, in the case at hand from Ukraine, and that in his opinion the FEI violated its own rules by requesting to only put one Ukrainian judge on the judging panel following the GP Special Competition. Finally, Mr. Parkhomchuk stated that on 5 April 2016⁷, upon request by the UKR-NF, the UKR-NF, including himself, has met with the FEI to understand why the Appellant and Ms. Dzhumadzuk have been suspended⁸ by the FEI,

⁷ The meeting was held 4 days after the Notification letter was sent to the Appellant, setting out the alleged rule violation on her part.

⁸ Note: In fact the Appellant has been suspended on 28 April 2016, *i.e.*, the date of the FEI Decision. Ms. Dzhumadzuk has been suspended on 25 April 2016.

and which rules were breached by them. That the FEI⁹, *i.e.*, FEI Dressage Department, was only able to provide them with information on which rules had been breached following the meeting, but were not able to answer their questions during the meeting. With regard to nationalistic judging the FEI has answered that there was a huge difference in the scores and that the difference was bigger than acceptable. That the UKR-NF has requested the FEI to provide it with evidence as to why the two Ukrainian judges, who scored Ms. Logutenkova during the GP Special Competition higher than the remaining three judges from Belgium, Finland and Poland made the mistake rather than the remaining three judges. That it had however not received any answer from the FEI side in this respect.

8.7 Mr. Kempermann stated that he was Chair of the FEI Dressage Committee since 2009. That he himself was not an FEI Dressage judge, but that some of the members of the FEI Dressage Committee were FEI 4* and 5* Dressage judges. Furthermore, that he was also an FEI Bureau and Executive Board member, and part of various FEI Working Groups. That professionally he was however an equestrian events organizer, among others the (well-known) event in Aachen, Germany. Mr. Kempermann confirmed that he was not present during the GP Special Competition. That however one of the Dressage Committee members has been present, but that he did not know whether this person saw Ms. Logutenkova competing. Mr. Kempermann explained that he has been informed about rumours with regard to judging issues at the GP Special Competition either on the day of the Competition, or on the following day. That by the time the FEI Dressage Committee has met on 17 March 2016, the FEI Dressage Committee has been presented – either directly or via the FEI Headquarters, which conducted the investigation – with the following documents¹⁰ (the “**five documents**”):

(i) A Foreign Judge Report, with a remark that the Foreign Judge had received complaints about the judging during the GP Special Competition, and that the Foreign Judge had informed the concerning judges, *i.e.*, the Appellant and Ms. Dzhumadzuk, and the Organizing Committee about it.

(ii) A General Judge Report, dated 3 March 2016, by Mr. Stephen Clarke¹¹, General Judge, who was the spokesperson on behalf of the judges, and the contact person in judging issues. That Mr. Clarke had stated that “... *the concerning judges have acted in an unfair and unsportsmanlike way with a blatant over-marking who brought the sport and the judges into disrepute and they have judges¹² in a nationalistic manner, their behaviour is unacceptable and that it carries consequences...*”.

(iii) An email by the Judges Advisory Panel, a panel of five members, stating that “...*we fully agree with the opinion of Mr. Clarke*”.

⁹ Whereas the FEI Secretary General was present during the meeting, no representative from the FEI Legal Department joined the meeting.

¹⁰ These documents have not been provided in the present case.

¹¹ Mr. Clarke was not on site during the GP Special Competition.

¹² Mr. Kempermann states “judges”, whereas he meant and it should read “judged”.

(iv) An analysis by Mr. Stickland reporting "nationalistic judging" during the GP Special Competition.

(v) Written statements by the remaining three judges of the GP Special Competition.

Furthermore, Mr. Kempermann confirmed that the FEI Dressage Committee was aware of the protests lodged by the POL-NF and by Mr. Carvalho.

8.8 Mr. Kempermann confirmed that the Minutes of the FEI Dressage Committee were correct, and that the FEI Dressage Committee has taken a decision based on the information it has been provided¹³, which it considered as more than sufficient, as well as based on the opinion of its members. That in this respect the statistics of Dr. Stickland¹⁴ have also been very clear, namely that it concerned nationalistic judging for him. That the conclusion of the FEI Dressage Committee members was – unanimously – that "nationalistic judging" at the GP Special Competition has occurred. The FEI Dressage Committee did not discuss what "nationalistic judging" was in general, but that it has been clear to all members of the Dressage Committee that judging has to be considered as nationalistic when "*the rider with the same nationality as the judges - if the rider's award better than it should have been*". Only the decision that the results of the GP Special Competition should not count towards the Olympic ranking had been taken by a majority vote, 5 members in favour, 1 member against.

Finally, that the FEI Dressage Committee has taken a decision with regard to "nationalistic judging", and that the FEI Dressage Committee has proposed a three (3) months suspension, but that it was for the FEI Headquarters to initiate disciplinary proceedings against the judges, and to hear the judges prior to imposing sanctions on them. The FEI Dressage Committee did not consider it necessary to hear the judges prior to its decision, *i.e.*, that nationalistic judging has occurred during the GP Special Competition.

b) Additional arguments by Parties during the hearing

8.9 During the hearing both Parties maintained their positions submitted in writing prior to the hearing.

(i) Arguments by the Appellants

8.10 Furthermore, the Appellants argued that, it was evident that already on 22 March 2016, the FEI – when publishing its press release – has commenced disciplinary proceedings without having heard the Appellant,

¹³ Mr. Kempermann confirmed that the FEI Dressage Committee did not conduct its separate own investigation, nor review any video material, also as such is generally not available.

¹⁴ Mr. Kempermann was not aware of the press release concerning Dr. Stickland's findings in 2009, inter alia stating that most judges do not up-score their countries, but down-score other athletes.

or anyone else, at this point in time. That therefore the Appellants did not see the procedures in front of the FEI as transparent. That the FEI had based its decision only on the ruling of the FEI Dressage Committee Decision with regard to nationalistic judging. Furthermore, in the view of the Appellants – and as previously submitted - the FEI had to wait for the Appeal-time to elapse, prior to imposing any sanctions, such as a suspension, on the Appellant.

- 8.11 During the hearing the Appellant confirmed that she was familiar with the FEI Codex of Dressage Judges and that she understood that she has to comply with it. That she judged in accordance to her experience. That every judge has its own opinion, and that her scores were relevant to the performance of the rider. With regard to her previous statement, stating that *"it was its 5th test for the last six months that I judged at CDI. From month to month this horse has been showing a constant progress... Despite of the mistakes in some elements the Grand Prix Special was executed way better. There was more impulse and the horse generally looked better than previously."*, the Appellant stated that she has evaluated the combination according to the performance on the day and not according to its development.
- 8.12 With regard to the existence of the five documents on which the FEI Dressage Committee among others based its decision on nationalistic judging – as outlined by Mr. Kempermann – the Appellants argued that the Preliminary Decision of the Tribunal clearly stated that every document relevant for the Appellants to defend themselves have to be included in the case file, which has not been the case with regard to these documents. That therefore this has to be considered as contrary to what was considered as a fair trial, and contrary to equality of arms. That the ECHR previously found that access to documents was very relevant.
- 8.13 In addition to its previous submissions in writing the Appellants further argued that there were neither legal nor factual grounds to issue the FEI decisions in the case at hand and in the case of Ms. Dzhumadzuk, and that it was unjust to suspend the Appellant and Ms. Dzhumadzuk due to the alleged nationalistic judging; the FEI decisions were wrong from both a subjective and objective point of view. That the Appellant has explicitly denied having judged in a nationalistic manner with regard to the combination, and that her explanation was plausible. Furthermore, that the FEI has approved the Event and the composition of the juries, and that the officials of the FEI, including the Dressage Committee and the FEI HQ, who concluded that the Appellant has allegedly judged in a nationalistic manner were not present during the GP Special Competition, did not witness the GP Special Competition and the combination's performance, and that no video was made available, nor existed, to analyse the outcome of the view and the position of every member of the Ground Jury, including the Appellant. That the review of the Event, including the GP Special Competition, was only limited to the analysis of the results and therefore other than announced by the FEI on 22 March 2016 no "thorough investigation" into the results of the Event.

- 8.14 That the term nationalistic judging was not defined by the FEI; therefore it may not constitute a legal ground to suspend judges, such as the Appellant. Further that – according to his witness statement - Mr. Kempermann has created his own definition of nationalistic judging. However, that in this respect no one could know what the “*score should be*”, if one did not witness the test him or herself. That therefore it was impossible to determine whether the Appellant’s judging can be considered as nationalistic judging or not.
- 8.15 Furthermore, the Appellants referred to the press release by eurodressage.com with regard to Dr. Stickland’s finding of nationalistic judging, as well as to a further research paper published in 2002 by Mr. Eric Zitzewitz from the Stanford University under the title “*Nationalism in Winter Sports Judging and Its Lessons for Organizational Decision Making*”. Mr. Zitzewitz came to similar conclusions to the ones in Dr. Stickland’s report, concerning figure skating and ski jumping, namely that nationalistic judging occurred by downgrading the opponent. The Appellants argued that the FEI did however not investigate this aspect taking for granted that the Appellant was guilty of judging in a nationalistic manner with regard to the Ukrainian combination; this assumption was purely made on the nationality of the Appellant and the combination. That the other option, *i.e.*, downgrading/down-scoring by the other judges, was far more likely and should have been reviewed also, especially since there was one judge from Poland, and that a Polish Athlete was Ms. Logutenkova’s direct competitor, and since the POL-NF had lodged a protest with regard to the results of the Lier Event.
- 8.16 Moreover, that the results of Ms. Logutenkova and the Horse did not have any influence on the Olympic rankings, and that Ms. Logutenkova qualified for the Olympic Games with the horse DON GREGORIUS. That therefore the question should be asked “to whose benefit” would the Appellant and Ms. Dzhumadzuk judge Ms. Logutenkova and the Horse in a nationalistic way. That the Appellant and Ms. Dzhumadzuk also judged the combination of Ms. Logutenkova and the horse DON GREGORIUS, and that those scores were not disputed by anyone. The Appellant proved that she acted in good faith, and did not have any interest in judging the combination in a nationalistic manner during the GP Special Competition.
- 8.17 Finally, the Appellants welcomed that the FEI wanted to investigate and resolve controversies frequently arising from judging in the dressage sport, but argued that addressing the problem could not be ad hoc, but the problem, *i.e.*, the current judging system in the dressage sport itself, had to be deliberate and aimed to tackle the problem at its core. The FEI might have wanted to set an example during the stressful days of the end of the Olympic qualifications. That from the facts and circumstances, it appeared however that in the “heat of the moment”, the FEI “acted impulsively and punished the wrong persons”.

(ii) Arguments by the FEI

- 8.18 To start with the FEI clarified that in total there were two decisions taken, one by the FEI Dressage Committee concerning the “fairness principle”,

which resulted in the suspending of the results of the GP Special Competition, and against which decision the Appellants did not lodge any Appeal within the time period foreseen. That the FEI Dressage Committee Decision mentioned nationalistic judging, and that the Appellant shall be afforded the right to be heard, which right had been fully granted to the Appellant. That, as the outcome of the Dressage Committee Decision was crucial from an Olympic Ranking point perspective, a press release has been issued by the FEI in this regard, in order to be transparent, and since the FEI has received many queries by National Federations inquiring whether they had qualified an Olympic quota place or not.

- 8.19 The second decision was taken by the FEI Secretary General and FEI Legal Director, deciding to suspend the Appellant and Ms. Dzhumadzuk for a period of three (3) months for nationalistic judging. The present case concerned an Appeal by the Appellants with regard to this second decision. The Appellant has been suspended for the entire three (3) months, and the Appellants have at no point in time throughout the proceedings made use of the legal mechanism of interim measures as provided for in the IRs, *i.e.*, requested for the suspension to be lifted.
- 8.20 Furthermore, the FEI argued that the FEI when taking a decision in the matter at hand, has looked at the scores of the GP Special Competition and taken the decision based solely on the scores. The FEI Dressage Committee has agreed that it concerned nationalistic judging, and that there had been no reason for the FEI not to believe the committee. Upon request by the Tribunal, as to why the FEI has not provided the five documents in the present proceedings, the FEI stated that the five documents have been considered by the FEI Dressage Committee in their decision, but not by the FEI in the FEI Decision, nor did the FEI rely on any of the documents in the present proceedings.
- 8.21 That by looking at the scoring of the GP Special Competition there was no doubt that there was a huge difference in the scores provided by the Appellant and by Ms. Dzhumadzuk compared with the scores given by the remaining three judges, and that there was a complete lack of consistency in the scoring from the side of the Appellant and Ms. Dzhumadzuk. That the Appellant and Ms. Dzhumadzuk have been very consistent with regard to the other combinations except when it came to Ms. Logutenkova where they scored clearly in her favour. Further that the Appellants offered no plausible explanation as to why the Appellant's score had been so high during the GP Special Competition. The FEI argued that, voluntarily or not, the Appellant and Ms. Dzhumadzuk clearly judged in favour of an athlete of their own country, and that this had to be considered as nationalistic judging. Further, that the Appellant and Ms. Dzhumadzuk clearly violated the Codex, as they did not comply with the Codex, in not judging in a neutral, independent and fair position; because if they had done so, their scores of Ms. Logutenkova would have the same deviation as their scores from the other combinations compared to the remaining three judges, which was not the case, *i.e.*, an 8% and 9% versus an 1.5% deviation. The FEI further stated that it was not considering the Appellant and Ms. Dzhumadzuk as bad people, but that in that competition, *i.e.*, the GP

Special Competition they had "*let their hearts over their heads*" for an athlete of their own country.

- 8.22 Moreover, the FEI clarified that the case at hand concerned only the GP Special Competition, and that the circumstances of the other competitions of the Event were not relevant in the matter at hand.
- 8.23 Finally, the FEI argued that the sanction, *i.e.*, a 3-months suspension, was proportional. In the FEI's view, where the credibility of judging was questioned, the entire image of the dressage sport was questioned. The Appellant has served the full period of suspension, and has returned to judging as normal.

9. Jurisdiction

The Tribunal has jurisdiction over the matter pursuant to the Statutes, GRs and IRs.

10. Admissibility of the Appeal

In accordance with Article 38.1 of the Statutes, Article 165 of the GRs and Article 17 of the IRs, the Tribunal finds the Appeal admissible, as the Appeal arises from a Decision taken by the FEI against the Appellant, *i.e.*, Ms. Shulga, and that the Appellants have lodged her Appeal within the deadline foreseen under Article 165.5 of the GRs.

11. Decision

- 11.1 The Tribunal, having taken into consideration all arguments, submissions and evidence by the Parties, considers that in order to deliberate whether to grant or partially grant, or whether to dismiss the Appeal on its merits, it has to decide on the points as follows. Even though the Tribunal has examined and considered all other points raised by the Parties, it does not regard them as relevant for the outcome of the decision. Therefore, the Tribunal will discuss and decide the questions as follows:
- a) Whether or not the Appellant's right to be heard with regard to the FEI proceedings has been violated, and whether such potential violation is deemed to be cured in the proceedings in front of the FEI Tribunal.
 - b) Whether or not the Appellant violated any FEI Rule(s), and thus whether the FEI Decision was rightfully imposed on the Appellant.
 - c) Whether or not the sanction imposed on the Appellant by the FEI was justified and proportionate.
- 11.2 With regard to the Appellant's claim that her right to be heard was not respected in the FEI proceedings, the Tribunal takes note that on 22 March 2016 the FEI issued a press release communicating that "*following*

a thorough investigation into the results from the three-star Dressage event at Lier (BEL), the FEI has found evidence of nationalistic judging in favour of a Ukrainian athlete, Inna Logutenkova, by two Ukrainian judges in the Grand Prix Special test on 2 March 2016". Furthermore, the Tribunal takes note that the Appellant has been notified by the FEI of the alleged rule violation on 1 April 2016, and afforded the right to be heard prior to notifying the FEI Decision and imposing a sanction on the Appellant on 28 April 2016. In addition, the Tribunal takes note that the press release of 22 March 2016 aimed to inform with regard to the suspension of the results of the GP Special Competition. Whereas the Tribunal finds that it is unfortunate that the press release of 22 March 2016 already mentions nationalistic judging by two Ukrainian judges, which in the view of the Tribunal can be understood as concerning the Appellant and Ms. Dzhumadzuk, the Tribunal finds that the Appellant's right to be heard has not been violated. As a matter of fact, the FEI granted the Appellant the right to respond to the notification of the alleged violation, and requested the Appellant to explain the significant differences of her scores in comparison to the remaining three judges' scores, prior to the FEI Decision and prior to imposing any sanctions on the Appellant. The Tribunal further finds, that even if the Appellant's right to be heard would have been violated in the FEI proceedings, which is not the case in the present case, such shortcomings are cured in the present Appeal proceedings. In this respect, at the end of the hearing both Parties expressly acknowledged that the Tribunal has respected their right to be heard and their procedural rights.

- 11.3 Regarding whether or not the Appellant has violated (a) FEI Rule(s), the Tribunal is satisfied that sufficient evidence has been provided in order for it to find that FEI Rule(s), and more specifically the Codex, has been violated by the Appellant. The Tribunal comes to this conclusion as set out in the following. To start with, Article 2 of the Codex requires a judge to have a "*neutral, independent and fair position towards riders*". The Tribunal takes note of the FEI submission that the FEI, when taking a decision in the matter at hand, had looked at the scores of the GP Special Competition and taken the decision based solely on those scores. The scores the Appellant has awarded to Ms. Logutenkova during the GP Special Competition are over 9% higher than the average of the scores awarded by the remaining three judges (with the exception of the other Ukrainian judge, Ms. Dzhumadzuk). In this respect the Tribunal takes note that the scores the Appellant awarded to the other athletes in the GP Special Competition did not deviate from the scores awarded by the remaining three judges by more than 2% on average. The Tribunal takes note of the Appellant's explanation with regard to her scoring of the combination at the GP Special Competition, namely that she scored on the performance she saw on the day. The Tribunal however finds that the Appellant's explanation does not justify her scores, and such large deviation of her scores when compared with the remaining three judges. In this respect, the Tribunal further finds that the Appellants have not provided any evidence – specific to the case at hand - that would allow it to conclude that the matter at hand rather concerned a down-scoring of the combination by the remaining three judges, than an up-scoring by the Appellant and by Ms. Dzhumadzuk, as alleged by the Appellants. The

Tribunal does not consider a simple reference to a general article dating back seven years, *i.e.*, to 2009, confirming that down-scoring was more likely than up-scoring as sufficient evidence. The Tribunal comes to this conclusion without taking into account – since the specific report has not been provided – that apparently the same person, *i.e.*, Dr. Stickland, has confirmed in a report that the case at hand concerns an up-scoring from the part of the Appellant and Ms. Dzhumadzuk. The Tribunal therefore holds that the position of the Appellant towards the scoring of the combination has not been *neutral, independent and fair*, as required by a judge under the Codex. As a consequence the Appellant violated Article 2 of the Codex. Finally, the Tribunal finds that the FEI in its decision has clearly outlined which FEI Rule has been violated by the Appellant, namely Article 2 of the Codex.

- 11.4 In a second step, which is not a decisive one for the rule violation, the Tribunal considers whether the matter at hand concerns a matter of “nationalistic judging”. To start with the Tribunal takes note of the reasons of the FEI Decision, which in particular outline that “*during the GP Special Competition, you judged in such a way as to favour an athlete of the same nationality as you and, thus, your scoring amounted to nationalistic judging and was a breach of the Codex.*”¹⁵ Furthermore, Article 2 of the Codex lists Nationalistic judging as an activity, which will lead to or may lead to a “conflict of interest”. In addition, the Tribunal takes note of the definition of nationalistic judging provided by Mr. Kempermann, namely “*the rider with the same nationality as the judges - if the rider’s award better than it should have been*”. In the opinion of the Tribunal, the intention of the rule maker must have been that judging has to be considered as “nationalistic”, where a judge does not have a “*neutral, independent and fair position*” towards a rider, and where such rider is of the same nationality as the judge. The Tribunal finds that the Appellant, by not judging in a *neutral, independent and fair position towards* Ms. Logutenkova, and clearly in favour of Ms. Logutenkova, and by having the same nationality as Ms. Logutenkova, was therefore judging in a nationalistic way. The Appellants’ claim that no definition of nationalistic judging existed prior to imposing a sanction on the Appellant, and thus that the FEI Decision had therefore to be invalid or void, has to be dismissed. The Tribunal finds in this respect that “nationalistic judging” is merely listed as one example of Article 2 of the Codex, and it does therefore not matter in the case at hand whether a definition of nationalistic judging existed or not. As previously found by the Tribunal the Appellant violated Article 2 of the Codex by not judging in a neutral, independent and fair position towards Ms. Logutenkova, which was clearly the case given the deviations of her scores with regard to this specific combination only, *i.e.*, she very strongly favoured this combination when scoring, as previously outlined. In this respect the Tribunal finds that Article 2 of the Codex does not specify a general threshold – contrary to the 6 % concept of Article 438 of the DRs – which decides whether a judge has judged in a neutral, independent and fair position towards a rider. Rather this has to be established on a case-by-case basis. Nevertheless, such large deviations should cause alert, and

¹⁵ FEI Decision, letter of 28 April 2016, Annex I, last para.

potential rule violations should be further investigated.

- 11.5 Finally, with regard to nationalistic judging the Tribunal is surprised that the five documents, not submitted in the present proceedings, have not been mentioned by the FEI at any stage in the proceedings prior to the hearing. In this respect, the Tribunal has taken note of the FEI's argument that it did not rely on those documents when deciding upon sanctions. The Tribunal however finds that the FEI Decision was certainly influenced by the previous FEI Dressage Committee Decision, coming to the conclusion that "nationalistic judging" has occurred, and recommending sanctions to the Appellant and Ms. Dzhumadzuk. Moreover, Mr. Kempermann made it plain that at least four (4) of the five documents supported the view that nationalistic judging had occurred. The Tribunal is therefore of the opinion that the five documents should have been included in the case file in the case at hand; even more so since the Appellants have requested inclusion of documents of this category, even though not being able to specify them. The Tribunal believes that the inclusion of the five documents might have shortened proceedings, affected the hearing, and ultimately avoided some costs in the case at hand. Therefore, the Tribunal decides that the Appellants shall not bear any costs of the proceedings, other than the deposit already made. However, even if the five documents had been included in the case file, the Tribunal would not have come to a different conclusion when deliberating the case at hand, as the statistical evidence by itself is sufficient to decide in the matter at hand.
- 11.6 The Tribunal finds that – and it has not been disputed by the Parties – the FEI, and its representatives, *i.e.*, the FEI Secretary General and the FEI Legal Director in the case at hand, was the competent organ to undertake disciplinary actions against the Appellant, and to issue the FEI Decision, with all its consequences. In accordance with Article 7 of the Codex "*The FEI and the FEI Dressage committee have the right to undertake disciplinary actions against judges who do not follow the Codex and FEI rules.*" Furthermore, Article 7 of the Codex foresees a "Temporary Suspension" as one of the disciplinary actions. The Tribunal finds that the Appellant's claim that the FEI had to wait for the Appeal-time to elapse, prior to imposing any sanctions, such as a suspension, on the Appellant, has to be dismissed. Pursuant to Article 20.7 of the IRs, decisions being appealed shall remain in full force and effect pending determination of the Appeal. The Tribunal finds that no order otherwise has been made in the case at hand; neither have the Appellants requested for any interim relief, as provided for in the IRs.
- 11.7 Finally, regarding the sanction imposed by the FEI on the Appellant, the Tribunal finds that the FEI decided within its latitude. In accordance with Article 7 of the Codex, disciplinary actions with regard to violations of the Codex shall range from a "Warning letter" to a "Temporary Suspension", such as in the case at hand, and finally to a "Removal from the FEI Dressage Judges' list". Given the circumstances in the case at hand, the Tribunal finds that a three-months suspension was not manifestly excessive to the seriousness of the conduct, *i.e.*, the violation of Article 2 of the Codex.

11.8 For the above reasons, the FEI Tribunal therefore decides as follows:

- 1. The Appeal is admissible.**
- 2. The Appeal is dismissed on the merits.**
- 3. The Decision of the FEI is upheld.**
- 4. All other requests are dismissed.**
- 5. No deposit shall be returned to the Appellant.**
- 6. The Parties shall bear their own costs and expenses.**

11.9 According to Article 168 of the GRs this Decision is effective from the date of oral or written notification to the affected party or parties.

11.10 According to Articles 165.1.3 and 165.6 of the GRs, this Decision can be appealed before the Court of Arbitration for Sport (CAS) within twenty-one (21) days of the present notification.

V. DECISION TO BE FORWARDED TO:

- a. The Parties: Yes**
- b. Any other: No**

FOR THE PANEL

A handwritten signature in black ink, appearing to read 'Henrik Arle', is written over a light blue rectangular background.

Mr. Henrik Arle, FEI Tribunal Panel Chair