

## Equestrian Sports (Fédération Equestre Internationale - FEI) - Concept "FEI Clean Sport"

### *The case of contamination analysed from the point of view of strict liability and proportionality and proposals submitted to the FEI for a revision of the regulations*

Global Sport Regulation – CAS Candidate

Supplementary Oral Presentation Review Document - English version

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#### **Preamble (source: [www.fei.org](http://www.fei.org))**

Today, the FEI is the governing body for eight equestrian disciplines: show jumping, dressage, eventing, driving, endurance, vaulting, reining and para-equestrian.

Equestrian events were first introduced to the Olympic Games in 1900, in a formula that is surprisingly similar to that of today. With the introduction of the sport to the Olympic Games, it became essential to standardize the rules of competition. In May 1921, delegates from ten national equestrian organisations met in Lausanne to discuss a project for an international federation.

Horseback riding is one of the few sports where men and women compete on equal terms at all levels of Olympic competition. It is also the only sport that brings together two athletes: the horse and the rider. The key to their success depends on their complicity and mutual respect.

#### **1. Introduction**

Fair and clean sports and the protection of animals are central issues today. The FEI has therefore enacted various provisions/regulations concerning the fight against doping. In addition, the FEI carries out doping and medication tests continuously and very regularly. These tests serve to protect the horse in the equestrian sport and to ensure fair play between competitors.

In daily practice the drifts are rapid: a medicine is administered, an ointment is applied to a small wound or the horse is placed in a foreign stall. At a future competition, the rider who is considered to be the responsible person could see his horse being subjected to a doping control which could have serious consequences. If the result of the test is positive, the medication is not necessarily intentional but often due to a lack of knowledge and therefore careless handling of the prohibited substances that are detected in the horse's body during a test. It is therefore very important that equestrian sportsmen and women learn about the subject of doping and medication. They should be aware of the current regulations concerning the administration of medication to horses. Knowledge about doping, anti-doping and medication is an essential part of the training of every equestrian sportsman and woman!

The standard of strict liability used by the Fédération Equestre Internationale (FEI) in equine doping cases is a source of discord among the legal world, riders and coaches. The FEI Disciplinary Tribunal and the Court of Arbitration for Sport (CAS) have consistently upheld this standard and no alternative is currently being considered. At the heart of the application of this standard of strict liability is the protection of the equine athlete. With the dual objectives of protection of the horse athlete, and maintaining equality between competitors, the FEI

imposes a suspension of the horse and/or the athlete or both when a horse's sample records a positive analytical finding (AAF - adverse analytical finding). The standard of strict liability and the implementation of provisional suspensions puts the welfare of the horse first. While the FEI's intentions are based on this noble premise, ambiguities and inconsistencies have undermined the effectiveness of the Equine Anti-Doping and Controlled Medication Regulations (EADCMR).

## 2. History of the FEI Clean Sport Concept

The FEI Commission on Anti-Doping and Medication was founded in November 2008. It was set up in response to the high-profile doping cases from the Olympic Games in 2008 and an appeal to the FEI President from a number of riders requesting greater clarity on doping and medication substances.

The Commission's mission was to continue the work initiated by the Task Force, which started in 2004, on Doping Policy and Medicinal Products, composed of members from the scientific, veterinary and sporting communities and from all sectors involved in equestrian sport and its governing bodies.

Its objective was to establish the best possible system to prevent the use of methods or substances that influence the performance of a competition horse, while ensuring the well-being of the horse at all times.

In order to enable the Commission to carry out its tasks, four focus groups have been set up with specific terms of references. The working groups included members of the Commission as well as experts in the field representing different stakeholders, namely:

- Laboratory Working Group: it was requested to discuss issues related to the analysis of FEI samples and their compliance with FEI policy.
- Legal Working Group: was tasked with reviewing existing Anti-Doping and Medication Control Rules and how they might be amended, as well as evidentiary issues.
- List Working Group: considered issues related to the Equine Prohibited Substances List and the associated Therapeutic Use Exemptions (TUE) matters and how substances should generally be categorized.
- Communication and Education Working Group: has been tasked with establishing a communication and education strategy to create an information platform for the Clean Sport campaign.

In May 2009, the FEI set up an Ethics Panel as an independent commission to assess and investigate practices among members of the German equestrian team and its officials at the Olympic equestrian events in Hong Kong in 2008. Under the chair of Britain's former Metropolitan Police Commissioner Lord Stevens, the Ethics Panel was renamed to the Stevens Commission. The Commission members were David O'Connor (President of the United States Equestrian Federation), Ken Lalo (Chair FEI Tribunal) and John Roche, FEI Director of Jumping.

The Stevens Commission remit was subsequently broadened to include a wider overview of equestrian sport to dovetail with the work of the Ljungqvist Commission and provide the FEI with a complete spectrum of changes to be implemented in the fight against doping.

The recommendations from the Stevens Commission, which were published in September 2009, supported and supplemented the work of the Ljungqvist Commission (Dr Arne Ljungqvist is a medicine Professor and a former IOC member). The work of the two Commissions was then aligned at a meeting in October 2009 to produce the Joint-Commission Recommendations, which received overwhelming support at the FEI General Assembly in Copenhagen on November 19<sup>th</sup> 2009, setting out revolutionary changes designed to transform the face of equestrian sport.

The vote of approval for the Progressive List in the General Assembly in 2009, permitting the restricted use of a small number of non-steroidal anti-inflammatory drugs (NSAIDs), provoked considerable debate. Obviously, this change in policy would affect equestrian sport at a number of levels and concerns were expressed in several different quarters. The FEI acknowledged that these concerns were all legitimate and that there was clearly a need for further debate on the issue.

The political choice of whether the restricted use of NSAIDs should be permitted in competition was delayed until the FEI General Assembly (Taiwan) in 2010, allowing for a broader debate prior to the vote and a full review of the list of prohibited substances, with all the relevant and necessary research. In the interim, the new FEI Anti-Doping and Controlled Medication Regulations (EADCMR), the Equine Prohibited Substances List was sent to the National Federations on October 20<sup>th</sup> 2009, and the new Veterinary Regulations came into effect on April 5<sup>th</sup> 2010.

In 2010, the period leading up to the General Assembly saw the successful implementation of all the measures required by the Clean Sport campaign and also saw the organization of an FEI Congress on the use of NSAIDs in equine sport. The establishment of a platform for science and philosophy related to the use of NSAIDs provided an opportunity to discuss the different aspects of the debate in equine sport. At the FEI General Assembly in 2010, the National Federations voted to adopt the proposal of the FEI Listing Group. They concluded that there was insufficient scientific knowledge at the moment to allow the use of NSAIDs in competition and that the FEI needed to put in place mechanisms to maintain the effect of significant political changes.

### **3. The objective of the fight against doping in equestrian sports is equine welfare**

The relationship between man and horse goes back for thousands of years. Although it is not known exactly why horses were domesticated, it is assumed that they were first used for meat production and then as "tools" for transportation.

Horses played an important role in the First and Second World Wars. However, after the Second World War, work horses virtually disappeared, mechanization and the resulting increase in leisure time changed the role and perception of the horse as an animal used for transport or as a source of food compared to a "leisure animal". Today at the Olympic Games, there are only three Olympic disciplines where human and equine athletes can compete together: show jumping, eventing and dressage.

The central role of equestrian regulatory bodies is to safeguard the welfare of the horse. The welfare of the horse "must always be the primary driver", even in situations where there are conflicts with "certain commercial aspects of the industry". The FEI, the world's regulatory body for equestrian sports in safeguarding the welfare of horses, has a **Code of Conduct** for the welfare of the horse. This Code lists a number of requirements that stakeholders of the sporting world must respect, including general considerations on the welfare of equidae such as good horse management, training methods, farriery, saddlery and transport. Under the heading "fit to compete", there are guidelines on fitness and competence, health status, doping and medicines. Under the EADCMR rules, it is stated that any act or intention of doping and the illicit use of medicines is a serious breach and will not be tolerated. After any veterinary treatment, sufficient time must be allowed for full recovery before a competition. All these regulations for international competitions are bound by this Code, which states that "the welfare of the horse must be the priority at all times". It is clear from these articles of the Code that the FEI positions itself as the representative of the equine athlete. Equitation represents a unique bond between man and animal. The CAS has recognised this inimitable relationship, in particular the vulnerable position of the horse as a consenting actor in relation to humans. The CAS further states: "Horses cannot themselves avoid the ingestion of prohibited substances. The welfare and health argument has a special position and resonance in their case".

#### 4. The ethical aspects of this perspective

The use of medication or drugs in equestrian sports raises several ethical issues. The Animal Welfare Act (2006) refers to "unnecessary harm" and it is difficult to apply the concept of "unnecessary harm" in equestrian sports, as the use of horses in sport is not "strictly necessary".

The appropriate term would be "avoidable suffering", as this term would undoubtedly allow humans to address welfare issues related to use of animals for sport, even if it is considered that the use of animals for sport is fundamentally unethical.

There are two important ethical considerations with regard to doping and horses. If a horse is doped in order to improve its performance, there is an element of cheating, which is contrary to the principles of clean and fair competition. There is also an animal welfare issue if a substance is given to a horse either to enhance or to mask an injury.

There is also the issue of a grey area represented by feed and feed supplements that can be easily ingested by the horse and which unintentionally result in a positive test for a prohibited substance or controlled medication, as is very often the case at present.

There is a moral and ethical dimension when it comes to administering pharmacological products to equine athletes in the context of sporting competition.

However, the FEI makes a distinction between doping (performance enhancement or masking an injury) and the use of *bona fide* veterinary treatment in the form of medication. When prohibited substances are found, the human athlete, in most cases, is aware of the dangers

and consequences, however, in the case of the equine athlete, they have no choice. Therefore, it is important that the FEI supports the equine athlete to safeguard their welfare.

#### **5. The FEI Clean Sport Initiative - Global Equine Anti-Doping and Controlled Medication Programme (EADCMP)**

The FEI's Clean Sport initiative aims to produce a detailed approach to clean sport as well as incorporating World Anti-Doping Agency (WADA) principles. The use of substances with the potential to affect equine performance, health or welfare and/or with a high potential for misuse are contrary to the integrity of equestrian sport and the welfare of horses (*source: Commission Ljungqvist and Stevens report*).

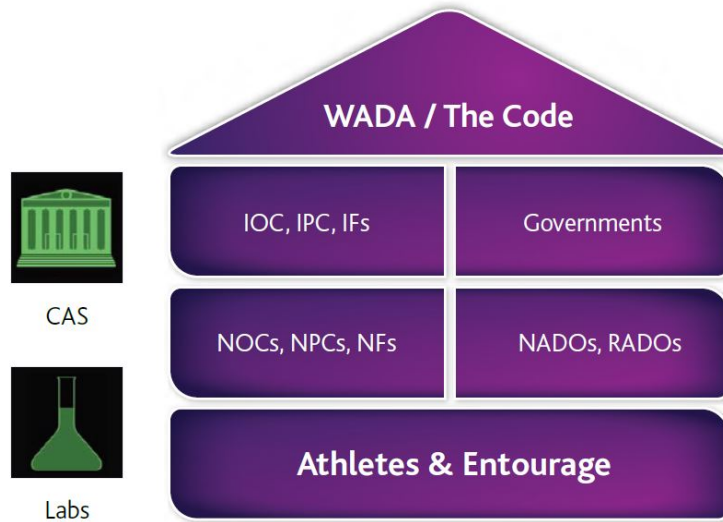
The FEI's EADCMP has run on a global scale under a new harmonized system since January 1<sup>st</sup> 2016. Increased testing is being carried out at FEI events on a worldwide scale. Testing takes place throughout all levels of FEI disciplines in a harmonized way and the number of horses tested is now evenly distributed across all levels of FEI events. (cf. A guide to the new EADCMP - [https://inside.fei.org/system/files/Global%20EADCMP%20Guide\\_0.pdf](https://inside.fei.org/system/files/Global%20EADCMP%20Guide_0.pdf) )

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# Anti-Doping Organisation

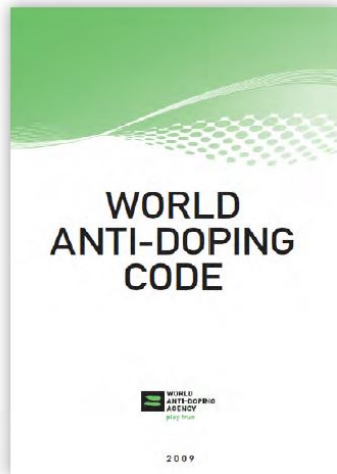
**GLOBAL ANTI-DOPING ORGANISATION CHART**



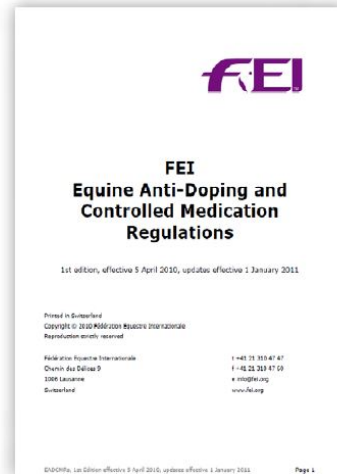
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# Two athletes - Two systems



World Anti-Doping Code  
Anti-Doping Rules for Humans



FEI Equine Anti-Doping and Controlled Medication Regulations (EADCMR)

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## Two athletes - Two systems

### Human Athlete

WADA / NADA Programmes

In-Competition and  
Out-of-competition testing

Registered Testing Pool

ADAMS / Whereabouts

Therapeutic Use Exemptions (TUE)

Prohibited Substances List

WADA Code

### Equine Athlete

FEI Medication Control Programme

In-Competition and  
Out-of-competition testing

Any horse can be tested at any FEI event

No ADAMS / Whereabouts

Equine Therapeutic Use Exemptions (ETUE)

Equine Prohibited Substances List

Equine Anti-Doping and Controlled Medication  
Regulations (EADCMR)

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## Concept of Prohibited Substances



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## Equine Doping Definition (Banned Substances)

Doping is defined as the occurrence of one or more of the Equine Anti-Doping (EAD) Rule violations set forth in Article 2.1 through Article 2.7 of the Equine Anti-Doping (EAD) Rules.

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## Equine Controlled Medication Definition

A Controlled Medication violation is defined as the occurrence of one or more of the Equine Controlled Medication (ECM) Rule violations set forth in Article 2.1 through Article 2.5 of the Equine Controlled Medication (ECM) Rules.





## Differences

PROHIBITED SUBSTANCES			
EADCM Regulations Article	BANNED SUBSTANCES (Doping)	EADCM Regulations Article	CONTROLLED MEDICATION
2.1	Adverse Analytical Finding (AAF)	2.1	Adverse Analytical Finding (AAF)
2.2	Use or Attempted Use	2.2	Use or Attempted Use
2.3	Refusing	2.3	Refusing
2.4	Tampering, or Attempted	2.4	Tampering, or Attempted
2.5	Possession of Banned Substances or Banned Methods		–
2.6	Trafficking or Attempted		–
2.7	Assisting, encouraging, aiding, abetting, covering up	2.5	Assisting, encouraging, aiding, abetting, covering up

### 6. The concept of contamination: its contours and where it fits into the EADCMR concept

It is important to mention this concept and explain its contours, as contamination represents a significant part of the legal cases handled by the FEI's legal department. Since 2015, it is estimated that around 44% of all positive cases have been contamination cases (stand April 23<sup>rd</sup> 2020).

What does contamination mean? The classic definition that is easily found speaks of a **defilment** that would result from contact with an impure, unclean or contaminating object. Etymologically, this term comes from Latin and fully reflects the notion of defilement.

This notion has several dimensions which are briefly described below:

Quantitative dimension: we are talking about concentrations that are often microscopic and in the nanogram ( $10^{-9}$  g), picogram ( $10^{-12}$  g) or even femtogram ( $10^{-15}$  g) range. To give a pragmatic dimension to the picogram, we need to imagine a drop poured in the Lake of Geneva in Villeneuve and could still find it in Geneva (at the other end of the lake)...

Qualitative dimension: when the definition refers to soiling, certain physical characteristics of the contaminant molecule are very important. Volatility, lipophilicity, hydrophilicity, resistance to temperature, resistance to light and half-life are physical criteria that need to be known.

Geographic dimension: some of these contaminant molecules are often endemic to certain regions. The substances contained in plants are very well identified botanically and geographically. These indications must also be part of the criteria for identifying possible contaminations. The Lupin flower in Portugal and the Poppy flower in north-eastern Europe are classic examples.

Therapeutic dimension: in view of the microscopic concentrations of the molecules causing the contamination, the question of a possible therapeutic effect should legitimately be asked. In the majority of cases, no therapeutic effect exists. The mere physical presence of a molecule today is due to the increasing quality of detection methodologies used by laboratories, which have become very efficient.

FEI Clean Sport's EADCMR concept does not specifically address the case of contamination. As noted above, prohibited substances are categorized. There are banned substances (BS) on the one hand and controlled medication substances (CM) on the other hand. The contamination may contain molecules belonging to both categories. Interpretation is difficult and therefore not applicable.

In view of the increasing number of such cases, the FEI has decided to create a new category (outside the EADCMR concept) in 2016 called "specified substances", which, in our view, recognises the true existence of contamination. There are also legal steps to find a lighter outcome to these cases.

In our opinion, it seems necessary to address this issue during a forthcoming revision of the EADCMR regulations.

## **7. The concept of strict liability as defined by WADA (citation):**

### *7.1. What is strict liability?*

The principle of strict liability applies in situations in which urine/blood samples, collected from an athlete, yielded an abnormal test results. It means that each athlete is objectively responsible for the substances found in his or her sample, and that an anti-doping rule violation occurs when a prohibited substance (or its metabolites or markers) is found in his or her bodily sample. A violation occurs even if the athlete did not act intentionally and even if the athlete acted without even gross negligence.

In fact, there are two types of a fault: intention or negligence. If someone is negligent, it necessarily means that he or she did not act intentionally. It should also be mentioned that in the case of strict liability, it exists even in the absence of any fault.

*7.2. Where does this principle come from?*

Prior to the World Anti-Doping Code (the Code) coming into force on January 1<sup>st</sup> in 2004, the basic document that provides the framework for the anti-doping policies, rules and regulations of the sports organisations and public authorities, the principle of strict liability was applied by the International Olympic Committee in its Anti-Doping Code and by the vast majority of sports organizations in their anti-doping regulations. Consistent with the wishes of WADA's partners, the Code continues to apply this principle.

*7.3. Does this rule offer flexibility and allow for the circumstances of the case or the athlete's intention?*

Yes, there is flexibility when a sanction is being considered. The rule of strict liability is the starting point. While a violation of the anti-doping rules occurs regardless of the athlete's intent, the sanction process does not arise from strict liability and provides flexibility to take into account the circumstances of the case.

*7.4. How is the principle of strict liability put into practice?*

If the sample in question is collected during a In Competition Test, the athlete's results in this competition are automatically cancelled. This rule helps to preserve fairness to the other athletes participating in this competition. With regard to subsequent sanctions (Art. 10 of the Code), the athlete has the possibility to avoid or reduce the penalty if he can establish, to the satisfaction of the court, how the substance entered his system, demonstrating that he did not commit any fault or significant fault, or in certain circumstances that he did not intend to improve his sporting performance. **This means that the burden of proof lies on the athlete.** The principle of strict liability set out in the Code has been consistently upheld in the decisions of the Court of Arbitration for Sport (CAS) and the Swiss Federal Tribunal.

*7.5. Has WADA made any changes in relation to the principle of strict liability under Code 2021?*

No. The principle of strict liability has still remained in Code 2021. The CAS has consistently upheld the strict liability rule in the presence of a prohibited substance in an athlete, accompanied by the possibility of modifying the sanctions according to the criteria set out. It ensures the right balance between the effective application of anti-doping rules for the benefit of all stakeholders and fairness where exceptional circumstances have resulted in a substance being used and found in an athlete's body without significant negligence on the athlete's part.

*7.6. How the WADA Code should be interpreted in the world of equestrian sports and what is the meaning of the concept of strict liability?*

The FEI, a partner of WADA, will strictly apply the new Code 2021. The concept of strict liability will be retained and applied. The burden of proof will therefore always rest on the person responsible (PR). This concept and its application is further strengthened by stricter animal

protection legislation in all countries, particularly in Northern Europe. For some years now, the Swiss law has provided that the animal is no longer a thing but a living meaning that it has rights and therefore can be defended in a tribunal. Nowadays, the evolution of the normative philosophy of the science of ethics also speaks of the "**animal dignity**" and of the horse in particular.

The assessment of its physiological needs and respect for its attributes as a living animal in a herd have become fundamental priorities that will not be ready to be put in question. From this point of view, maximum protection of the animal will remain a strong argument and this is important.

With the creation of a "specified substances" category in 2016 also cases of food contamination were taken into account. One could have imagined a relaxation of the notion of strict liability in this type of case. However, the current context of animal protection requires the application of the precautionary principle and there will be no relaxation on this point. Instead, the FEI is considering further adaptations in its revision process of the "Clean Sport" concept, which will involve greater flexibility in the allocation of sanctions, the setting of more screening limits for contaminating substances and greater exchange between the various analysis laboratories.

It is to be expected that the amendments to Code 2021 will play a favourable role in protecting athletes confronted with inexplicable cases of contamination, although care and risk assessment in the application and distribution of feed and food supplements remains a responsibility that is difficult to assume completely in practice.

## **8. The legal concept of strict liability in the practice of equestrian sports:**

A violation of the EADCMR rules is a tort of strict liability (Art. 2.1.1 EADR). There is an irrebuttable presumption that the "person responsible" (RP), which includes the rider and the surrounding personnel in certain circumstances, is responsible for an abnormal test result (art. 2.2.2.8 EADR). It is not necessary to establish intent, fault, negligence or intentional use of a prohibited substance. The inclusion of entourage personnel is the result of proposals and comments from the various National Federations in view of the regulations in 2010. The use or attempted use of a prohibited substance or prohibited method is provided in this framework (art. 2.2 EADR). With regard to the use of a prohibited substance, the person responsible (PR) and his entourage have a duty of care to ensure that no prohibited substance enters the horse's body or that a prohibited method is used. However, in the event of an attempt to use a prohibited substance or prohibited method, intent must be demonstrated. The success or failure of the use or attempted use of a prohibited substance or prohibited method is irrelevant (article 2.2.2 EADR).

With respect to the control of drug substances, a violation of the EADCMRs occurs if the substance is present at the time of an event without any valid veterinary prescription. (section 2.1 EADR). In this case and only in this case, a drug may be administered to a horse during an event "provided the appropriate FEI guidelines for the administration of an authorised treatment are followed". The FEI asserts that the EADR rules are based on a distinctive and

essential characteristic of the man/horse partnership in equestrian sport, namely that the horse is unable to speak and it is the role of the FEI to protect it. It is therefore the responsibility of the FEI to speak on its behalf and to ensure that at every stage of governance, regulation, administration and practice of the sport, the welfare of the horse is paramount. Accordingly, all treatments must be administered with respect for the health and welfare interests of the horse but not for any other reason.

According to these ECMR rules, a controlled medication may be administered to a horse. However, it must be "absolutely justifiable on the basis of the horse's state of health". If a horse is unable to compete due to injury or illness, it is entitled to appropriate veterinary treatment and a rest or recovery period is necessary.

The ECMR rules place the burden of proof on the person responsible and his or her entourage. The presumption of innocence is rebutted. It is up to the person responsible to establish or have established specific facts or circumstances that will give a level of evidence and an estimate of probability that will be analyzed by a disciplinary commission. In accordance with the WADA Code, the balance between the level of evidence and the estimate of probability is precarious and the notion of doubt does not benefit the accused.

In fact, the standard of strict liability imposed by sport governing bodies, including the FEI, for prohibited substances is higher than the standards practiced in civil law, where the burden of proof is clearly on the prosecution to prove facts and fault. Accordingly, it is permissible to argue that the FEI and CAS are using a quasi-criminal principle in this case. It is in fact applying a civil standard of proof of balance of evidence and not the criminal standard of absence of reasonable doubt. Strict liability is a principle used in civil law.

It is therefore difficult to reconcile the public welfare argument with equine doping. Perhaps the term "moral offence" would be more accurate in cases of equine doping. The equine athlete is a sensitive being who relies on humans to ensure its safety and well-being. They are in an extremely vulnerable position because they are unable to verbalize or express themselves and depend on their human guardians to act in its best interest. By applying a standard of strict liability, the person responsible (PR) is responsible for any substance that the horse ingests.

#### **9. Should the concept of strict liability be made more flexible?**

The FEI and CAS have consistently and firmly maintained the standard of strict liability for reasons of fair competition and animal welfare. The person responsible (PR) have challenged it on the basis of proportionality and a violation of legal principles. The FEI's approach to strict liability is strongly criticised because stakeholders in the equine sport sector believe that there is a very fine, even subtle difference between the need to protect the horse and cases where strict liability goes too far. As a result, it would no longer concern a clean sport. The increasing number of cases of food contamination is a proof of this. This distinction is even more pronounced when it is known that the horse's feed may be contaminated or that there is contamination through litter in a poorly cleaned stable. Many lawyers feel that the bar is set too high because there are grey areas, especially in cases of contamination. These same

lawyers advocate the introduction of a "lower fixed sanction in the case of proven accidental contamination or even better, a sanction in the form of a warning or reprimand".

In cases of contamination, the person responsible (PR) must prove, at great expense of expert opinion and laboratory analysis, that the inadvertently ingested substance was the result of contamination and, if this can be demonstrated, is granted a suspension or reduced ineligibility or is likely to get no sanctions.

The FEI is also largely inspired by what is practised in the world of racing. The IFHA (International Federation of Horseracing Authorities) anti-doping rules are based on the fundamental principle of strict liability. The FEI's argument is weak and open to criticism because the regulatory bodies for horse racing and equestrian sports use the concept of strict liability for the same purpose.

However, the position of an equine athlete is readily compared to that of a minor who, although it is a human being, is not yet legally responsible and autonomous. The person responsible (PR) is in the position of a guardian and it is his or her responsibility to ensure that the horse does not ingest a prohibited substance and to follow the rules regarding controlled medication.

At the moment, the continued application of this strict liability remains important because of the underlying principle to protect the welfare of equidae. If the FEI should deviate from this, the whole concept of EADCMR would be at risk. The FEI tribunal and the CAS take into account mitigating measures and certain aggravating circumstances in the area of sanctions. So there is flexibility but still following the concept of strict liability.

In recent years, the FEI has realised the limits of this practice and the legal department is being overwhelmed by increasingly frequent cases of contamination. Proof of this is the creation of the category "specified substances" since 2016, which allows for faster procedures and more flexible sanctions. This is a concrete proof that the system needs to be reformed at least for this category of substances.

## **10. The legal concept of proportionality**

The balance of interests ultimately amounts to a proportionality analysis.

The principle of proportionality requires that any authority - originally a State but by extension in our context a sports authority - chooses solutions that strike a reasonable balance between the objective that a measure is intended to achieve on the one hand, and the impact on the persons concerned on the other hand.

Historically, the proportionality requirement has its origin in the constitutional law of civil law countries, as a means of preventing excessive state intervention in individual rights. More generally, it is an instrument for "measuring" legal admissibility that permeates all areas of law.

Proportionality is an important factor in the revision of the content of sports regulations, including the area of doping. The CAS committees have applied this principle systematically from the very first days of the fight against doping.

Proportionality issues are often in the spotlight when it comes to determine the severity of sanctions in the field of doping. However, proportionality must be applied to all aspects of the WADA regime. The World Anti-Doping Code in 2015 newly included an explicit reference to the principle of proportionality, as well as "human rights".

It is generally accepted that the assessment of proportionality includes three concepts once a legitimate interest has been identified:

- Adequacy: the measure is "adequate" if it is appropriate to achieve the objectives, pursued by the legitimate interest, or at least contribute to it. This criterion is also used to avoid measures being implemented under a legitimate pretext to pursue another, unexpressed and illegitimate interest. For example, a sanction should have a deterrent effect on athletes.

- Necessity: the measure is considered "necessary" if it is not less incisive than a measure that would be equally adequate to achieve the objective (sometimes referred to as the "least incisive measure" test). In the words of a CAS panel, the measure is acceptable in the circumstances only if it is "the only weapon in the fight against doping". For example, a period of ineligibility will have a deterrent effect that a financial sanction could not have.

- Proportionality in the strict sense: the measure may not go beyond what is strictly necessary to achieve the objective in the concrete situation at stake; the measure must strike a reasonable balance with the interests of the data subject ("means- purpose- relationship"), in other words, the interference with rights must not outweigh the importance of the objectives pursued.

## **11. The legal concept of proportionality in the practice of equestrian sports:**

As can easily be imagined, the person responsible (PR) is often shocked when he or she learns that positive control has been found during a competition. He or she must first understand what strict liability is and therefore accept the burden of proof. He or she then realizes that demonstrating how a prohibited substance entered the horse's body is simply not within their competence and will generate enormous costs. Indeed, only scientific experts and competent lawyers will be able to allow him or her to provide an explanation and the credible arguments necessary to prove his or her good faith, to demonstrate his or her duty of care and ensure that the degree of fault is minimal and mitigated.

This is where the concept of proportionality must play its role. Indeed, the assessment of good faith, the credibility of arguments, the demonstration of the good management of a stable and its sport horses will be entrusted to a legal committee which will have to analyse, assess and finally impose a sanction according to the principle of proportionality. The degree of the

sanction will depend on the quality and quantity of the incriminated substance(s) and on the credibility of the arguments provided by the scientific experts and lawyers.

It is not uncommon to find that the persons responsible within the meaning of the EAD regulations are minors. This status still confers a special regime to be adopted for the legal commission which should impose a sentence in accordance with the principle of proportionality. To what extent should a sanction be punitive, incisive, educational? What is the responsibility of the wider community? Should a suspension and ineligibility be ordered?

All these criteria make the legal concept of proportionality an ideal tool for weighing up the force and significance of a sanction. The application of this notion must be present when there is a violation of the EAD rules and must complement the notion of strict liability in equestrian sports.

## **12. Proposals to the FEI for a future EADCMR review**

The timing of the proposals is very opportune as with the introduction of the new WADA Code in January 2021, the FEI has started a broad consultation process with all stakeholders in the equestrian sports sector. This consultation procedure will run until mid-May 2020. Here are the proposals selected and transmitted, there are five of them and they are listed in order of importance.

### **1. Strict definition of feed contamination in horses**

This definition must come from the scientific and veterinary communities and must absolutely represent practical interests. It must be understandable, easy to apply and not be the result of a compromise that would suit lawyers in its interpretation and application. The criteria set out in chapter 6 of this document are a good approach.

### **2. Relaxation of the concept of strict liability in cases of contamination and revision of sanctions**

A possible relaxation of the concept of strict liability in cases of established food contamination must be possible before the person responsible (PR) incurs major costs for expert opinions and laboratory analyses. The notion of proportionality should also be used to allocate sanctions that are not very incisive and can go as far as a simple warning.

### **3. Establishment of a greater number of screening limits for contaminating substances, even if they fall into the category of banned substances**

The FEI must commit to and fund studies of screening limits for contaminating substances. These substances have been known for many years and have to be related to the specific botany of each continent. Some of these studies have already been carried out with the IFHA institutions (International Federation of Horseracing Authorities). Synergies are to be sought as far as these food contaminations exist in the whole equestrian sports world.



#### **4. To widen the possibilities of elective testing by FEI-approved laboratories**

Opportunities for targeted elective testing of food and forages must be intensified and practised at modest costs and in a prophylactic manner. It is always preferable to act early instead of late and sterile reactions. The FEI could negotiate agreements with its approved laboratories and share the list.

#### **5. Introduction and practice of "Out of competition" testing**

This measure, which is already applied in the racing world, must absolutely be considered. It is educational and allows for intervention before and during training. The image damage in case of positive results would be much, much less important. The education of the entourage around sport horses would also be easier and more credible.

### **13. Conclusions**

The principle of strict liability reinforces the FEI's commitment to ensure fairness in competition and the well-being of equidae. The principle of strict liability, although considered "unreasonable" by many in the equestrian sports sector, is a form of violation of fundamental rights. There is therefore a strong chance that this notion will remain, but it could be relaxed in certain cases. Flexibility and differentiated use in the application of sanctions using the principle of proportionality will be necessary.

The horse is unable to express itself and depends on humans to protect and safeguard it. The standard of strict liability ensures that the rules about prohibited substances and controlled medications are taken seriously. A deviation from the standard of strict liability could render the "EADCMR" concept ineffective or weaken it.

The person responsible (PR) is in a position of guardianship and is responsible for ensuring that research is conducted on the ingredients and properties of all food. The non-autonomous or dependent position of the equine athlete is used to justify the burden of proof, thus adhering to the principle that the horse is vulnerable and in need of greater protection.

The FEI recognizes that there may be innocent ingestion of a prohibited substance through contamination. This is demonstrated by the creation of this new category of "specified substances" since 2016. In these cases, a more flexible and lenient approach has already been adopted by the FEI. It could be considered to shift the burden of proof to the Federation.

The FEI's position on doping is commendable as it puts the welfare of equine athletes first. However, the EADCMR regulations are overwhelmed with verbiage and legal jargon that is

difficult for the person responsible and his entourage to understand. The transfer of knowledge in this delicate area is more difficult at all levels.

The EADR regulations are a replica of the WADA rules, which were written with human athletes in mind. In this case, they do not fit. The document needs to be revised to reflect the fact that the target of such a regulation is an equine athlete, a sentient being and not a harnessing party. If this EADR regulation should be redrafted with the horse in mind, this would reflect an FEI approach that would better recognize the equine athlete as such.

Both athletes and race horses are tested out-of-competition, whereas the FEI only conducts in-competition testing. A revision of the regulations along these lines would recognize the specific needs of the equine athlete and his protection and the introduction of out-of-competition testing for prohibited substances would help to give the regulations more credibility.

#### References:

- **WADA and all its annexes:**  
[https://www.wada-ama.org/en/resources/the-code/world-anti-doping-code?gclid=EAlaIqobChMIaWMqgOh6QIVRofVCh2G-AZnEAAAYASAAEgI4NfD\\_BwE](https://www.wada-ama.org/en/resources/the-code/world-anti-doping-code?gclid=EAlaIqobChMIaWMqgOh6QIVRofVCh2G-AZnEAAAYASAAEgI4NfD_BwE)
- **FEI and all its annexes:**  
<https://www.fei.org/> - <https://inside.fei.org/> - <https://inside.fei.org/fei/cleansport>
- **The concept of strict liability:**  
Documentation IDHEAP – code of obligations - module 4: The basic laws of global sport  
  
*Publication* in Denning Law Journal, 2019, Vol 31, pp 41-76 – *Dr Laura Donnellan* (Lecturer in Law School of Law, University of Limerick, Ireland) – The FEI speaks for the horse who has no voice and the CAS listened: equine welfare and anti-doping in equestrianism
- **The concept of proportionality:**  
Documentation IDHEAP - module 3: The anti-doping regime  
*Livre* ASSER International Sports Law Series – Springer – *Marjolaine Viret* - Evidence in Anti-Doping at the Intersection of Science and Law, 2016, pp 132 ff
- **Published CAS Awards:**  
Award CAS 2010/A/2268 I. v. FIA – pp 32 – 33 on the principle of proportionality

- **Published FEI Tribunal decisions:**

FEI Decision on case 2015/BS03 – Steve Guerdat (SUI) – case of with banned substances **Codeine, Morphine** due to **contamination** with Puppy Seeds

<https://inside.fei.org/system/files/Case%202015-BS02%20-%20NASA%20-%202015-BS03%20-%20NINO%20DES%20BUISSONNETS%20-%20Final%20Tribunal%20Decision%20-%202018%20September%202015.pdf>

FEI Decision on case 2018/CM12 – Pablo Barrios (VEN) – case with controlled medication substances **Caffeine and Theophylline** due to feed **contamination**

<https://inside.fei.org/system/files/2018-CM12%20LE%20VIO%20-%20Final%20Tribunal%20Decision%20-%202015%20February%202019.pdf>

FEI Decision on case 2019/BS11 – Gaj Riossa (SLO) – case with banned substance **Synephrine** due to hay **contamination**

<https://inside.fei.org/system/files/Case%202019%20-%20BS11%20-%20FAMORKU%20-%20FEI%20Tribunal%20Decision%20-%20Approval%20of%20Agreement%20between%20Parties%20-%2030%20August%202019.pdf>

FEI Decision on case 2019/BS17 – Fanny Skally (FRA) – case with banned substance **Ergonovine** due to hay **contamination**

[https://inside.fei.org/system/files/Case%202019%20-%20BS17%20-%20AMITIE%20DES%20DOUCES%20-%20FEI%20Tribunal%20Decision%20-%20Approval%20of%20Agreement%20between%20Parties%20-%2004%20October%202019\\_corrected.pdf](https://inside.fei.org/system/files/Case%202019%20-%20BS17%20-%20AMITIE%20DES%20DOUCES%20-%20FEI%20Tribunal%20Decision%20-%20Approval%20of%20Agreement%20between%20Parties%20-%2004%20October%202019_corrected.pdf)

FEI Decision on case 2019/BS46 – Bruno Cavalheiro-Rebello (BRA) – case with banned substance **Ractopamine** due to feed **contamination**

<https://inside.fei.org/system/files/Case%202019-BS46%20CHABELLO%20-%20Final%20Tribunal%20Decision%20-%20Approval%20of%20Agreement%20between%20Parties%20-%2010%20February%202020.pdf>