LEGAL AND BUSINESS JOURNAL

RECENT FEI CASE: common sense prevails

In this edition of Horse International we would like to discuss an interesting case on the applicability of the multiple violation and aggravating circumstances. In early 2017 the FEI announced that seven endurance riders from a country in the Middle East and their trainers have all been provisionally suspended from the date of notification. The seven horses were also suspended for a two-month period from the date of notification. Samples taken from the horses that competed at four different events in one place in the Middle East between the end of November 2016 and mid-January of this year tested positive to the same four prohibited substances, the stimulant Caffeine and its metabolites Theophylline, Theobromine and Paraxanthine. Paraxanthine is a Banned Substance under the 2017 FEI Equine Anti-Doping and Controlled Medication Regulations (EADCMRs).

Reclassification Paraxanthine led to lifting Suspension

Caffeine is already listed as a Specified Substance and the FEI List Group has recommended that Paraxanthine should be reclassified as a Controlled Medication and Specified Substance from 1 January 2018. Specified Substances are substances which are more likely to have been ingested by horses for a purpose other than the enhancement of sport performance, for example, through a contaminated food. On 28 April 2017, the Preliminary Hearing Panel – following a request for lifting of the Provisional Suspension by the FEI, and after the FEI had provided further background information on the Prohibited Substance Paraxanthine – decided to lift the Provisional Suspensions of the Persons Responsible (PRs) and trainers. The Preliminary Hearing Panel took note that the Prohibited Substance Paraxanthine would most likely be reclassified from a Banned Substance on the 2017 Prohibited List to a Controlled Medication and Specified Substance in 2018. The Preliminary Hearing Panel agreed with the FEI that in such case the lex mitior principle shall apply.

Agreement between FEI and the PRs and trainers

On 7 November 2017, the parties reached an agreement where the parties concluded that the conditions for Article 10.5 of the Equine Anti-Doping (EAD) Rules (and to some extent Article 10.5 of the Equine Controlled Medication (ECM) Rules which would be applicable to the cases as of 1 January 2018, given the reclassification of the substance Paraxanthine) - Reduction of the Period of Ineligibility based on No Significant Fault or Negligence are fulfilled in the cases at hand and as a matter of fairness and following the principle of proportionality, the period of

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ineligibility should be reduced to two (2) months ineligibility for the PRs and trainers. In the case of PR Mr D (*the real names of the persons involved have been changed), the ineligibility period was agreed on six (6) months ineligibility, starting from the date of the sample collection, 17 December 2016 and ended on 16 June 2017.

Application of Articles on Multiple Violations and Aggravating Circumstances

On 16 November 2017, the Tribunal requested further information on how the alleged 'several earlier anti-doping rule violations' of Mr. Z and trainer Mr. X, as previously submitted by the FEI, had been taken into consideration in the above mentioned Agreement. On 22 November 2017, the FEI on one hand and the PRs and trainers on the other hand, responded to the Tribunal, both agreeing that the 'several earlier anti-doping rule violations' had been taken into consideration in the agreement, and that the parties had come to the conclusion that neither the provision on Multiple Violations (Art. 10.8 of the EAD Rules), nor the provision on Aggravating Circumstances (Art. 10.7 of the EAD Rules) applied in the cases at hand. Article 10.8 states that for a PR's second ECM Rule violation within the previous four years, the period of ineligibility shall be the greater of: (a) three months; (b) one-half of the period of ineligibility imposed for the first ECM Rule violation without taking into account any reduction under Article 10.6; or (c) twice the period of ineligibility otherwise applicable to the second ECM Rule violation treated as if it were a first violation, without taking into account any reduction under Article 10.6. The Aggravating Circumstances article, Art 10.7, states that if the FEI establishes that aggravating circumstances are present which justify the imposition of a period of ineligibility greater than the standard sanction, then the period of ineligibility otherwise applicable shall be increased up to a maximum of four years unless the PR can prove to the comfortable satisfaction of the FEI Tribunal that he/she did not knowingly commit the EAD Rule violation. The occurrence of multiple substances or methods may be considered as a factor in determining aggravating circumstances under this Article 10.7. The PR can avoid the application of this article by admitting the EAD Rule violation as asserted promptly after being confronted by the FEI with the EAD Rule violation.

Delay in notifying the PR

The FEI argued after looking into the matter of 'several earlier anti-doping rule violations' it was noted that the PR was not aware of his first violation when competing again with the same horse. The FEI notified the National Federation (NF) on 11 January. The NF received it at the same day, however, did not notify the PR until the 15 January. Hence, when the PR competed again on 14 January with the same horse, he was not aware of his first violation. The very same chain of events unfolded to the other cases and the FEI stated that none of the PRs or trainers could have been aware of the earlier violations since they had not been notified about the first violation before the second violation took place. The representatives of the PRs and trainers argued along the lines of the FEI and stated that none of the present cases may be considered as a second violation, namely because Mr. Z did not commit these violations after he received notice pursuant to Article 7 of the EAD Rules, but before receiving such notice. It was argued that the violations should therefore be considered together as one single violation per each of the PRs and trainers in accordance with Article 10.8.4.1 of the EAD Rules which states that for purposes of imposing sanctions under Article 10.8, an EAD violation will only be considered a second violation if FEI can establish that the Athlete committed the second EAD Rule violation after he/she received notice pursuant to Article 7, or after FEI made reasonable efforts to give notice of the first anti-doping rule violation. If FEI cannot establish this, the violations shall be considered together as one single first violation, and the sanction imposed shall be based on the violation that carries the more severe sanction. Moreover, the FEI argued that, since these cases concerned cases with a plausible explanation of contamination at the feed mill, which was outside the control of the PR and trainers, and there was then no intent to dope the horses, the FEI was of the view that aggravating circumstances should not be applied in such cases. The representatives of the PRs and trainers argued that those provisions, which could lead to stricter sanctions, could only apply if the PR knowingly committed the Rule violation at stake. However, in the cases at hand, neither the PRs nor the trainers were aware of the contamination of the feed with Caffeine; even the feed supplier was not aware of said contamination prior to further investigations in the cases at hand. On the basis of these arguments the Tribunal ratified the agreement between the FEI and the PRs and trainers and did not urge for stricter sanctions on basis of multiple violations or aggravating circumstances.

Conclusion: common sense prevails

Both the approach of the FEI in this case and the decision of the Tribunal ratifying the agreement between the FEI, the PRs and trainers are welcome. From our point of view they demonstrate that also in doping cases which are based on the strict liability rule common sense may be successfully applicable. We consider this a good development. In upcoming editions of the Legal and Business Journal we shall keep zooming in on similar matters. <

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If you have any questions and/or comments after reading this article, we would be happy to hear from you. You can also contact us for all equine-law related questions or matters. Please contact us via info@europeanequinelawyers.com or by telephone +31-(0)135114420.

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