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ARBITRAL AWARD

The Arbitration Committee of the Czech Olympic Committee, consisting of Mgr. Lukáš Trojan, chairman JUDr. Jaromír Bláha and JUDr. Pavel Šafář, members

in respect of the following application for appellate review:

Applicant: **Andrea Halíková, date of birth: 17 June 1995**
residing at Radimovice 22/25, 251 69 Velké Popovice
(hereinafter the "**Athlete**")

Represented by: **Mgr. Matěj Vácha, attorney-at-law**
with his registered office at Tyršův dům, Újezd 450/40, Prague 1 – Malá Strana,
Postal Code 118 01

against the

decision of the Executive Committee of the Czech Equestrian Federation, Ref. No. VV ČJF 1/2020 of 24 June 2020 (hereinafter the "**contested decision**")

with participation of:

- 1) **Antidoping Committee of the Czech Republic**
with its seat at Za Císařským mlýnem 1063/5, 170 00 Prague 7
(hereinafter the "**Antidoping Committee**")
- 2) **Czech Equestrian Federation**
with its seat at Zátopkova 100/2, 160 17 Prague 6 – Strahov
(hereinafter the "**CEF**")

renders this:

arbitral award:

- 1) **The decision of the Executive Committee of the Czech Equestrian Federation of 24 June 2020, Ref. No. VV ČJF 1/2020, is hereby cancelled in respect of paragraph II of the operative part, and is hereby confirmed in respect of paragraphs I, III, IV, V and VI of the operative part.**
- 2) **The Athlete, Andrea Halíková, is hereby suspended (rendered ineligible) for a period of 22 months.**
- 3) **Each of the parties shall bear its own costs.**

Reasoning:

1. Competence of the Arbitration Committee and Composition of the Tribunal

- 1.1. In the case at hand, the tribunal is asked to hear and decide on the Athlete's application for appellate review of 15 July 2020, directed against the decision of the Executive Committee of the CEF (the "**CEF Executive Committee**") of 24 June 2020, Ref. No. VV ČJF 1/2020, where by virtue of the decision contested by the application for appellate review, the CEF EC
- i) cancelled the decision of the CEF Disciplinary Committee of 23 February 2020, Ref. No. DIK-4/2019-8 (the "**CEF Disciplinary Committee's decision**");
 - ii) suspended the Athlete (rendered her ineligible) for a period of 24 months;
 - iii) disqualified all the results achieved by the Athlete from 16 June 2019 to the date of legal force of the CEF Disciplinary Committee's decision on provisional suspension of the Athlete;
 - iv) cancelled the CEF Disciplinary Committee's decision of 16 August 2019 on provisional suspension of the Athlete as of the date of legal force of the contested decision;
 - v) made a decision on the costs of the disciplinary proceedings.

The proceedings before the CEF Disciplinary Committee and, subsequently, before the CEF Executive Committee, based on an appeal filed by the Antidoping Committee, were concerned with suspected violation of an anti-doping rule by the Athlete.

- 1.2. The CEF is a member of the Czech Olympic Committee and is subject to its Statutes, which lay down, in Art. XIII (3), the competence of the Arbitration Committee of the Czech Olympic Committee (hereinafter the "**COC Arbitration Committee**") to hear and decide this case. The competence to hear and decide the case also follows from Art. 13.2.2 of the Regulations, which is binding on all the national sports unions and their members. Neither of the parties pleaded a lack of competence of the COC Arbitration Committee to hear and decide the case at hand.
- 1.3. In conformity with Art. 2 (1) of the Rules of Procedure of the COC Arbitration Committee, the Chairman of the COC Arbitration Committee appointed a three-member tribunal to hear the case at hand, consisting of the Chairman of the COC Arbitration Committee, as the presiding arbitrator, and a further two members of the COC Arbitration Committee appointed by him as arbitrators, specifically JUDr. Jaromír Bláha and JUDr. Pavel Šafář (hereinafter the "**tribunal**"). No plea of bias was raised against any member of the tribunal by any of the parties in the sense of Art. 2 (6) of the Rules of Procedure of the COC Arbitration Committee.

2. Facts of the Case

- 2.1. On 16 June 2019, the Athlete was tested in-competition positive for the prohibited substance of cocaine. The Antidoping Committee notified the Athlete of the positive test and suspected



violation of Art. 2.1 of the Regulations for Doping Control and Sanctions in Sport in the Czech Republic (hereinafter also the "**Regulations**") by means of a letter of 10 July 2019.

- 2.2. The Athlete asked for analysis of the B sample.
- 2.3. In a letter of 25 July 2019, the Athlete was notified that the test result for the B sample was the same as for the A sample, and that, in the opinion of the Antidoping Committee, the relevant doping rule had indeed been violated, and the CEF was required under the Regulations to initiate disciplinary proceedings.

3. Proceedings Before the CEF Disciplinary Committee

- 3.1. The notice of violation of the anti-doping rule was delivered to the CEF on 10 July 2019 and the notice of the positive test result for the B sample on 26 July 2019.
- 3.2. The CEF Disciplinary Committee notified the parties of the initiation of disciplinary proceedings (hereinafter the "disciplinary proceedings") by means a letter of 8 August 2019.
- 3.3. On 16 August 2019, the Athlete received the CEF Disciplinary Committee's decision of 16 August 2019 on her provisional suspension until the proceedings in her case were closed with final effect. This decision was made under Art. 7.7.1 of the Regulations, since the Athlete disagreed with voluntary provisional suspension as she claimed not to have used the prohibited substance knowingly.
- 3.4. Proceedings were held in the case, including oral hearings, and on 23 February 2020, the CEF Disciplinary Committee issued a decision whereby it suspended the Athlete (rendered her ineligible) for a period of 12 months, where the 192-day period of provisional suspension was counted towards the Athlete's period of ineligibility.
- 3.5. The Antidoping Committee appealed against the decision of the Disciplinary Committee.

4. Arguments of the Parties

Athlete's arguments presented in the disciplinary proceedings

- 4.1. The Athlete relied in her defence on an assertion that the prohibited substance entered her body when she kissed her boyfriend. She referred to Art. 10.5 of the Regulations and further presented various assertions to establish that the preconditions for applying the provision on no significant fault or negligence were met on her part. She stated, in particular, that she had only known her boyfriend for a short time, had not been aware that he was a drug user, to which he had confessed only *ex post facto*, and that she had not violated the standard of utmost caution by kissing him after her competition ride. She referred to the CAS rulings in *Gasquet* and *Barber*. The Athlete suggested the application of Art. 10.4 of the Regulations, as there has been no fault or negligence on her part.
- 4.2. The Athlete presented an expert report drawn up by Ing. Jaroslav Zikmund on 20 October 2019, with a consultation on 14 December 2019.



Arguments presented by the Antidoping Committee in the disciplinary proceedings

- 4.3. In its statement of 2 September 2019, the Antidoping Committee emphasised that cocaine was a non-specified substance and, under the Regulations, an anti-doping rule was violated if any quantity of such a substance was present in the Athlete's body.
- 4.4. It further stated that before the disciplinary proceedings were initiated, the Athlete had contacted the Antidoping Committee with several inquiries concerning the quantity of the prohibited substance in her body, and in each case, presented a different version of how the substance had entered her body.
- 4.5. In its statement of 7 November 2019, the Antidoping Committee questioned the Athlete's version and stated that she was culpable (at fault) of the violation at least in the form of advertent negligence, but more likely in the form of gross negligence.
- 4.6. In the proceedings, the Antidoping Committee presented an expert report of 24 January 2020, which indicates that the relevant finding established the use of cocaine or a product containing cocaine. In the case at hand, cocaine was very likely used within several hours before the doping test. The Athlete's version that shortly before her doping control, she kissed her boyfriend, who had snorted cocaine on the same day, has been assessed by the expert in that if cocaine had indeed been transferred by kissing, this could not have led to the test result such as those obtained in the case at hand. It is unknown in the Athlete's case whether the urine sample was taken at a time when the concentration was growing, at the maximum level or decreasing. If it was taken in the phase of growing or decreasing concentration, it is practically ruled out that the presence of cocaine in the Athlete's urine could be explained by kissing. If the sample was taken at the time of maximum concentration, such a test result could be neither confirmed nor disproved. This, however, would require a combination of factors, where the man's mouth would have to be highly contaminated by cocaine and the urine sample would have to be taken in the peak phase of the cocaine concentration.

Arguments presented by the Antidoping Committee in the appeal

- 4.7. The Antidoping Committee referred to Art. 2.1.1 of the Regulations, according to which it is each Athlete's personal duty to ensure that no prohibited substance enters his or her body. Athletes are responsible for any prohibited substance or its metabolites or markers found to be present in their samples.
- 4.8. Furthermore, the Antidoping Committee pointed out the principles of clean sports and protection of athletes, and concluded that the Athlete had substantially deviated from the strict standards of utmost caution. The Antidoping Committee does not believe her defence and refers to considerable delays and procedural defects in the proceedings before the CEF Disciplinary Committee.
- 4.9. The Antidoping Committee referred to an expert report prepared by Ing. Jan Stríbrný, Ph.D., an expert in the sector of healthcare, the field of toxicology, which it had commissioned in the



case. The expert report allegedly implied that the amount of cocaine determined in the Athlete's body did not correspond to an amount that could realistically be transferred to the Athlete's body in the way described by the Athlete. This could only be a trace quantity.

- 4.10. Furthermore, the Antidoping Committee pleaded that the CEF Disciplinary Committee had proceeded at variance with Art. 10.11.3 of the Regulations, when it counted the period of the Athlete's involuntary provisional suspension towards the time of her ineligibility.
- 4.11. The Antidoping Committee further points out that cocaine is a non-specified substance included in group S6., Stimulants, letter a), Non-Specified Stimulants, according to the 2019 List of Prohibited Substances and Methods. According to the WADA TD2019DL technical document, the World Anti-Doping Agency (hereinafter the "WADA") has not set any specific quantity limits for non-specified stimulants.
- 4.12. The Antidoping Committee thus considers that the presence of any amount of such a substance in the Athlete's body is sufficient for a conclusion on violation of the anti-doping rule. In accordance with Article 10.2 of the Regulations, the Antidoping Committee suggested that the Athlete be suspended (rendered ineligible) for a period of four years, including disqualification of her results. The Antidoping Committee considers any reduction of the period of ineligibility based on no significant fault or negligence, or for reasons other than fault, inapplicable.

5. Proceedings at the Level of the CEF Executive Committee

- 5.1. Following an appeal filed by the Antidoping Committee, a hearing was ordered before the CEF Executive Committee for 4 May 2020. The hearing was then indeed held on that day. Furthermore, a hearing also took place on 9 June 2020, where the decision contested by the application for appellate review was issued.

Athlete's arguments presented in the appellate proceedings

- 5.2. The Athlete stated that her conduct did not deviate from the strict standard of utmost caution required of all athletes. The Antidoping Committee's interpretation puts unreasonable requirements on athletes.
- 5.3. Furthermore, the Athlete points out that the expert report presented by her and the report submitted by the Antidoping Committee are not mutually contradictory, as it cannot be ruled out that cocaine entered the Athlete's body in the manner she described. In the Athlete's opinion, the Antidoping Committee is trying to ruin her sports career. Furthermore, she points out that the degree of fault (culpability) on her part is minimal and that she is not a professional athlete. The Athlete presented another expert report of 13 May 2020, drawn up by experts Jiří Hladík (an expert in the sector of healthcare, the field of forensic medicine) and Šárka Winzigová (an expert in the sector of healthcare, the field of toxicology). This report concludes that the version presented by the Athlete as regards the manner of contamination is possible.
- 5.4. The Athlete suggested that the decision of the CEF Disciplinary Committee should be confirmed.



- 5.5. A statement on the version of events presented by the Athlete was also made by WADA during the proceedings (e-mail of 26 March 2020). According to WADA, the version presented by the Athlete in respect of the contamination of her body by cocaine is basically unlikely (especially in view of the concentration of cocaine in the Athlete's body).

Decision of the CEF Executive Committee

- 5.6. The CEF Executive Committee cancelled the decision rendered previously by the CEF Disciplinary Committee and suspended the Athlete (rendered her ineligible) for a period of 24 months, and also decided to disqualify all her results from 16 June 2019, cancelled the Disciplinary Committee's decision on provisional suspension of the Athlete, and ruled on the costs of the proceedings.
- 5.7. In the opinion of the CEF Executive Committee, an anti-doping rule was violated under Art. 2 of the Regulations, as a non-specified substance in category S6, non-specified stimulants, had been used; this is a substance prohibited in-competition regardless of its quantity, and the Antidoping Committee is not required to establish the Athlete's intent to contaminate her body.
- 5.8. The CEF Executive Committee concluded that, under Art. 10 of the Regulations, a suspension (ineligibility) could be imposed for a period of up to four years or, on the other hand, a sanction could be waived. The CEF Executive Committee then referred to Art. 10.2.1, 10.2.2, 10.4 and 10.5.2 of the Regulations.
- 5.9. When considering the possible application of Art. 10.4 and 10.5.2 of the Regulations, the CEF Executive Committee concluded that these provisions could be applicable only if the Athlete established how the prohibited substance entered her body. The CEF Executive Committee thus dealt with the question of intent in the Athlete's conduct.
- 5.10. The CEF Executive Committee concluded that the Athlete had managed to establish a lack of her intent to cheat in competition and to help herself achieve a better result by using the prohibited substance. The influence of cocaine on an athlete's performance in equestrian sports is questionable and could justifiably be considered counterproductive. The CEF Executive Committee therefore decided to consider the Athlete's conduct unintentional and follow from the basic two-year period of ineligibility.
- 5.11. Furthermore, in paragraph 11 of its decision, the CEF Executive Committee stated that *as to the manner in which the prohibited substance had entered the Athlete's body, it reached a consensus that the Athlete had been able to establish, in the light of the above-specified degree of the burden of proof imposed on the Athlete by the Regulations, that the given substance, i.e. cocaine, had most probably entered her body due to a "contaminated kiss" with her boyfriend, who had previously snorted cocaine and licked the remainder of the substance. In this conclusion, the CEF Executive Committee agreed with the reasons presented by the Disciplinary Committee, and based on weighing the evidence adduced at 51:49 in favour of the accused Athlete, such probability could not be unambiguously rebutted even through the newly submitted expert reports.*



- 5.12. The CEF Executive Committee stated that as the manner in which the prohibited substance had entered the Athlete's body had been established, the general condition had been met for reducing the period of ineligibility within the meaning of Art. 10.4 or 10.5 of the Regulations. The CEF Executive Committee, however, found no reasons for applying these provisions as it did not consider the circumstances of the case exceptional enough for it to be possible to conclude that the Athlete could not have avoided contamination of her body by the prohibited substance.
- 5.13. The CEF Executive Committee then concluded that it had followed from the basic ineligibility period of two years as the violation had not been intentional and no reason had been found for reducing the period of ineligibility.
- 5.14. In view of the circumstances of the case, the CEF Executive Committee ruled that the period of ineligibility had started on 16 August 2019, i.e. the date of legal force of the decision on provisional suspension. The Athlete's ineligibility would thus end on 17 August 2021.

6. Application for Appellate Review

- 6.1. The Athlete applied for an appellate review of the above decision rendered by the CEF Executive Committee by virtue of a blank pleading filed with the COC Arbitration Committee on 15 July 2020. In the pleading, she claimed that the contested decision of the CEF Executive Committee should be changed in that the original decision of the CEF Disciplinary Committee would be confirmed, i.e. including her suspension (ineligibility) in the duration of 12 months.
- 6.2. The Athlete's legal counsel later supplemented the above on her behalf by a pleading of 25 August 2020. In the latter pleading, it was stated that the Athlete was asking for a change in the imposed sanction which she considered disproportionate. The Athlete has an amateur and not professional status, and this fact should be taken into account in view of the case law of the Arbitration Court for Sport (hereinafter the "CAS"). In this context, the Athlete's suspension (ineligibility) is disproportionate, as the degree of fault (culpability) regarding the Athlete's intoxication is minimal. The Athlete further pointed out the decision-making practice of the International Federation for Equestrian Sports (hereinafter the "FEI") with regard to positive doping control results. Furthermore, the Athlete stated that the contested decision did not take into account the effect of the substance found in the Athlete's body on her performance, and more specifically, did not take into account that the effect on her performance was minimal or even counterproductive at a certain stage.
- 6.3. The Athlete refers to the World Anti-Doping Code effective from 1 January 2019 (probably a typing error – from 1 January 2021 – note by the COC Arbitration Committee, hereinafter the "2021 Code"). The Athlete points out Art. 4.2 and 10.2.4 of the 2021 Code, concerning the use of "social" drugs that do not affect an athlete's performance. These are prohibited only in-competition. If an athlete establishes that such a substance was used out-of-competition without the intent to influence his or her performance, ineligibility is newly imposed for a period of three months. These substances are designated as Substances of Abuse and, as from 1 January 2021, should also include cocaine. Furthermore, the Athlete states that the suggested



sanction goes entirely against the new concept of dealing with abuse of prohibited substances out-of-competition.

- 6.4. By virtue of her application for appellate review, the Athlete seeks a change in the decision of the CEF Executive Committee in that the original decision of the CEF Disciplinary Committee would be confirmed and she would be rendered ineligible for 12 months.
- 6.5. The CEF responded to the application for appellate review by a pleading of 28 August 2020.

7. Oral Hearing Before the COC Arbitration Committee

- 7.1. An oral hearing before the COC Arbitration Committee was held on 2 September 2020.
- 7.2. Along with the members of the tribunal and Secretary of the COC Arbitration Committee, the oral hearing was also attended by the Athlete, together with her legal counsel, Mgr. David Švec (substituted for by Mgr. Matěj Vácha, attorney-at-law), by JUDr. Jan Zajíc (substituted for by Mgr. Jan Bureš, attorney-at-law) for the Antidoping Committee, and by Mgr. Ondřej Novák, Chairman of the CEF Disciplinary Committee, authorised to represent the CEF before the COC Arbitration Committee, for the CEF.
- 7.3. The legal counsel for the Antidoping Committee referred to the written statement and summarised the presented arguments, and stated, in particular, that the sanction was not disproportionate. He considers the Athlete's version hard to believe, especially with regard to the concentration of the prohibited substance. The Athlete failed to establish a lack of negligence and a reference to the yet ineffective 2021 Code is not admissible. The Athlete failed to establish that the use of the prohibited substance had not enhanced her performance. The Antidoping Committee suggests that the contested decision be upheld.
- 7.4. The legal counsel for the Athlete referred to the application for appellate review and pointed out that the Athlete was an amateur athlete, and that the prohibited substance had no effect on her performance. Furthermore, he referred to the newly adopted 2021 Code, which substantially reduced sanctions imposed for analogous cases of abuse of prohibited substances.
- 7.5. The tribunal then proceeded with the Athlete's examination. The Athlete described what had occurred on the day of the doping control and what preceded the control, and described the timeline. She described her relationship with her boyfriend and how she believed the prohibited substance had entered her body. She further described her sports career and her ambition to become a member of the national team (or, more specifically, the absence of any such ambition). She did not live in a common household with her boyfriend. This was the first time the Athlete had been tested for doping. She also described why her boyfriend had allegedly used cocaine.
- 7.6. The meeting of the COC Arbitration Committee was closed and the parties were given a deadline by 11 September 2020 to present their final motions.



8. Final Motions

- 8.1. The tribunal invited the parties to present their final motions in the case.
- 8.2. The CEF filed its final motion in the case. In its final motion, it summarises that the conditions for imposing ineligibility for a period of four years have not been met since the application of the prohibited substance was not intentional and did not aim at enhancing the sports performance. The basic duration of the sanction should be two years and it is up to the COC Arbitration Committee to decide on a possible application of further provisions allowing for reduction of the sanction in case of no significant fault or negligence. It was appropriate to antedate the beginning of the period of ineligibility because the length of the proceedings was not attributable to the Athlete.
- 8.3. Represented by her legal counsel, the Athlete stated in her final motion of 11 September 2020 that the arguments she had presented indicated that the proposed duration of her ineligibility was disproportionately strict.
- 8.4. The Athlete referred to her previous statements where, in her opinion, she had explained in detail and documented by expert reports how her body could have been contaminated by the prohibited substance.
- 8.5. She further pointed out that she was an amateur athlete and this should have been reflected in the duration of the sanction in line with the decision-making practice of the FEI. The proposed duration of the sanction is excessive in her opinion. She is also convinced that the duration of the sanction should reflect the influence of the substance on the Athlete's performance. She firmly believes that the use of cocaine cannot have any positive effect on sports performance.
- 8.6. Furthermore, the Athlete pointed out that the new 2021 Code effective from 1 January 2019 (probably a typing error – from 1 January 2021 – note by the COC Arbitration Committee) comprised new rules. Allegedly, a new category of punishment will be introduced for out-of-competition "social" use of drugs that are prohibited substances under the 2021 Code. The use of these substances is generally unrelated to sports performance and the presence of these substances in a tested competition sample is usually caused by the consequences of out-of-competition use without any relation to a sports performance. In these cases, ineligibility is newly imposed in the duration of three months, which can be reduced to one month if the athlete agrees to undergo treatment. The Athlete points out that the sanctions for such use are substantially lower. The Athlete is aware that these provisions are not yet effective, but disagrees that they are irrelevant in the case. The new 2021 Code reflects certain injustice and unnecessary harshness associated with the use of prohibited substances unrelated to sports performance. This is a regulation *de lege ferenda* as, according to the Athlete, WADA considers the current provisions overly harsh. The Athlete urges the tribunal to take these changes into account. She suggests a reduction of the proposed duration of ineligibility.



9. Legal Assessment

- 9.1. The Athlete filed an application for appellate review of the decision rendered by the CEF Executive Committee. The CEF Executive Committee is a body of the CEF in the sense of its Statutes, vested with the competence to decide on appeals against decisions of the CEF Disciplinary Committee. In accordance with the Regulations, it is a body competent to hear and decide disputes ensuing from violation of anti-doping rules. Within the meaning of Art. 13.2.2 of the Regulations, it is possible to contest decisions of the Federation by an appeal (application for appellate review) filed with the COC Arbitration Committee. The application for appellate review was filed within the deadline pursuant to Art. 13.7.2 of the Regulations and the applicant paid a fee pursuant to Section 20 (1) of the Rules of Procedure of the COC Arbitration Committee. The application for appellate review is admissible.
- 9.2. The tribunal first has to deal with the question of whether the anti-doping rules were violated in the case at hand. At this point, the tribunal of the COC Arbitration Committee refers to Art. 2.1.1 of the Regulations, according to which *"it is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, Fault, negligence or knowing Use on the Athlete's part be demonstrated."* Under Art. 2.1.2 of the Regulations, the presence of a prohibited substance, *inter alia*, is a sufficient proof of an anti-doping rule violation. Under Art. 2.1.3 of the Regulations, it holds that *"[e]xcepting those substances for which a quantitative threshold is specifically identified in the List, the presence of any quantity of a prohibited substance or shall constitute an anti-doping rule violation"*.
- 9.3. The tribunal unambiguously concludes with reference to the facts and evidence described above that the Athlete violated anti-doping rules within the meaning of Art. 2 of the Regulations as the presence of a prohibited substance was determined in her body, specifically the prohibited substance of cocaine, or rather its metabolites benzoylecgonine and methylecgonine. According to Art. S 6 of the List of Prohibited Substances, cocaine is a non-specified stimulant, which is prohibited only in-competition.
- 9.4. The tribunal further dealt with the issue of intent and possible application of Art. 10.4 and 10.5 of the Regulations. Pursuant to Art. 10.2.1. of the Regulations, it holds that *"The period of Ineligibility shall be four years where: 10.2.1.1 The anti-doping rule violation does not involve a Specified Substance, unless the Athlete or other Person can establish that the anti-doping rule violation was not intentional."* Art. 10.2.2 provides that *"If Article 10.2.1 does not apply, the period of Ineligibility shall be two years."*
- 9.5. In other words, in conformity with Art. 10.2.1.1 of the Regulations, for achieving a two-year period of ineligibility, the Athlete would have to prove that the violation of the anti-doping rule was not intentional. According to Art. 10.2.3 of the Regulations, *"The term 'intentional' is meant to identify those Athletes who cheat."* Furthermore, according to Art. 10.2.3 of the Regulations, it holds that *"The term, therefore, requires that the Athlete or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping"*



rule violation and manifestly disregarded that risk." According to Art. 10.2.3 of the Regulations, it further holds that *"An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be not intentional if the substance is a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition [in a context unrelated to the sports performance]."*

- 9.6. The interpretation of the term "intent" or "intentional" is not straightforward. This aspect is most elaborated in criminal law, where intent is classified as direct intent or indirect (oblique) intent. In terms of sports law, the best guidance for construction of this term can be found in the CAS case-law; however, it should be noted that the approach to this issue is not unequivocal. Indeed, in some cases, the CAS ruled that the notion of intent comprised, in doping cases, both direct intent and indirect (oblique) intent (*dolus eventualis*),¹ while elsewhere it decided that the term "intent" had to be interpreted strictly, while it was difficult to prove oblique intent and distinguish it from negligence (recklessness) in doping practice.² It should be added that the mentioned cases pertained to the resolution of cases under the "former" World Anti-doping Code of 2009. Nonetheless, some of the conclusions continue to be applicable. The ambiguities in this respect are partially clarified by the currently effective wording of Art. 10.2.3 of the Regulations and the World Anti-Doping Code (the "2015 Code"), which indicates that the notion of intent also includes *dolus eventualis* (the athlete knew that there was a significant risk that his or her conduct might result in violation of an anti-doping rule and manifestly disregarded this risk); nonetheless, the specific situation always has to be assessed in respect of the first sentence of Art. 10.2.3 of the Regulations, i.e. an intent exists where the athletes cheats.
- 9.7. According to Art. 3.1 of the Regulations, the *"[Antidoping Committee] shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the [Antidoping Committee] has established an antidoping rule violation to the comfortable satisfaction of the hearing panel [...] Where these Rules or the 2015 Code place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability."*
- 9.8. The term "*balance of probability*" is well elaborated in the CAS case-law. According to the CAS, *"...In other words, for the Panel to be satisfied that a means of ingestion is demonstrated on a balance of probability simply means, in percentage terms, that it is satisfied that there is a 51% chance of it having occurred. The Player thus only needs to show that one specific way of ingestion is marginally more likely than not to have occurred."*³ Within the evaluation of the facts, the tribunal must assess the facts of the case, and the origin of the prohibited substance

¹ See CAS ruling 2012/A/2822 Qerimaj v. International Weightlifting Federation.

² See CAS ruling 2013/A/3316 WADA v. Bataa.

³ See, e.g., decision CAS 2017/A/5296 World Anti-Doping Agency v. Gil Roberts; decision CAS 2009/A/1926 International Tennis Federation v. Richard Gasquet; and decision CAS 2009/A/1930 WADA v. ITF & Richard Gasquet.



in the Athlete's body in the light of the above described balance of probability and evaluate whether the arguments presented by the Athlete are more probably true than not.

- 9.9. In the case at hand, the prohibited substance was used in-competition, specifically during the "CPI Summer Cup" event, which took place from 13 to 16 June 2019. The positive test took place on the last day of the event and it is thus clear, in the context of the experts' findings, i.e. that the contamination must have occurred shortly (not more than several hours) before the test, that this was a case of use in-competition. Consequently, it is not possible to automatically presume under Art. 10.2.3 of the Regulations *in fine* that intent was not involved in the given case. Nonetheless, having regard to all the circumstances of the case, as described below, the tribunal considers that the Athlete established the chronology of facts at a balance of probability required for not considering the Athlete's conduct in this matter intentional and, therefore, it is necessary to follow from the basic period of ineligibility, i.e. two years.
- 9.10. Furthermore, the tribunal dealt with the question of whether there existed any circumstances on the Athlete's part that would justify the application of Art. 10.4, Art. 10.5 (or Art. 10.6) of the Regulations. The tribunal concluded in this regard, in view of the circumstances of the case, that while the Athlete was at fault in terms of how the substance entered the Athlete's body, and the degree of fault does exceed the degree required for a possible application of Art. 10.4 of the Regulations, the tribunal had found reasons for a further reduction of the sanction based on Art. 10.5 of the Regulations. In this respect, the COC Arbitration Committee partially agrees with the CEF Disciplinary Committee as to applicability of Art. 10.5 of the Regulations. However, the tribunal disagrees with the CEF Disciplinary Committee as regards the degree of negligence in terms of the three degrees of fault (negligence) defined in CAS' decision-making practice and as described below.
- 9.11. According to Art. 10.4 of the Regulations, *"If an Athlete or other Person establishes in an individual case that he or she bears No Fault or Negligence, then the otherwise applicable period of Ineligibility shall be eliminated."* According to Appendix 1 – Definitions to the Regulations, the term No Fault or Negligence means *"A case where the Athlete establishes that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance. Except in the case of a Minor, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system."*
- 9.12. According to Art. 10.5, or more specifically Art. 10.5.2 of the Regulations (as the substance concerned in the case at hand is a non-specified substance), it holds that *"If the Athlete establishes that he or she bears No Significant Fault or Negligence, subject to further reduction or elimination, the otherwise applicable period of Ineligibility may be reduced, as provided in Article 10.6, based on the Athlete degree of Fault, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable."* According to Appendix 1 – Definitions to the Regulations, No Significant Fault or Negligence means *"A case where the Athlete establishes that his or her Fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation. Except in the case of a Minor, for*



any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system.”

- 9.13. Based on the balance of probability (see Art. 3.1 of the Regulations and the CAS decision-making practice), the tribunal accepted that the prohibited substance had not been used intentionally and it seems likely that the prohibited substance entered the Athlete’s body when she kissed her boyfriend at the time. The tribunal accepted the Athlete’s assertion that the use of the substance had no connection with the competition and most likely could not have positively affected her sports performance.
- 9.14. In view of all the circumstances of the case, the tribunal accepted the Athlete’s version indicating unintentional use and admitted it as probable. Based on the accepted balance of probability, the Athlete thus succeeded in establishing one of the basis prerequisites for applying Art. 10.4, or Art. 10.5 of the Regulations, specifically how the prohibited substance entered her body. The tribunal assessed further conditions for application of Art. 10.4 and 10.5 of the Regulations.
- 9.15. As regards Art. 10.4 of the Regulations, according to comments on the World Anti-Doping Code, Art. 10.4 may only be applied in exceptional circumstances, e.g. where the athlete could establish that he or she was sabotaged by a competitor. In any case, it is required that the athlete maintain at all times the highest degree of prudence so as to avoid a prohibited substance entering his or her body. Of relevance in this respect are conclusions made in CAS decisions, specifically in cases 2012/A/2804 Kutrovsky v. ITF, CAS 2005/C/976&986 FIFA & WADA, CAS 2005/A/847 Knauss v. FIS. On the other hand, reference can also be made to the CAS decision in CAS Advisory Opinion to FIFA – CAS 2005/C/976, where the CAS stated that *“the endeavours to defeat doping should not lead to unrealistic and impractical expectations the athletes have to come up with... No fault means that the athlete has fully complied with the duty of care”*.
- 9.16. As will be explained below, the tribunal is convinced that the Athlete did not assert or establish any special circumstances of the case that would allow for application of Art. 10.4 of the Regulations, as the tribunal is convinced that the Athlete acted negligently and was at fault in terms of how the prohibited substance entered her body.
- 9.17. The prohibited substance entered the Athlete’s body when she kissed her boyfriend. The tribunal took into consideration, to the Athlete’s benefit, that the kiss allegedly occurred directly after her competition ride when, overwhelmed with emotions, the Athlete could not completely control her behaviour and probably could not notice that her boyfriend at the time had used the prohibited substance. However, this changes nothing about the fact that the Athlete acted negligently as specified in the following paragraphs.
- 9.18. On the one hand, the tribunal perceives that the Athlete is not a professional competing at the international level; however, it holds at the same time that she must have been aware that she was taking part in competitions subject to doping control. The competition where the doping control took place involves, among other things, prizes worth hundreds of thousands (*of crowns*) and it is thus not a purely amateur event, as the Athlete was trying to convince



the disciplinary bodies. It is also clear from the Athlete's statement that she participates in competitions as part of her gainful activities (sale of horses). The tribunal points out that the Athlete is responsible for her preparation and also for a sound choice of people surrounding her. The tribunal considers it unreasonable to claim that the athlete should recognise the taste of a drug. On the other hand, the tribunal considers that if the Athlete's partner (boyfriend) uses cocaine several times a day (on Sunday, between 2 p.m. and 5 p.m.), it is more than likely that he is more than an occasional user and, in view of the way this drug influences a person's behaviour, it is unlikely that the Athlete could have been completely unaware of her boyfriend's use of cocaine.

- 9.19. The tribunal did not believe that the Athlete had been unaware of the abuse of cocaine by her boyfriend, but in view of the totality of the circumstances, and especially the time of the day and time of her contact with her boyfriend (directly after the ride), it would be too harsh, in the tribunal's opinion, to require that the Athlete be so careful and far-sighted to refuse a kiss from her boyfriend because she might get hypothetically contaminated by a drug. Although the tribunal did not believe that the Athlete had been completely unaware of the drug abuse by her boyfriend, she can hardly be expected to inquire her boyfriend at such a time as to whether or not he had taken a drug, instead of accepting a kiss from him. The tribunal thus came to the conclusion that this constituted no significant negligence.
- 9.20. The tribunal thus concludes that, based on the totality of circumstances of the case at hand, further conditions for the application of Art. 10.4 of the Regulations were not met as the Athlete's conduct can be considered negligent since the Athlete kissed a contaminated person in-competition. As athletes bear strict liability for what is present in their body, they must always be careful what they ingest, and also with whom they come into contact and how. In the tribunal's opinion, in no case did the Athlete exercise utmost caution that could warrant the application of Art. 10.4 of the Regulations.
- 9.21. As already stated above, the tribunal believes that application of Art. 10.5 of the Regulations comes into consideration in the case at hand in view of the existence of no significant fault or negligence. The Athlete has established, based on the necessary balance of probability, how the prohibited substance entered her body. The COC Arbitration Committee considers it plausible that the substance was not intentionally applied with the intent to cheat. The Athlete has managed to convince the tribunal that she did not ingest the prohibited substance with a view to enhancing her sports performance. However, this changes nothing about the fact that the Athlete acted negligently as specified in the preceding paragraphs.
- 9.22. If Art. 10.5 of the Regulations is applied in the case at hand (non-specified substance), the period of ineligibility can range from one to two years. In case CAS 2017/A/5015 International Ski Federation (FIS) v. Therese Johaug & Norwegian Olympic and Paralympic Committee and Confederation of Sports (NIF) & CAS 2017/A/5110 Therese Johaug v. NIF, the CAS set three categories of fault (negligence) and the corresponding duration of ineligibility, specifically: (i) a significant degree of fault may lead to a sanction of 20 – 24 months; (ii) a normal degree of fault may lead to 16 – 20 months; and (iii) a light degree of fault may lead to 12 – 16 months. In this case, the tribunal considers that the Athlete's degree of fault is significant.



- 9.23. After determining the degree of fault/negligence, it is necessary to take into consideration the subjective elements (culpability) that have to be reflected in setting the specific period of ineligibility.⁴
- 9.24. In the tribunal's opinion, the degree of negligence falls in the category of significant as the Athlete was supposed to avoid any contact during the entire competition that would make it possible to contaminate her body. Moreover, the Athlete did not assert in the proceedings that she had advised her boyfriend during the time of their relationship of her duties in the fight against doping and possible risks of contaminating her body.
- 9.25. The tribunal found objective conditions for reducing the period of ineligibility. For the reasons described above and also in view of the relatively abnormal concentration of the prohibited substance in the Athlete's body, the tribunal considers the degree of negligence to be significant and, therefore, the sanction should be imposed in the interval of 20-24 months. The tribunal preferred to impose a sanction in middle of this range, i.e. for a period of 22 months, as it also took into account the fact that the Athlete had been active in the proceedings, attempted to defend herself and assisted in clarifying the case.
- 9.26. In respect of a reduction of the period of ineligibility under Art. 10.6 of the Regulations, the tribunal states that none of the conditions for the procedure under Art. 10.6 of the Regulations were met in the case.
- 9.27. Beyond the scope of the above, the tribunal states that even if the Athlete did not enhance her sports performance by using the prohibited substance, it nonetheless holds under Art. 2.1.2 of the Regulations that, according to Art. 2.1, the presence of a prohibited substance, its metabolites or markers in the Athlete's sample alone is a sufficient proof of violation of an anti-doping rule. The athlete bears "strict" liability in this case, and this is also absolutely regularly accepted by the CAS. Consequently, in this sense, it is irrelevant in imposing the sanction whether the prohibited substance is or is not capable of enhancing the sports performance. Furthermore, the tribunal states that it is equally impossible to follow from the CAS' conclusions in cases *Gasquet* and *Barber*, where the facts were different, and in the opinion of the tribunal, the degree of the Athlete's fault was not such as in the case at hand; reference can be made in this respect especially to the description of facts in those decisions. As also emphasised by the CAS, each case must be assessed strictly according to the specific and unique circumstances of the given case.
- 9.28. As regards the principle of proportionality, the tribunal states that its use has been permitted by CAS in the past in exceptional cases⁵. However, these were absolutely exceptional and specific cases and, moreover, all occurred before the effective date of the 2015 Code. This case is not so exceptional as to render a 22-month period of ineligibility disproportionate. The principle of proportionality is already reflected in the Code and the Regulations; see the introductory provisions of the Code, according to which: "*The Code has been drafted giving*

⁴ See decision CAS 2013/A/3327.

⁵ See, e.g., CAS 2005/A/830 Squizzato v. FINA, TAS 2007/A/1252 Oussama Mellouli & Federation Tunisienne de Natation, and CAS 2010/A/2268 I. v. Fédération Internationale de l'Automobile.



consideration to the principles of proportionality and human rights." Moreover, especially after the effective date of the Code in 2009, the CAS has had the opportunity to express its opinion on the question of proportionality, where it stated in several cases that the Code already provided sufficient flexibility in imposing sanctions and thus proportionality could be invoked at most in "extremely rare and exceptional cases".⁶ The above is all the more true of the provisions of the 2015 Code, i.e. according to the currently effective regulation. This is not the case here.

- 9.29. At the same time, the tribunal notes that it is not appropriate to consider a reduction of the sanction based on the alleged new regulation enshrined in the 2021 Code, where the Athlete pointed out that Art. 10.2.4 of the 2021 Code might be applicable in her case in the sense that, after 1 January 2021, she would receive a period of ineligibility from one to three months for the conduct for which a 24-month period of ineligibility was actually imposed. The tribunal does not agree with this Athlete's conclusion. According to the new Code, two conditions must be met simultaneously for the application of the new provision of Art. 10.2.4, specifically the use of a prohibited substance included in the list of Substances of Abuse out-of-competition and, at the same time, a proof that the use of the prohibited substance is unrelated to the sports performance. The first condition was not met in the case at hand, as the use clearly occurred in-competition (see Appendix 1 to the Regulations – interpretation of the term In-Competition: *Unless provided otherwise in the rules of an International Federation or the ruling body of the Event in question, "In-Competition" means the period commencing twelve hours before a Competition in which the Athlete is scheduled to participate through the end of such Competition and the Sample collection process related to such Competition.*) The second condition (relation to the sports performance) thus no longer needs to be assessed; nonetheless, its fulfilment would be at least disputable and, as a matter of fact, the Athlete did not make any substantial effort to establish this condition either. The tribunal considers all the Athlete's suggestions concerning application of a valid, but not yet effective, regulation irrelevant.
- 9.30. Given the above, it can thus be summarised as follows: (1) The tribunal found no intent in the Athlete's conduct within the meaning of Art. 10.2.1 and 10.2.3 of the Regulations. (2) Consequently, it is appropriate to apply Art. 10.2.2 of the Regulations, i.e. the basic period of ineligibility of two years. (3) There is no ground for eliminating the sanction (ineligibility) under Art. 10.4 of the Regulations in the case at hand. (4) The conditions for reducing the sanction of ineligibility in the case at hand under Art. 10.5 of the Regulations are met, as the tribunal found no significant fault/negligence on the part of the Athlete.
- 9.31. Consequently, on the basis of all the above and in conformity with Section 18 (3)(a) and (b) of the Rules of Procedure of the COC Arbitration Committee, the tribunal ruled in that it cancelled paragraph II of the operative part of the CEF Executive Committee's decision and

⁶ CAS 2010/A/2307 WADA v. Jobson, CBF a STJD, or CAS 2009/A/2012 Doping Authority Netherlands v. Nick Zuijkerbuijk.



decided itself on the matter, and upheld the contested decision in respect of all other paragraphs of its operative part.

10. Commencement of the Period of Ineligibility

- 10.1. As a rule, the period of ineligibility runs from the date of the final decision in the case, i.e. in the case at hand, from the time when this decision is issued. According to Art. 10.11.1 of the Regulations, "*where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the Athlete or other Person, the body imposing the sanction may start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection or the date on which another antidoping rule violation last occurred. All competitive results achieved during the period of Ineligibility, including retroactive Ineligibility, shall be Disqualified.*"
- 10.2. In this case, the tribunal found legitimate grounds for application of Art. 10.11.1 of the Regulations as there were delays in the proceedings not caused by the Athlete. At the same time, the Athlete was already provisionally suspended from the time of legal force of the preliminary measure, and the Athlete was thus *de facto* already unable to compete from 16 August 2019, as stated by the CEF Executive Committee in its decision.
- 10.3. According to Art. 10.11.3.1 of the Regulations, the period of provisional suspension is counted towards the period of ineligibility. Consequently, the entire period from 16 August 2019 to the present day has to be counted towards the period of ineligibility.
- 10.4. According to the above, the period of ineligibility under this decision will therefore end on **17 June 2021**.

11. Disqualification of Results

- 11.1. In accordance with Art. 10.8 of the Regulations, all competitive results of the Athlete obtained from the date when the sample was collected, i.e. from 16 June 2019 (including the Athlete's results in the competition "CPI Summer Cup 2019"), until the date of this decision, are disqualified.

12. Costs of the Proceedings

- 12.1. In conformity with Section 20 (4) of the Rules of Procedure, the COC Arbitration Committee has decided that each of the Parties shall bear its own costs.

Advice: This award is final and is not subject to any further appeal, except an appeal filed with the CAS in Lausanne by the International Federation for Equestrian Sports (FEI) or the World Anti-Doping Agency (WADA) within the meaning of Art. 13.2.3 of the Regulations, within 21 days of service of this Award. Therefore, the Award shall also be delivered, in addition to the Parties, to the



International Federation for Equestrian Sports (FEI) and the World Anti-Doping Agency (WADA).

In Prague, on 13 October 2020

Mgr. Lukáš Trojan, chairman of the COC Arbitration Committee



JUDr. Jan Exner, secretary of the COC Arbitration Committee

