



**DECISION of the FEI TRIBUNAL**

**dated 20 July 2018**

**In the matter of**

**Ms. Skye Morssinkhof**

**Mr. Stefan Morssinkhof**

**“Person Responsible” or “PR”**

**“Owner”**

**together “Appellants”**

**represented by Dr. Monika Gattiker, LANTER, Seefeldstrasse 19, 8032 Zurich, Switzerland, and Ms. Jacqueline Brown, Keystone Law, 48 Chancery Lane, London, WC2A 1JF, United Kingdom**

**vs.**

**FÉDÉRATION EQUESTRE INTERNATIONALE (“FEI”)**

**“FEI” or “Respondent”**

**I. COMPOSITION OF PANEL**

Mr. Henrik Arle, one member panel

**II. SUMMARY OF THE FACTS**

- 1. Case File:** The Tribunal duly took into consideration the Parties’ written submissions and communications received to date.
- 2. Oral hearing:** On 18 July 2018, via telephone conference call.

Present:

Mr. Henrik Arle, one member panel  
Ms. Erika Riedl, FEI Tribunal Clerk

For the Appellants:

Ms. Skye Morssinkhof, Appellant  
Mr. Stefan Morssinkhof, Appellant  
Dr. Monika Gattiker, legal representative  
Ms. Jacqueline Brown, legal representative  
Mr. Francois Kasselmann, witness

For the FEI:

Ms. Anna Thorstenson, FEI Legal Counsel  
Ms. Ana Kricej, FEI Junior Legal Counsel

### **III. DESCRIPTION OF THE CASE FROM THE LEGAL VIEWPOINT**

#### **1. Articles of the Statutes/Regulations which are applicable:**

Statutes 23<sup>rd</sup> edition, effective 29 April 2015 ("**Statutes**").

General Regulations, 23<sup>rd</sup> edition, 1 January 2009, updates effective 1 January 2018 ("**GRs**").

Internal Regulations of the FEI Tribunal, 3<sup>rd</sup> edition, 2 March 2018 ("**IRs**").

Veterinary Regulations, 14<sup>th</sup> edition 2018, effective 1 January 2018, Chapter IX ("**VRs**").

FEI Code of Conduct for the Welfare of the Horse.

#### **2. The relevant Legal Provisions:**

##### **Article 28.2 of the Statutes:**

"The Secretary General is responsible for the following:

(...)

(x) The observance of the Statutes, General Regulations, Sport Rules and Procedural Regulations of a General Assembly;

(...)"

##### **Article 38.1 of the Statutes:**

"Subject to Articles 38.2 and 38.4, the FEI Tribunal shall decide all cases submitted to it by or through the Secretary General, whether Appeals from or matters not otherwise under the jurisdiction of the Ground Jury

or Appeal Committee. These cases may be:

- (i) Any infringement of the Statutes, General Regulations, Sport Rules, or Procedural Regulations of a General Assembly or of violation of the common principles of behavior, fairness, and accepted standards of sportsmanship, whether or not arising during an FEI meeting or Event;
- (ii) Any issue of interpretation of the Statutes, General Regulations, and Sport Rules;
- (iii) Notwithstanding anything to the contrary in this Article, the FEI Tribunal may review and decide upon any matter involving abuse of horses."

#### **Article 165 of the GRs – Appeals:**

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

- 1.1 With the Appeal Committee (or with the FEI Tribunal if there is no Appeal Committee) against Decisions by the Ground Jury.
- 1.2 With the FEI Tribunal against Decisions of the Appeal Committee or any other person or body.
- 1.3 With the CAS against Decisions by the FEI Tribunal. The person or body lodging such Appeal shall inform the Secretary General and provide him with copies of the statement of Appeal. (...)

3 Appeals to the Appeal Committee must be in writing, signed and accompanied by supporting evidence in writing or by the presence of one or more witnesses and must be lodged no later than one (1) hour after the Decision of the Ground Jury.

4 If there is no Appeal Committee, Appeals to the FEI Tribunal must be in writing, signed and accompanied by supporting evidence in writing or by the presence of one or more witnesses and must reach the FEI Tribunal no later than fourteen (14) days after the end of the Event. So far as Competitions are concerned, the right of Appeal is limited to questions of the eligibility of an Athlete or Horse and questions involving the interpretation of the Sport Rules.

5 Appeals to the FEI Tribunal must be dispatched to the Secretary General and signed by the appellant or his authorised agent and accompanied by supporting evidence in writing or by the presence of one or more witnesses at a designated hearing and must reach the FEI Tribunal within thirty (30) days of the date on which the Secretary General's notification of the earlier Decision was sent. (...)"

#### **Article 18.1 of the IRs - Jurisdiction:**

"In accordance with Article 38 of the FEI Statutes, the FEI Tribunal has the competence to hear and determine any matter properly submitted to it, including, but not limited to, Claims (as provided for in Article 30 of these Internal Regulations of the FEI Tribunal), those matters specified in Article 163 (Protests and Disciplinary cases) and Article 165 (Appeals) of the FEI General Regulations and all disputes and proceedings arising under the Equine Anti-Doping and Controlled Medication Regulations. (...)"

### **Article 1014 of the VRs - Pony Measuring Facilities:**

"(...) 2. The OC must ensure that suitable conditions for Pony Measurement are provided. The Measuring Area must have:

- a) a total area of at least 3m by 3m;
- b) a measuring "pad" of at least 3m by 1.5m that is flat, even and level which must be checked using a spirit level or laser and the floor must be non-slippery (a concrete slab or other paved surface is most desirable; plywood, dirt, gravel or other uneven surfaces are not permitted);
- c) freedom from unnecessary disturbances and distractions;
- d) adequate lighting to facilitate the process;
- e) ideally a separate entrance and exit to allow safe movement of Ponies into and out of the area;
- f) must be sheltered; and
- g) a Waiting Area for those Ponies awaiting Second Measurement. (...)"

### **Article 1082 of the VRs - Regulatory Height:**

1. "Ponies' regulatory height at the withers must not exceed 148.0cm without shoes.
2. Ponies being measured at FEI Events are given a height allowance; their height at the withers must not exceed 150.0cm without shoes or 151.0cm with shoes.

### **Article 1083 of the VRs - Pony Measuring at FEI Events:**

1. Pony Measuring is administered by the FEI Veterinary Department who selects the FEI Events at which measuring will take place, appoints the Measuring Veterinarians and provides FEI approved Measuring Sticks.
2. Pony Measuring may be announced in the Competition Schedule however the FEI reserves the right to carry out unannounced Pony Measuring at FEI Events.
3. Pony Measuring is carried out in the Measuring Area, usually before the Horse Inspection unless otherwise approved by the FEI Veterinary Department. Notwithstanding anything contrary regulated in the GRs, if Pony Measuring is carried out before the Horse Inspection, the Period of the Event shall commence when Pony Measuring starts. (...)"

### **Article 1085 of the VRs - Pony Measuring Procedure:**

"(...) 5. Following measuring, Ponies are declared as either having:

- a) "Measured In" and permitted to compete; or

b) "Measured Out".

6. The Measuring Veterinarians must notify the PR or their representatives of the Ponies having Measured Out using a Second Measurement Notification Form. These Ponies must be presented for Second Measurement within a maximum of 1 hour following the Initial Measurement. (...)

10. The Measuring Veterinarians must notify the PR or their representative, the GJ and the VD of any Ponies having Measured Out after the Second Measurement.

11. The Measuring Veterinarians must mark, stamp and sign the Ponies' Passport, on the Identification Page, stating the date, Event and the words "Measured Out - Pending an Appeal". A red pen must be used for that purpose. A copy of the Identification Pages must be sent to the FEI Veterinary Department within 72 hours of the conclusion of the Event.

12. Ponies having Measured Out after the Second Measurement are not permitted to compete in the Event and any future FEI Pony Events until an Appeal Measurement has been carried out and the Pony has Measured In.

13. The Measuring Veterinarians must inform the FEI Veterinary Department of any Ponies having Measured Out in the Pony Measuring Report. (...)"

14. The FEI Veterinary Department will inform the respective NF of any Ponies having Measured Out. It is the responsibility of the NF to ensure that Ponies having Measured Out are not entered in any future FEI Pony Events until an Appeal Measurement has been carried out and the Pony has Measured In."

#### **IV. DECISION**

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

## 1. Factual Background

- 1.1 The FEI Event CSIOP/CDIOP/CDIP in Hagen, Germany took place from 12 to 17 June 2018 (the "**Event**").
- 1.2 A pony measurement took place during the Event on 14 June 2018. Hundred and twenty-one (121) ponies were measured at the Event. One of the ponies measured was the equine Elle Birken (for the purpose of this Decision the "**Pony**").
- 1.3 According to the Pony Measurement Verification Form the Pony measured 152.0cm and 151.5cm on the Second Measurement. The height of 151.5cm with the remark "*measured in with tolerance*" has been recorded by the FEI Officials, and the Pony was allowed to compete at the Event.

## 2. Reports from the Event

- 2.1 The Pony Measurement Verification Form from the Event, and signed by the two (2) Measuring Veterinarians states as follows:

*"The Measuring Area has been verified prior to the Pony Measurement by the Measuring Veterinarians and Organizer (...) The measuring "pad" of at least 3m by 1.5m is flat, even and level and the floor is non-slippery (...)."*

- 2.2 The Report of the Foreign Judge/Ground Jury President does not record any official warnings and/or protests, unusual incidents, or other irregularities regarding the Event.

- 2.3 The Pony Measurement Report from the Event, states as follows:

*"(...) The Organisation team around Francois Kassermann did a perfect work, brought away the 4 horses and cleaned and disinfected all 4 boxes. We used the first box to the left for measuring, as we all agreed it to regular flat surface. No differences in height were visible and sufficient light. Floor was checked with scale from mobile phone in different places and angles. It was the best floor and surface since long time.*

*Between 09:00 and 17:00 we measured 121 from 123 ponies. 2 ponies were withdrawn, 1 in CSIOP and 1 in CDIOP (see lists).*

*We had 17 ponies in the stewarded waiting area for re-measurement 1 hour later. 9 ponies were after 1 hour still over 151.0cm.*

*Meanwhile some protests reached the Ground Jury, having concerns about the surface. With the President of the GJ Joachim Geilfuss and OC President Francois Kassermann we had another look at the measuring box. Mr. Kassermann didn't want discussions and problems and proposed to measure the surface with a specialist, using a laser*

*system. We agreed and at 15:15 the system arrived. He measured the complete box and especially the measuring area ( where the sticks are in use). In the measuring area was a maximum difference from 6 mm and in the complete diagonal measurement ther was a difference from 1 cm over about 4 meters. These differences cannot be seen without using a laser.*

*Having noticed these facts, we had to discuss the situation between Vet's and GJ. As the rules doesn't clearly define the tolerance of 2 cm (up 151.0cm) being for the ponies (Situation: foreign place, excitement, stress, competition, being alone) and/or slight invisible differences in height of surface as here in this case, we had to find a solution. Our (Vets)proposal was because of 6mm difference in the measuring area to give way and Measure in the 1 pony with 151.5cm. („In dubio pro reo!") and to measure out all other 8 ponies.*

*The president oft he GJ remarked the 1 cm difference on the whole length oft he diagonale, and, because this was public, to add 1 cm (up to 152. 0 cm ) to avoid legal processes and problems to the FEI. We followed this proposal, even it was hard to release 5 ponies over 151.0 cm. So we found as a solution to have a note in the passport (Identification page in red) „Pony measured in with tolerance – 152cm- Pending for Re-Measurement!" (...)"*

### **3. Proceedings prior to the Appeal**

3.1 On 25 June 2018, the FEI Veterinary Department informed the Appellants through the National Federation of the Netherlands ("**NED-NF**") that FEI Officials at the Event took an incorrect decision in allowing an additional 1cm tolerance for the pony measurement. However, no such provision was contained in any of the FEI Rules and Regulations. Therefore, the Pony, together with eight (8) additional equines (registered with the National Federations of Sweden, Denmark, the Netherlands and Italy), had been measured out at the Event. Finally, the FEI stated that "*These equines are not eligible to compete in future FEI pony Events until an appeal measurement has been carried out and the equine has measured in.*"

3.2 On 10 July 2018, the FEI Legal Department informed the Appellants that the FEI had interviewed Dr. Gerit Matthesen who stated as follows:

*"After having analyzed the measuring area by laser, our (Vet's) first proposal was to allow one pony (EllenBirken NED) to continue, as the height was 151.5, so in the difference of the realistic measuring area with a difference of 6 mm.*

*So the passport went to a different staple from the 8 other ponies. Somehow it went back to the showoffice with all other passports, and I missed it out, to sign it like the other passports.*

*It was a very busy situation and a lot to do and think about for us. Hence, I signed only the paper and not the passport. I apologize for that!"*

- 3.3 Furthermore, the FEI explained that the FEI sees this as an "administrative error" that should not overrule FEI regulations. Implementing the same rules for everyone was fundamental for the FEI and that was the main reason why the FEI annulled the extra allowance height for all ponies that measured over 151.0cm, an allowance that was wrongly given by the officials on the event site.
- 3.4 The Pony measured over 151.0cm at the Event which was noted in the notification and the measuring list. What was further noted on the notification was irrelevant since the FEI annulled all extra height allowances that was not in accordance with the VRs. The FEI's goal was it to create a fair competition with a level playing field for all participants. From a FEI perspective it was not fair that the Pony that measured over 151.0cm should be accepted, but not the other ponies that measured over 151.0cm.
- 3.5 On 3 July 2018, the FEI wrote a letter to the National Federations of Sweden, Italy and the Netherlands (the "**NFs**") regarding pony measurements at the Event. The letter states that the letter is a reply by the Legal Department on behalf of the FEI Secretary General to a letter sent by the NFs. Referring to Article 1082 of the VRs, the FEI stated that the background of that rule was that the FEI was aware that the conditions at competitions might not be perfect, *i.e.*, the ponies more excited and stressed at competitions, the ponies in competition condition can be slightly higher, the measuring pad can vary a few mm in flatness, the surface of the measuring pad can be uneven, and the environment can be noisy and stressful. The 2cm extra height allowance was there in order to even out such differences in conditions at the competition site.
- 3.6 The FEI further argued that the measuring surface at the Event was deemed suitable by the Measuring Veterinarians, who had checked the surface with spirit level; otherwise they would not have performed the measurement. Due to the excitement and disagreement on site, the Organiser decided that the floor was to be checked by laser, and this laser measurement showed some very minor difference in heights from one corner to the other. Looking at middle of the 1,5 m x 3,0 m measuring pad, the difference was somewhere around 7mm. This was exactly the reason for why the allowance of 2cm was there for the competition measurements. According to the report the measuring place was deemed suitable by the Measuring Veterinarians.
- 3.7 The FEI Officials on site took an incorrect decision in allowing an additional 1cm tolerance, hence the ponies that measured at 152.0cm, measured in. The FEI decided to annul such decision since there was no such provision in any of the FEI Rules and Regulations.
- 3.8 Finally, the letter stated as follows: "*We further inform you that the ponies are blocked in the FEI system until they have measured in.*"

#### **4. Procedural Background**

- 4.1 On 12 July 2018, the Appellants submitted an Appeal, and on 16 July 2018, the Appellants submitted a complementary submission to the initial Appeal.
- 4.2 On 18 July 2018, the FEI provided its Answer to the Appeal.
- 4.3 On 18 July 2018, – upon request by the Appellants – a hearing took place.
- 4.4 More specifically, the Appellants requested for a “Preliminary Hearing”, and the FEI suggested expedited proceedings in the case at hand. The Tribunal agreed to expedited proceedings and established a schedule to which none of the Parties objected.
- 4.5 On the day prior to the hearing, the FEI requested consolidation of the Appeal in the case at hand with another appeal lodged by the NFs, also concerning the pony measurements at the Event. The Appellants opposed to consolidation. At the outset of the hearing, the Tribunal decided not to grant the FEI’s request, due to the timing of the request, and since the NFs had not been invited to attend the hearing in the case at hand.

#### **5. Written submissions by the Appellants**

- 5.1 The Appellants submitted that the Appeal concerned an Appeal under Articles 165.1.2 and 165.5 of the GRs and Article 38 of the Statutes, due to (i) any infringement of the Statutes, General Regulations, Sport Rules or Procedural Regulations, (ii) any issue of interpretation of the Statutes, General Regulations, Sports Rules or Procedural Regulations, concerning the decisions of the FEI Legal Department and the FEI Veterinary Department (together “**the Decision**”).

- 5.2 The Appellants requested the following reliefs:

*"A. The decision dated 25 June 2018 to declare the Pony Measured Out under the FEI VetReg. shall be annulled with immediate effect.*

*B. The decision dated 3 July 2018 to annul the decision taken by the Ground Jury at the Event shall be annulled with immediate effect.*

*C. The Pony shall be declared eligible to compete at FEI events with immediate effect.*

*D. There shall be an urgent preliminary hearing on the request for relief A. to C. due to extreme urgency of the matter. And since matters of jurisdiction should be determined at the outset this submission provides a preliminary argument for urgent preliminary hearing. The Claimants expressly reserve the right to submit further arguments within thirty days of 3 July 2018 i.e. by 3 August 2018, should that be necessary following determination of this preliminary issue as to jurisdiction."*

- 5.3 On 16 July 2018, the Appellants submitted the following additional request for relief:
- "E. The FEI shall contribute CHF 10'000 to the legal cost of the Claimants."*
- 5.4 Regarding the admissibility of the Appeal, the Appellants argued that it concerned an Appeal against the decision of the FEI Legal Department to overrule the decision taken at the Event to declare the Pony as "Measured In", based on a decision by the President of the Ground Jury with the Veterinary Delegate.
- 5.5 The Pony had been expressly stated to be "Measured In" at the Event. There was no decision taken at the Event declaring the Pony as "Measured Out" and no notification had taken place under Article 1085.6 of the VRs that the Pony measured out.
- 5.6 Furthermore, the Appellants argued that, unlike the Pony, the other ponies had indeed "Measured Out" at the Event, since they were above the 0.6cm tolerance added by the Veterinary Delegate.
- 5.7 The Appellants claimed that on 10 July 2018, the FEI Legal Department confirmed that the Pony had not been "Measured Out", but that the FEI Legal Department considered the tolerance granted due to unlevelled floor was an administrative mistake of the Ground Jury at the Event. The FEI Legal Department without any explanation of the regulatory basis upon which it may do so, now declared the Pony as "Measured Out" and ineligible to compete at FEI events.
- 5.8 The Appellants argued that if the FEI considered there was an error with the Pony "Measuring In" at the Event, the FEI - in accordance with the GRs - was obliged to Protest to the Ground Jury at the Event within 30 minutes of the decision.
- 5.9 The FEI Legal Department and the FEI Veterinary Department had infringed rules by disregarding and purporting to overturn (i) a decision of the Measuring Veterinarians (ii) a decision by the President of the Ground Jury with the Veterinary Delegate, and (iii) acting *ultra vires*.
- 5.10 Referring to previous Tribunal decisions, the Appellants argued that a decision taken at an event by the Ground Jury stating that a pony is "Measured Out" was final (and not appealable). This had to also apply to a decision taken at an event where the Pony "Measured In". Since, according to the rulings of the Tribunal, the Tribunal has no jurisdiction on the measuring decisions taken at an event, the FEI Legal Department and Veterinary Department certainly had none. They had no competence based on FEI rules to overrule a decision taken at an event by the Ground Jury, with the Veterinary Delegate.
- 5.11 By contrast, the Appellants in the matter at hand had no reason to Protest at the Event as the Pony had "Measured In" and was permitted to compete.

- 5.12 The Pony and the PR have been selected for the European Championships. Therefore, the PR's interests as an athlete are affected, and in case the Pony is declared ineligible to compete at the European Championships, as well as "Measured Out", this also affected the financial interests of the Owner.
- 5.13 On 17 July 2018, the Appellants - in essence - further alleged, that the pony measuring took place "in a normal box (with one entrance), and the floor was not measured in advance. After several Ponies measured out and several PRs and owners complained, the floor was measured and as the measuring results showed the floor was not flat, even and level." In this respect, the Appellants also submitted a statement by Mr. Francois Kasselmann, President of the Event, who - in essence - confirmed, that the measuring pad was not level and that he required an independent contractor to check the measuring pad using a laser.

## **6. Written submissions by the FEI**

- 6.1 On 17 July 2018, and upon request by the Tribunal for clarification, the FEI confirmed that the Pony was (also) blocked in the FEI system from entering FEI competitions until it has "Measured In".
- 6.2 On 18 July 2018, the FEI submitted its answer to the Appeal (the "**Answer**").
- 6.3 The FEI requested the following prayers for relief:

*"1. Regarding both the Appeals<sup>1</sup> to reject all allegations brought by the Claimants, particularly:*

- a. Confirm that the FEI Tribunal has no jurisdiction to review the conditions of the Pony Measurement, alternatively that the correct Pony Measurement procedure was done at the Event;*
- b. Confirm the FEI's decision to annul the decision taken by the Measuring Veterinarians to allow 1 extra cm height allowance at the Event;*
- c. Not allowing the Equines to be re-measured at 151cm, since this it is not provided for in the rules;<sup>2</sup>*
- d. Confirm that the Equines only are to be measured on Appeal at 148cm;*
- e. Confirm that the Equine ELLE BIRKEN is to be considered*

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<sup>1</sup> Note: The Tribunal did not grant the FEI's request to consolidate the Appeal in the case at hand with the other Appeal. The FEI however maintained - as confirmed during the hearing - all prayers for relief also for the Appeal in the case at hand.

<sup>2</sup> Note: During the hearing the Parties agreed that no such request for re-measurement at 151.0cm was included in the Appeal, and the Appellants expressly confirmed that they did not seek such relief.

*Measured Out.*

*In any event:*

2. *Dismiss any other relief sought by the Claimants;*
3. *To order the Claimant and Persons Responsible to cover all legal costs."*

6.4 The FEI agreed with the Appellants that the Tribunal had no jurisdiction to review the conditions of the pony measurement at the Event. In this regard the President of the Ground Jury has confirmed that there was no written Protest submitted during the Event in relation to the pony measurement, hence a lack of jurisdiction of the Tribunal to decide this aspect.

6.5 Together with its submission, the FEI provided an Email from Mr. Joachim Geilfus, President of the Ground Jury at the Event, who - in essence - confirmed that he had received many complaints that the floor was not flat, and that he had asked the Organising Committee whether it was possible "to find an independent person to measure the floor". In addition, he stated as follows:

*"Due to the reason that there was no signed measurement soon I made the proposal to add the maximum differenz of one centimeter to the 1.51 so that the floor cannot be a reason for complains anymore. Gerit and the second Vet. Followed that proposal and I announced it to the "chefs". We all agreed with the "statement in the passport" Measured in this case 1.52 pending for remeasuring."*

6.6 Regarding the definition of "Pony" in the FEI Rules and height allowance in FEI competitions, the FEI argued that according to FEI Rules a pony is a small Horse of 148.0cm without shoes. For ponies to be eligible to compete at FEI events, they have to "Measure In" in accordance with FEI Rules. However, and for the benefit of the owners and athletes, the FEI graciously allowed for an extra height allowance for ponies being measured at FEI events. In this respect, the FEI brought forward the same arguments as in the letter to the NFs, dated on 3 July 2018, especially that this allowance of 2cm also included conditions where the surface of the measuring pad might be uneven.

6.7 The FEI furthermore argued, that the FEI as the international governing body had a duty to ensure the uniform and consistent application of the rules. Ponies who have been measured at over 151cm (with shoes) at pony measurements at other events have been measured out. It would therefore be inconsistent with the principle of the "level of playing field" not to consider the ponies that measured at over 151 at the Event as also having measured out. In taking the decision not to accept the "measured in" status of the ponies, the FEI was simply acting to give effect to Article 100.1 of the GRs.

6.8 The FEI further argued that young people competing at international pony

events had a right to expect that their competitors have fulfilled the same eligibility requirements as they have, and the most important one in pony competitions was that the equine is a "Pony" and not a "Horse". The Pony did not currently meet this requirement, and was therefore ineligible to participate until it undergoes a formal Appeal Measurement. The FEI was simply ensuring that the eligibility requirements, as clearly set out in the FEI Rules and Regulations, were observed by all competitors. Further, the FEI could have retroactively disqualified the results of the Event as per Article 113 of the GRs, as the equines did not meet an eligibility requirement. However, the FEI has chosen not to do so in order to be fair, since the ponies who were marked as "*measured in with tolerance*", were allowed to compete at the Event.

- 6.9 FEI Officials could not invent and apply rules that did not exist, they had no authority to do so. Since there was no extra 1cm height allowance provided for in any FEI Rules or Regulations, such decision must be considered unlawful and hence, had to be annulled.
- 6.10 The FEI respectfully submitted that all it had done was take appropriate steps to correct a clearly unlawful decision. Since the FEI Headquarters were only made officially aware of the unlawful decision after the Event, namely orally on 15 June 2018, and in writing on 18 June 2018, the FEI could not have filed a Protest on site within 30 minutes of the decision. Furthermore, the appropriate legal remedy would have been an Appeal rather than a Protest, since it concerned a Decision to (unlawfully) allow the tolerance. Since there was no Appeal Committee at the Event, the Appeal would have ended up before the Tribunal anyways.
- 6.11 Alternatively, the FEI had jurisdiction to file an Appeal directly with the Tribunal, as in accordance with the Statutes, the Tribunal may hear cases involving any infringement of – among others – Sport Rules. It was the position of the FEI that, while there was no bad faith on the part of the FEI Officials who took the decision to allow the 1cm tolerance, the decision itself was an infringement of the VRs (which came to the statutory definition of "Sport Rules"). It was also a violation of the common principle of "fairness" in that the ponies for whom the tolerance was allowed at the Event were treated differently to all ponies who measured at over 151.0cm at other pony measurements and were consequently "Measured Out". The FEI therefore had not acted *ultra vires* in the matter, and it was not uncommon for the FEI Headquarters to correct decisions from FEI Officials, as stated in Annex VI of the VRs for example.
- 6.12 Moreover, the FEI argued that the Pony "Measured Out", as it measured 151.5cm, which was not within the height defined for a pony. As previously stated, the fact that nothing was marked in the Pony's passport had to be considered as an administrative mistake, which did not invalidate the measurement itself. From an FEI perspective there was no difference between the Pony and any of the other equines that measured above the allowance of 151.0cm at the Event. None of them could be accepted or are eligible to compete at FEI events until they have "Measured In" at an Appeal Measurement.

- 6.13 The FEI also submitted arguments as to why the Pony cannot be presented for (re)measurement at 151.0cm. The Appellants however confirmed during the hearing – as outlined further below – that they did not seek such measurement.
- 6.14 Finally, the FEI also made a submission with regard to the “floor condition” at the Event. However, since the Tribunal finds that it has no jurisdiction in this regard – as outlined in the decision part further below – these FEI arguments do not have to be included in this Decision.

## **7. Hearing**

- 7.1 The Parties had full opportunity to present their cases, submit their arguments and answer to the questions posed by the Tribunal. After the Parties’ final submissions, the Tribunal closed the hearing and reserved its final decision. The Tribunal heard carefully and took into consideration in its discussion and subsequent deliberation all the evidence and the arguments presented by the Parties even if they have not been summarized herein.
- 7.2 At the end of the hearing, upon being questioned by the Tribunal, the Parties acknowledged that they have had the opportunity to be heard and to present their case.
- 7.3 During the hearing, both Parties referred to their submissions in writing. In the following, only those points are included which have either not been included in their submissions in writing or subsequently been modified by the Parties during the hearing.
- 7.4 Mr. Kassermann was heard as witness. However, his witness statement related to the measuring conditions at the Event, which are outside of the jurisdiction of the Tribunal, as decided further below. Hence, Mr. Kassermann’s testimony does not need to be included in this Decision.
- 7.5 Regarding jurisdiction, both Parties agreed that the Tribunal did not have jurisdiction to review the conditions of the pony measurement and the measurement results at the Event, but that the Tribunal had jurisdiction to decide on the Appeal at hand with regard to the FEI decision to annul the FEI Officials decision to allow an additional 1cm allowance, *i.e.*, the Decision.
- 7.6 In essence, the Appellants further argued that the “Measured Out” box has not been ticked, and that this concerned a decision by the Measuring Veterinarians and the President of the Ground Jury, which had signed the document. Both, the circumstances and the results of measuring were decisions that were final, and thus not appealable to the Tribunal, and could neither be changed or annulled by the FEI. In the Appellants’ view there was no distinction between the measurement results, and a pony having “Measured In” or having “Measured Out”.
- 7.7 The Appellants further argued, that a three-pronged approach had been

taken by the FEI Officials, *i.e.*, ponies measuring between 151.1cm and 151.5 cm, which had been "*measured in with tolerance*", ponies measuring between 151.6cm and 152.0cm, requiring re-measurement and ponies measuring above 152.0cm which had been considered as having "Measured Out".

- 7.8 In this respect, the Appellants also argued that it was not correct that the allowance, *i.e.*, the 2cm, in the rules included differences in the floor. The rules were clear in that the floor had to be "flat, even and level". The FEI only annulled part of the decision at the Event, only the measurement part, and not the decision considering that the floor was flat, which was clearly not the case, as proven by the laser measuring.
- 7.9 Moreover, the pony CRAZY-HARDBREAKER had been treated differently, as it had been measured the same height than the Pony, but considered as having "Measured In".
- 7.10 In addition, the Appellants clarified that the Appellants merely sought that the Pony is to be considered as having "Measured In", which was the case based on the decision taken at the Event, and that they were not requesting (re)measurement at 151.0cm. There was a clear remark saying that the Pony "Measured In". The main issue in the case at hand was jurisdiction. Referring to previous decisions, only the Ground Jury and Appeals Committee would have had jurisdiction to overturn the FEI Officials decision at the Event. The Appellants questioned on which basis the FEI overruled the decision taken by FEI Officials that the Pony "Measured In". Even if the FEI was not aware what happened at the Event, there had always been the possibility to lodge a Protest within fourteen (14) days, which the FEI had not done, and neither had they appealed the FEI Officials decision.
- 7.11 The FEI had no jurisdiction to annul the decision of the FEI Officials. There was no legal basis for it, and without legal basis, no matter whether a decision was wrong or not, no one could just overrule such a decision. The FEI Headquarters had manifestly and fundamentally failed to establish any jurisdiction upon which they based their decision after the Event to annul the "Measuring In" of the Pony.
- 7.12 It was also a matter of level playing field that sports decisions or decisions taken at an event are not to be overruled by someone else, and neither the FEI Headquarters. The FEI could not invent rules, be allowed to issue decisions and invent procedural rules as they had done in the case at hand. Moreover, the pony measuring had to be considered as a veterinary issue, as it was a matter of accepting a pony on inspection prior to a competition. In the case at hand – and following previous FEI Decisions – the Pony measurement conditions, as well as the fact that the Pony "Measured In" at the Event could no longer be contested by the FEI.
- 7.13 Finally, the Pony had "Measured In" on several previous occasions.
- 7.14 To start with, the FEI clarified that the Decision was taken by the FEI Headquarters on behalf of the FEI Secretary General.

- 7.15 The FEI further argued that it did not annul the measurement results as such, but only the remark of the 1cm tolerance, as this was unlawful according to the rules. The FEI argued that there was no bad faith on the part of the FEI Officials but that the FEI Officials' decision itself was an infringement of the FEI Regulations, more specifically Sports Rules. The FEI as the governing body had to annul such decisions. The decision of the FEI Officials was unlawful, and thus null and void. According to the FEI the decision by the FEI Officials never came into force.
- 7.16 FEI Rules were clear, namely that any pony over 151.0cm is considered as having "Measured Out", and a right to Appeal Measurement was granted to all ponies in this case, including the Pony. The Rules were there in the first place to set a level playing field, so everyone could compete in fair and equal conditions, and that was where the FEI tried to be consistent. That was also the reason why the FEI annulled the decision that was not correctly taken in accordance with the rules, and thus null and void.
- 7.17 The FEI further argued that the case at hand did not only concern jurisdiction, but ineligibility. The FEI agreed with the Appellants that the FEI could not annul decisions on veterinary reasons, but pony measurements did not concern veterinary issues. The case at hand did not concern a sporting decision (the decision was not made by the Ground Jury but by the Measuring Veterinarian) or a veterinarian decision, but rather an eligibility requirement for ponies in order to be allowed to compete.
- 7.18 Regarding the pony CRAZY-HARDBREAKER, the FEI clarified that the Measuring Veterinarian had informed the FEI that the pony measured 151.0cm on Second Measurement, which was included on the last page of the Measuring Report. Only the note by the steward attending the second measurement was missing from the Horse list. Therefore, according to the FEI, this pony was within the rules.

## **8. The Decision**

- 8.1 In a first step, the Tribunal has to decide whether the Appeal or parts of it are admissible. Only where the Tribunal has jurisdiction, it can decide on the merits of the Appeal. The Tribunal however finds that it has only jurisdiction to decide certain parts of the Appeal.
- 8.2 In line with its previous decisions, the Tribunal finds that the Appeal regarding the conditions of the pony measurements at the Event is inadmissible, as the administrative remedies available at the Event under the GRs and the VRs, *i.e.*, a Protest with the Ground Jury have not been exhausted. The Tribunal notes that, according to evidence received, such as the Foreign Judge Report from the Event, no Protests were lodged at the Event. The pony measurement conditions can no longer be contested and the Tribunal lacks jurisdiction to rule on those conditions. In addition, also the Parties agreed that the Tribunal has no jurisdiction to decide this part of the Appeal.

- 8.3 Moreover, the Parties also agreed that the results of the pony measurements do not fall under the jurisdiction of the Tribunal for the very same reason. Therefore, if a pony has been measured 151.0cm this result stands, and so do the other results, *i.e.*, a pony measuring 151.5cm, such as the Pony in the case at hand.
- 8.4 The Tribunal finds that it has jurisdiction to decide on the remaining claims brought forward in the Appeal. In accordance with Article 38 of the Statutes the Tribunal has jurisdiction to decide "*Any infringement of the Statutes, General Regulations, Sport Rules, or Procedural Regulations of the General Assembly or of violations of the common principles of behaviour, fairness, and accepted standards of sportsmanship whether or not arising during an FEI meeting or Event;*". The Tribunal has therefore jurisdiction to decide on any infringement of the Sport Rules, and more specifically the VRs in the case at hand, including the relevant parts thereof concerning pony measurements.
- 8.5 At this juncture, the Tribunal wishes to clarify that the case at hand is different from previous cases the Appellants referred to. In those cases the ponies have actually been registered as having "Measured Out" as they measured higher than the 151.0cm with shoes allowance at the events. In the case at hand however, the Pony has been neither registered as having "Measured Out" or as having "Measured In". In fact, the FEI Officials at the Event decided to create a different category – not foreseen in any FEI Rules or Regulations –, namely "*measured in with tolerance*". Hence, the main issue in the case at hand is not the decision whether the Pony measured in or out, but the wrongful application of FEI Rules. Put differently, the Pony Measurement conditions, as well as the fact that certain ponies measured out at the Event, can indeed no longer be contested. The main issue of this Appeal is however whether any rule can justify a decision not to "measure out" a pony that fails to meet the regulatory height, including height allowance when measured at an FEI event, and thus is different from the cases referred to by the Appellants. Ultimately, it concerns an issue of authority to make or amend rules.
- 8.6 Furthermore, and as the Parties are also in agreement, in accordance with Article 165 of the GRs and Article 18 of the IRs, the Tribunal has jurisdiction to hear and determine Appeals which may be lodged against any Decision, such as the Decision in the case at hand. The Tribunal will decide further below whether such Decision was authorised under FEI Rules.
- 8.7 In a second step the Tribunal will decide on the merits of the case where it has jurisdiction, and thus on the decision of the FEI Officials at the Event to declare the Pony "*measured in with tolerance*" and the decision by the FEI to intervene and declare such decision by the FEI Officials incorrect and unlawful, and as a consequence the Decision to annul the decision by the FEI Officials, which in turn also affected the Pony.
- 8.8 To start with, the Tribunal finds that Chapter IX of the VRs, as applicable in the present case, provides a comprehensive set of rules defining ponies' regulatory height and the procedures to be followed as well as decisions

to be made when measuring ponies at FEI events, which the Tribunal finds are the issues to be decided in the case at hand. It follows from Articles 1082 to 1085 of the VRs that ponies can only be declared either as having a) "Measured In" and permitted to compete; or b) "Measured Out".

- 8.9 No provision foresees, and the Tribunal does not find any other ground which would allow for FEI Officials to declare a pony to have "*measured in with tolerance*". According to FEI Rules, *i.e.*, the VRs, a pony whose height exceeds 150.0cm without shoes or 151.0cm with shoes when measured at an FEI event must be declared as "Measured Out". The Tribunal wishes at this point also to clarify, that from the foregoing it does not matter whether the "*measured in with tolerance*" has been recorded in the Pony's passport or not.
- 8.10 The Appellants lodged an Appeal against the Decision to overrule the decision taken by the FEI Officials declaring the Pony as "Measured In" at the Event. From the evidence provided it results that the Pony measured 151.5cm, and has been declared as "*measured in with tolerance*". In a letter to the NFs, one of which is the PR's National Federation, the FEI informed the NFs that the decision taken by the FEI Officials has been declared as incorrect and annulled by the FEI.
- 8.11 The Appellants claim that the FEI had no competence based on FEI Rules to overrule a decision taken at an Event by the Measuring Veterinarians, and by the Ground Jury, with the Veterinary Delegate. The FEI had infringed rules, and acted *ultra vires*. The FEI argued that the measuring results are different and separate from declaring a pony "Measured In" or "Measured Out". Furthermore, that this aspect concerned a question of eligibility, *i.e.*, only an equine who measured (not higher than) 151.0cm with shoes at an event was eligible to compete in FEI competitions.
- 8.12 The Tribunal finds that the decision of the FEI Officials to sign a form with the added text "*measured in with tolerance*", and to allow the Pony which height measured was 151.5cm to compete at the Event was indeed incorrect and against the relevant rules, the VRs. Furthermore, the Tribunal finds that the decision taken by the FEI Officials was not a question of interpretation of the rules within the authority of FEI Officials, but rather an attempt to create a new rule, and beyond the authority of FEI Officials. The Tribunal therefore finds that those FEI Officials who agreed to deviate from the clear and explicit provisions in the VRs violated the GRs and Sport Rules, *i.e.*, the VRs, by exceeding their authority.
- 8.13 The Tribunal understands the demand for a more explicit rule establishing how the FEI as the governing body of equestrian sport shall act when fulfilling its obligation to ensure observation of the Sport Rules. However, the authority of the FEI to act derives from the Statutes. To ensure the rights of persons and bodies subject to the authority of the FEI, the legal system provides for a right of appeal, such as the Appeal in the case at hand.
- 8.14 Pursuant to Article 28.2(x) of the Statutes, the Secretary General is

responsible for "(x) *The observance of the Statutes, General Regulations, Sport Rules and Procedural Regulations of the General Assembly.*" In this regard, the Tribunal finds that, while the FEI has not specifically referred to this provision, their arguments were the same.

- 8.15 As a result, the Tribunal finds that the FEI Veterinary Department and the FEI Legal Department representatives, acting under the delegated authority of the Secretary General, have had an obligation to intervene and declare that the decision taken by the Event Officials with respect to the Pony was incorrect, not based on applicable rules, and thus from the result of the pony measurement the Pony has to be declared as "Measured Out".
- 8.16 Pursuant to Article 1088 of the VRs, the PR can initiate an Appeal Measurement. In this respect the Tribunal finds that, as the decision to declare the Pony "Measured Out" was contested, the time limits to request for an Appeal Measurement shall start from the date of this Decision.
- 8.17 Finally, the Tribunal has also taken note of the "fairness" arguments by the Parties. However, the Tribunal finds that no violation of the common principle of fairness takes place in those cases – such as in the case at hand – where the rules are not ambiguous, and where those rules have been implemented in order to protect the welfare of the horse and the level playing field. On the contrary, the principle of fairness cannot motivate a deviation from a clear rule that has not been proven to be against either welfare of the horse or level playing field.
- 8.18 The Tribunal finds that no legal costs shall be awarded to either party, since the Appellants' reasons to question conflicting decisions taken by different persons and bodies, all in the capacity of FEI representatives, were well founded.
- 8.19 All other arguments are dismissed. While the Tribunal has taken them into consideration, it did not find that they were relevant or decisive for the outcome of this Decision.
- 8.20 For the above reasons, the Tribunal decides as follows:
- 1) *The Appellants' request to annul the decision dated 25 June 2018 to declare the Pony "Measured Out" is dismissed. Thus, the Pony is to be considered as "Measured Out".*
  - 2) *The decision dated 3 July 2018 is upheld. Thus, the Appellants' request to annul the decision dated 3 July 2018 to annul the decision by the Ground Jury at the Event is dismissed.*
  - 3) *The Appellants' request to declare the Pony eligible to compete at FEI events with immediate effect is dismissed.*
  - 4) *No deposit shall be returned to the Appellants. Each party shall bear their own legal costs.*

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

8.22 According to Articles 165.1.3 and 165.6.1 of the GRs, this Decision can be appealed before the Court of Arbitration for Sport (CAS) within twenty-one (21) days of the present notification.

**V. DECISION TO BE FORWARDED TO:**

**a. The Parties: Yes**

**b. Any other: The National Federation of the Netherlands**

**FOR THE PANEL**

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

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**One member panel, Mr. Henrik Arle**