

INTERNATIONAL TENNIS FEDERATION

TENNIS ANTI-DOPING PROGRAMME

DECISION IN THE CASE OF ANDREI PLOTNIY

1. Original Anti-Doping Rule Violation

- 1.1 In March 2010, Mr Plotniy admitted that he had committed an anti-doping rule violation under Article C.1 of the Tennis Anti-Doping Programme in that carphedon, a stimulant that is a prohibited substance under the Programme, was present in the urine sample collected from him on 1 November 2009 at the 2009 Challenger held in Astana, Kazakhstan.
- 1.2 Consequent upon that admission, the results that Mr Plotniy obtained at the Astana event and at a subsequent event were disqualified, and he was declared to be ineligible for a period of 15 months, beginning on 1 November 2009 and therefore ending at midnight on 31 January 2011.

2. Prohibition on participation while ineligible

- 2.1 Article M.10.1 of the Programme provides as follows:

Prohibition Against Participation During Ineligibility:

No Participant who has been declared Ineligible may, during the period of Ineligibility, play, coach or otherwise participate in any capacity in (a) a Covered Event, any other Event or Competition, or any other kind of function, event or activity (other than authorised anti-doping education or rehabilitation programmes) authorised, organised or sanctioned by the ITF, the ATP, the WTA, or any National Association or member of a National Association; or (b) any Event or Competition authorised or organised by any professional league, or any international or national-level Event or Competition organisation.

- 2.2 And Article M.10.5 of the Programme provides as follows:

If a Participant who has been declared Ineligible participates in any capacity, during such period of Ineligibility, in a Covered Event or any other Event or Competition, or other function, event or activity (other than authorised anti-doping education or rehabilitation programs) of the type referred to at Article M.10.1(a) or Article M.10.1(b), the period of Ineligibility that was originally imposed shall start over again as of the date of such participation. The new period of Ineligibility may be reduced under Article M.5.2 if the Player establishes that he/she bears No Significant Fault or Negligence for such participation. The determination of whether a Player has violated the prohibition against participation while Ineligible, and whether a reduction under Article M.5.2 is appropriate, shall be made by the ITF, and such decision shall be subject to appeal in accordance with Article O. In any case, any results obtained by the Participant in such Event(s), with all resulting consequences, including forfeiture of any medals, titles, computer ranking points and Prize Money obtained in such Event(s), shall be automatically Disqualified.

- 2.3 On 8 March 2010, Mr Plotniy signed an 'acceptance of sanction' form, in paragraph 3 of which he expressly acknowledged the following:

'during the above-referenced period of Ineligibility, in accordance with Article M.10 of the Programme:

- 3.1 *I will remain subject to Testing (Article M.10.4 of the Programme; see also Article M.11.1 of the Programme);*
- 3.2 *I may not play, coach or otherwise participate in any capacity in (a) a Covered Event, any other Event or Competition, or any other kind of function, event or activity (other than authorised anti-doping education or rehabilitation programmes) authorised, organised or sanctioned by the ITF, the WTA, or any National Association or member of a National Association; or (b) any Event or Competition authorised or organised by any professional league, or any international or national-level Event organisation (Article M.10.1 of the Programme); and*
- 3.3 *If I fail to abide by this prohibition, a new period of Ineligibility may be imposed on me (Article M.10.5 of the Programme).'*

3. Mr Plotniy's participation in certain DTB events

- 3.1 Notwithstanding the foregoing, Mr Plotniy participated in five events authorised by the German Tennis Federation (the 'DTB'), namely in the Stadtlohn tournament (19-24 May 2010), the Rot-Weiss-Dülmen Open in Dülmen (1-4 July 2010), the Offenes WTV-Sommerturnier in Hamm (9-11 July 2010), the Dunlop-WTB-Circuit event in Birkmannsweiler (11-15 August 2010), and the Wager See Pokal at Wager am See (18-22 August 2010). His first day of participation was at Stadtlohn on 19 May 2010 and he played his last game on 22 August 2010, at the Wager am See event.
- 3.2 The ITF was notified of this by the DTB and separately by Mr Plotniy's legal representative on 25 August 2010. The following explanation was provided by Mr Plotniy's legal representative:

During the past months our client has been practising in Germany. Unfortunately, Mr Plotniy was not aware of the fact that during his period of Ineligibility he is not permitted to participate at tennis competitions on a pure national level (i.e. not hosted by ITF or WTA) either.

Hence, Mr Plotniy participated at five DTB tournaments, namely in Wager am See, Stadtlohn, Winnenden, Hamm and Dülmen. However, he has just been informed by the management of the Dülmen tournament that this participation may be regarded as an infringement of article M 10 of the Programme, too.

My client wants to express that he deeply regrets this error. He never intended to breach any regulation covering his period of Ineligibility but has obviously just overseen the respective regulation in his Acceptance of Sanction Form.

Of course, my client will return any prize moneys which he received from the respective events and he certainly accepts the forfeiture of any ranking points in relation to these tournaments. My client will immediately contact the respective tournament organizers and inform them accordingly together with his apologies for his failure.

Please appreciate that we are sending this e-mail immediately after Mr Plotniy has been informed about his failure. We kindly ask you not to impose further sanctions on our client since his failure was caused by unintentional oversight and not by any kind of purpose.

3.3 The ITF responded by email dated 28 August 2010, as follows:

In the Acceptance of Sanction form, signed by Mr. Plotniy on 8 March 2010, section 3.2 clearly specifies that Mr. Plotniy is not eligible to play in any Event authorised, organised or sanctioned by the ITF or any National Association during his period of ineligibility. Section 3.3 of the Acceptance of Sanction form goes on to state that, in the event that Mr. Plotniy fails to abide by that prohibition, a new period of ineligibility may be imposed on him.

Article M.10.5 of the Tennis Anti-Doping Programme states that the consequence for an ineligible Participant who participates in a Covered Event is that the period of Ineligibility that was originally imposed shall start over again as of the date of such participation, unless the Player establishes that he/she bears No Significant Fault or Negligence for such participation.

Accordingly, please provide, no later than 1700 GMT on Friday 3 August, any mitigation that demonstrates that Mr. Plotniy bore No Significant Fault or Negligence for his participation in the Events in question.

In any case, any results obtained by Mr. Plotniy in the Events in question, with all resulting consequences, including forfeiture of any medals, titles, computer ranking points and Prize Money obtained in such Event(s), shall be automatically Disqualified (Article M.10.5). We will notify you in due course in this regard.

3.4 Following an agreed extension of the time to answer, Mr Plotniy responded with a submission from his lawyers dated 9 September 2010, arguing (1) that the events in which he had participated fell outside the scope of Article M.10.1 of the Programme, so that in fact he had not failed to abide by Article M.10.1; and (2) in the alternative, he bore No Significant Fault or Negligence for that failure, and/or any further punishment would be disproportionate, so that no new period of ineligibility should be imposed upon him beyond the original period of ineligibility ending 31 January 2011.

3.5 The ITF addresses each of these submissions in turn below.

4. Mr Plotniy has breached Article M.10.1 of the Programme

4.1 As noted above, Article M.10.1 of the Programme prohibits a Player who is serving a period of Ineligibility from *'participat[ing] in any capacity in (a) a Covered Event, any other Event or Competition, or any other kind of function, event or activity (other than authorised anti-doping education or rehabilitation programmes) authorised, organised or sanctioned by the ITF, the ATP, the WTA, or any National Association or member of a National Association ...'*

4.2 Putting aside events authorised, organised or sanctioned by the ITF or the ATP or WTA, Mr Plotniy argues that the prohibition in Article M.10.1, properly interpreted, covers only *'national events in the home country of the respective Player (here: in Russia) or, if ever in other countries, only larger events, such as for example the German Masters tournaments or alike.'* He argues it should not be interpreted to cover tournaments of the type he participated in, because they were *'of a local scale only. All tournaments were hosted by small clubs, they offered only small prize money and did not create any public attention.'* He therefore asks the ITF to conclude that he did not fail to abide by the prohibition in Article M.10.1 of the Programme.

4.3 The ITF rejects these arguments. As it happens, the DTB characterises the tournaments in question as 'national tournaments'. But in any event Article M.10.1 of the Programme is

clear: it prohibits participation by an ineligible Player in (among other things) *'any ... event ... authorised, organised or sanctioned by ... any National Association or member of a National Association ...'*. There is no basis, either in the wording of Article M.10.1 or in the underlying rationale for the prohibition, to justify reading in limits on the scope of the prohibition to exclude events authorised, organised or sanctioned by a National Association or a member of a National Association because they are staged outside the Player's home country, or because they are staged at 'small' clubs and offer only 'small' prize money.

- 4.4 Accordingly, the ITF finds that Mr Plotniy has breached the prohibition set out at Article M.10.1 of the Programme.

5. Consequences

- 5.1 Where an ineligible Player breaches the Article M.10.1 prohibition by participating in any of the events referenced at Article M.10.1 of the Programme, Article M.10.5 provides that *'any results obtained by the Participant in such Event(s), with all resulting consequences, including forfeiture of any medals, titles, computer ranking points and Prize Money obtained in such Event(s), shall be automatically Disqualified'*, and *'the period of Ineligibility that was originally imposed shall start over again as of the date of such participation'*, subject only to potential reduction of that new period of ineligibility *'under Article M.5.2 if the Player establishes that he/she bears No Significant Fault or negligence for such participation.'*
- 5.2 Mr Plotniy does not argue that the results he obtained in the five DTB events in question should not be disqualified. However, he seeks to avoid imposition of any new period of ineligibility beyond the original 15-month period of ineligibility ending on 31 January 2011, either on the ground that he bears No Significant Fault or Negligence for his failure to abide by the Article M.10.1 prohibition or on the ground that any further suspension would be *'disproportionate'*.

5A. No Significant Fault or Negligence

- 5.3 For a sanction to be mitigated under Article M.10.5.2, the Player must establish *'that his/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 in issue.'* (See Programme App.1, definition of 'No Significant Fault or Negligence'). The Court of Arbitration for Sport has explained that the question is whether the degree to which the athlete has departed from the standard of care required of him under the anti-doping rules is or is not significant.¹ In addition, the Court of Arbitration for Sport has held that Article 10.5.2 (on which Article M.5.2 of the Programme is based) should be applied *'in a very restrictive manner.'*²
- 5.4 In 2009, Swiss cyclist Jürg Graf participated in a race organised by a member club of Swiss Cycling, notwithstanding that he was at the time serving a period of ineligibility imposed

¹ See CAS advisory opinion, *FIFA & WADA*, CAS 2005/C/976 & 986, rendered 21 April 2006, para 75.

² *Hipperdinger v. ATP*, CAS 2004/A/690, award dated 24 March 2005, para 72, relying on the comment to Article 10.5.2 of the Code, which states that *'Art 10.5 is meant to have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases'*.

under Article 10.10.1 of the Code (the equivalent of Article M.10.1 of the Programme). In proceedings instituted by the Swiss Olympic Committee under Article 10.10.2 of the Code (the equivalent to Article M.10.5 of the Programme), he argued that the period of ineligibility previously imposed on should not start again because he had not been aware that the race fell within the scope of the ban. In a decision dated 9 January 2010, the tribunal rejected that argument, finding that the rider was significantly at fault because he could have easily ascertained, if he had made any enquiries, that the race was organised by a member club of Swiss Cycling and, therefore, fell within the scope of his ineligibility. It therefore ruled that the period of ineligibility should start to run again from the date of that race.

- 5.5 In contrast, the plea of US cyclist, Kenny Williams that he bore No Significant Fault or Negligence for his breach of the prohibition against participating in specified events while ineligible was accepted. The reasoning given (USADA decision dated 10 August 2010) was as follows:

After consideration of all of the circumstances in your case, including that this is the first application of Article 10.10.2 involving a United States athlete, your lack of awareness of the extent of the rule, your pre-race inquiry that led you to believe that participation in the race was not prohibited, and your post-race conduct, including your prompt acceptance of responsibility, all of which point to a non-intentional violation and a lack of significant fault or negligence, USADA has determined that you should receive the maximum period of reduction of your increased period of ineligibility available under Article 10.5.2 of the Code which is one half the otherwise applicable period of increased ineligibility.

- 5.6 With respect, and without knowing the facts of that case, this seems to be a very generous approach towards the athlete. With the best will in the world, the ITF simply does not see how it can come to the same conclusion on the facts of this case:

5.6.1 As far as the ITF is aware, this case will be the first application of Code Article 10.10.2 in the sport of tennis. With respect, however, the ITF does not see how this can be relevant to the assessment of how significant Mr Plotniy's departure was from the required standards of conduct. In any event, ignorance of the provisions of the Programme could not be a mitigating factor for any Player. Article B.3 of the Programme specifically states that '*[i]t is the sole responsibility of each Player (1) to acquaint him/herself ... with all of the requirements of the Programme ...*'

5.6.2 Furthermore, in this case Mr Plotniy was required to sign an acceptance of sanction form that spelled out expressly that during his period of ineligibility he was not allowed to participate in any event authorised, organised or sanctioned by any National Association or member of a National Association. Therefore, there is absolutely no excuse for any '*lack of awareness of the extent of the rule*' on Mr Plotniy's part, such as USADA found in Mr Williams' case.

5.6.3 Mr Williams apparently conducted a '*pre-race inquiry that led [him] to believe that participation in the race was not prohibited.*' The same cannot be said of Mr Plotniy: even if he thought it might be possible that the broad wording of Article M.10.1 of the Programme might not extend to the types of event in which he wished to play, he should at the very least have asked the ITF for confirmation of that fact before he participated in those events. If he had done so, then he would have quickly found out that the prohibition did extend to those events. In other words, his position is no different from that of Swiss cyclist Jürg Graf. But Mr Plotniy failed to ask the ITF,

and nor does he claim to have conducted any other enquiry prior to the event. Instead, he says, he simply *'trusted in his agent's competence to assess the scope of the sanctions imposed upon him and to assess whether he would be allowed to participate in the respective tournaments.'* This is not good enough: if an athlete were able to avoid liability for anti-doping rule violations simply by delegating responsibility for compliance with those rules to his agent or other third party, *'[i]t would put an end to any meaningful fight against doping.'*³ Instead, it was Mr Plotniy's personal, non-delegable duty to conduct such enquiries as were necessary to ensure that what he proposed to do did not violate any provisions of the Tennis Anti-Doping Programme, including Article M.10.1. As a result, if his agent was at fault, that fault is imputed to him for purposes of Article M.10.5.2. Either way, as the Swiss Olympic Committee tribunal found in the case of Swiss cyclist Jürg Graf, so in this case the failure to (at the very least) seek clarification prior to participating in the DTB events was, in the ITF's view, a significant departure from the standard of care required of Mr Plotniy.

5.6.4 Mr Plotniy argues that his breach of the Article M.10.1 was not his agent's fault either, but rather the fault of the DTB for issuing him a player ID when his agent applied for it, without warning him that he was not permitted to play in local tournaments in Germany. Mr Plotniy says because of that omission his agent *'therefore had no reason to believe that Mr Plotniy would not be able to participate at the respective events.'* Once again, the ITF is unable to accept this. For one thing, the ITF understands that the DTB did not issue a player ID to Mr Plotniy until after his participation in the first tournament, in Stadtlohn, in May 2010, so it cannot have played any part in his participation in that tournament. But more importantly, the very clear language of Article M.10.1 of the Programme and paragraph 3 of his 'acceptance of sanction' form gave Mr Plotniy and his agent every reason to believe that Mr Plotniy was not permitted to participate in the DTB events. Whether or not the issue of player ID could be said to imply that such participation was permitted (the player ID does not in itself give a player any accreditation or access to an event), it could not be said to override that very clear language, but could at most have justified Mr Plotniy seeking clarification from the ITF as to whether the prohibition extended to these events. The bottom line is that it is a player's responsibility to ensure he respects his ban, not the responsibility of anyone else. Accordingly, the DTB's issuing a player ID does not excuse the failure of Mr Plotniy or his agent to conduct such inquiries as were necessary to ensure that his participation in these events was not prohibited.

5.6.5 Mr Plotniy points out that as soon as he was informed that he may have contravened Article M.10.1, he immediately informed the ITF of that fact. The ITF acknowledges that fact, and accepts that it is indicative of good faith on Mr Plotniy's part. Indeed, more generally, while the ITF may accept that Mr Plotniy was not knowingly and intentionally breaching the Article M.10.1 prohibition against participation in events while ineligible, it does not see how that could be said to establish No Significant Fault or Negligence on Mr Plotniy's part, which is the only issue here. It may have been an 'unintentional oversight' on the part of Mr Plotniy, but for the reasons stated above the ITF finds that it was an oversight for which he bears significant fault.

³ *Edwards v. IAAF and USATF*, CAS OG 04/003, award dated 17 August 2004, para 5.12; *D. v. FINA*, CAS 2002/A/432, award dated 27 May 2003, para 9.3.11.

5B. Proportionality

- 5.6 Finally, it is submitted on behalf of Mr Plotniy that even if his plea of No Significant Fault or Negligence is not accepted, it would be disproportionate to apply the sanction specified for this offence at Article M.10.4 of the Programme:

In any case, a re-start of the period of Ineligibility of 15 months ... would be too burdensome on Mr Plotniy taking into account that his original doping offence was a minor one and that the tournaments in question were on a local scale only. Please also take into account in any of your considerations that Mr Plotniy has always been far away from gaining any relevance as a tennis player. Any punishment that goes beyond the original period of ineligibility would in our opinion be disproportionate in relation to the subject matter.

- 5.7 The ITF does not accept this submission either. Mr Plotniy accepted a 15-month period of ineligibility as the appropriate sanction for his original anti-doping rule violation. In other words, he accepted that he had to remain out of the sport for a continuous period of 15 months. However, he then failed to respect that agreement and started participating in the sport again. That conduct is harmful to the integrity of the sport, which must be seen to be acting decisively to stamp out doping. Even if he did not do so in bad faith, his fault in doing so was significant. That justifies the re-starting of his original suspension so as to ensure that he does eventually serve the sanction properly imposed for his original offence, i.e., suspension from the sport for a continuous period of 15 months.
- 5.8 The ITF is required to follow its own rules, which permit reduction of the sanction specified in Article M.10.4 only if a plea of No Significant Fault or Negligence has been accepted. The availability of that plea provides the safety-valve that ensures the punishment imposed for the offence committed is proportionate. Where that plea is not accepted, no discretion exists to depart from the sanction specified in the Programme, and nor does the ITF accept that that sanction is out of proportion to the offence committed, let alone so disproportionate as to require the ITF to depart from the clear provisions of the Programme.

5. Decision

- 5.1 Based on the foregoing, the ITF decides as follows:

- 5.1.1 The results that Mr Plotniy obtained in the following events are disqualified, and the ranking points awarded therein are forfeited, along with the following prize monies:

<u>Event</u>	<u>Prize Money (€)</u>
Stadlohn	[no prize money awarded]
Waging am See	1,400
Winnenden	275
Hamm	400
Dülmen	600

- 5.2 The original 15-month period of Ineligibility imposed on Mr Plotniy now starts over again as from the date of his last participation in the events noted above, i.e., 22 August 2010, so that it will end at midnight on 21 November 2011. As a result, until that date Mr Plotniy may not *'play, coach or otherwise participate in any capacity in (a) a Covered Event, any*

other Event or Competition, or any other kind of function, event or activity (other than authorised anti-doping education or rehabilitation programmes) authorised, organised or sanctioned by the ITF, the ATP, the WTA, or any National Association or member of a National Association; or (b) any Event or Competition authorised or organised by any professional league, or any international or national-level Event or Competition organisation.' (See Article M.10.1 of the Programme). If he has any doubt as to exactly what this prohibition covers, or whether it covers a particular event in which he would like to participate, he should check with the ITF before participating in that event.

- 5.3 In accordance with Article M.10.4 of the Programme, the foregoing decision that Mr Plotniy has violated the prohibited against participation while ineligible, and that a reduction under Article M.5.2 is not appropriate, may be appealed to the Court of Arbitration for Sport in accordance with Article O of the Programme. Under Article O.5.1 of the Programme, the deadline for filing that appeal is 21 days from receipt of the decision being appealed.
- 5.4 Mr Plotniy and those other bodies that have a right of appeal under Article O of the Programme may appeal against this decision, such appeal to be filed within 21 days of receipt of this decision.
- 5.5 This decision is being sent to WADA and to RUSADA, and will be published on the ITF's website.

Stuart Miller
ITF Anti-Doping Manager
20 September 2010