

Doping Hearing Panel
of the
International Biathlon Union

The Doping Hearing Panel, sitting in the composition of Christoph Vedder (Chair), Günter Gmeiner and Juha Viertola, according to Rule 8.1.3 IBU Anti-Doping Rules, heard the case of Ms Oksana Kvostenko on June 1st, 2011 at the headquarters of the International Biathlon Union in Salzburg, Austria with the following persons attending:

- Ms Nicole Resch, General Secretary of IBU, representing IBU
- Ms Oksana Kvostenko
- Mr Roman Bondaruk, Secretary General of the Federation Biathlon of Ukraine, representing both the Athlete and the Federation Biathlon of Ukraine, as observer
- Mr Viktor Sizonenko, Interpreter for Ms Kvostenko.

Having heard the submissions of the parties and having duly deliberated the facts and the law the Panel renders the following decision:

I. Statement of Facts

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Ms. Oksana Kvostenko (hereinafter referred to as "the Athlete"), an athlete under the jurisdiction of the Federation Biathlon of Ukraine (hereinafter referred to as "FBU"), was tested by the International Biathlon Union (hereinafter referred to as "IBU") during the Biathlon World Championships at Khanty Mansiysk, Russian Federation on March 13, 2011. She was submitted to an in-competition test after she finished 2nd in the Womens Relay.

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The A sample 2576067 was analysed in the WADA accredited laboratory in Cologne, Germany after March 15, 2011 and showed the presence of ephedrine in a concentration of 15 µg/ml which is greater than the **decision limit** of 11 µg/ml.

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The results of the analysis of the A sample, together with the full package of documents, were reported as an adverse analytical finding ("AAF") by the Cologne laboratory to the IBU on March 30, 2011.

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By letter of April 6, 2011 the IBU Anti-Doping Administrator, Ms. Nicole Resch, informed the Athlete of the AAF and conducted the initial review with the result that no Therapeutic Use Exemption ("TUE") was applicable and no departure from the International Standard for Testing ("IST") or International Standard for Laboratories ("ISL") was apparent.

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By the said letter of April 6, 2011 which included the full documentation package related to the A sample analysis, the Athlete, the FBU and WADA were notified of

- a. the adverse analytical finding
- b. the anti-doping rule violated (Article 2.1 IBU's Anti-Doping Rules)
- c. the athlete's right to promptly request the analysis of the B sample or, failing such request, that the B sample analysis may be deemed waived
- d. the scheduled date, time and place of the B sample analysis, if the athlete or IBU chooses to request the analysis of the B sample (April 14, 2011)
- e. the opportunity of the athlete and/or the athlete's representative to attend the B sample opening and analysis at the scheduled date, time and place if such analysis is requested; and
- f. the possibility to request a provisional hearing by sending a written statement until April 13, 2011.

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By e-mail message of April 7, 2011 FBU informed IBU that it had instituted an official investigation of the case and agreed to the B sample analysis without any presence of the Athlete or a representative.

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As requested by IBU the opening and the analysis of the B sample took place on April 14, 2011 in the WADA accredited laboratory in Cologne without any presence of the Athlete or a representative.

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The analysis of the sample B 2576067 revealed the presence of ephedrine in a concentration greater than 10 µg/ml and, therefore, confirmed the results of the analysis of the A sample. The analytical report of April 15, 2011 was received by IBU on April 21, 2011.

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By letter of April 21, 2011 IBU's Anti-Doping Administrator notified the Athlete, the FBU and the WADA of the results of the B sample analysis. They were further informed that

"a result management process according to Art. 7 of the IBU Anti-Doping Rules will be initiated before the IBU Doping Hearing Panel as soon as the complete documentation package from the laboratory will be received by IBU. "

Furthermore, the Athlete was given the opportunity to provide a written statement to explain the positive result.

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According to Article 7.6.2 of IBU's Anti-Doping Rules ("ADR") the Secretary General of IBU chose not to place a provisional suspension on the Athlete.

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The complete documentation package of the B sample analysis was sent by IBU to the Athlete and FBU by e-mail on April 21, 2011.

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By letter of April 28, 2011 the FBU notified the IBU of the results of the investigation initiated by FBU and provided an explanation of how the Athlete had ingested ephedrine. Furthermore, the NOC of Ukraine, by letter of April 29, 2011, informed the IBU of the anti-doping activities performed by the Athlete in the framework of the Ukrainian NOC.

II. Procedure before the Doping Hearing Panel

1. The IBU Doping Hearing Panel

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The IBU Doping Hearing Panel (hereinafter referred to as "DHP" or "the Panel") is the competent body to hold the hearings according to Article 8 ADR which gives the athletes the right to a fair hearing. Within the framework of the IBU the Panel is the body to decide whether or not, in a given case, an anti-doping rule violation was committed. According to Article 8.1.8 ADR, the decisions of the DHP may be appealed to the Court of Arbitration for Sport in Lausanne, Switzerland. In such a situation, the decision of the DHP constitutes a "*decision of a federation*" appealable to CAS according to R47 CAS Code.

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Following the decision of the IBU Congress in September 2008 the IBU Executive Board, by resolution of February 6, 2009 established the DHP according to Article 8.1.1 ADR. It consists of a list of eight "*experts with experience in anti-doping*" (Article 8.1.1 ADR).

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Although the DHP is part of the institutional framework of the IBU and renders, in matters of alleged anti-doping rule violations, the final decision for the IBU, it acts in complete independence of the IBU. According to Article 8.1.1 ADR "*Each panel member shall be otherwise independent of IBU.*"

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The proceedings before the DHP are contentious trials between the IBU and the athlete concerned as parties. According to Article 8.1.2 ADR the "*cases shall be assigned to (it) for adjudication*" which means a decision reached by judges. The *Principles for a Fair Hearing* laid down in Article 8.3 ADR speak of the right of "*each party*" to present evidence and provide in its various items for a "*fair and impartial hearing panel*" and other guaranties which apply to judicial proceedings.

2. The Proceedings prior to the Hearing

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According to Article 8.1.2 ADR the IBU referred the alleged anti-doping rule violation of the Athlete to the DHP.

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The Chairman of the DHP, according to Article 8.1.3 ADR, appointed Mr. Günter Gmeiner, Mr. Juha Viertola and himself as the particular Panel to hear the case of the Athlete. As required by Article 8.1.3 ADR the Panel members have not been involved in the case previously and do not have the same nationality as the Athlete.

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The Chairman of the Panel determined the hearing to be held on June 1st, 2011 in Salzburg.

3. The Hearing and the Submissions of the Parties

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Accordingly, the hearing was held on June 1st, 2011 at the headquarters of IBU in Salzburg, Austria. The parties were present as indicated above. After the opening of the hearing by the Chairman the parties made their opening statements.

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IBU submitted that the results of the B sample analysis revealed the presence of ephedrine in the Athlete's body and, hence, confirmed the result of the A sample analysis. Ephedrine is a prohibited substance listed in the WADA Prohibited List. IBU concluded that the Athlete committed an anti-doping rule violation according to Article 2.1 ADR in the form of the presence of a prohibited substance.

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IBU did not submit a specific prayer for relief but left it to the Panel to determine the sanction to be imposed on the Athlete.

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The Athlete, in her opening statement, referred to the report on the investigation of her case by the FBU and repeated the facts which occurred in Anterselva, Italy in February 2011 prior to the World Championships and during the Championships in Khanty Mansiysk, in particular on March 13, 2011.

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The Athlete admitted to have taken the medication called "Broncholytin" which led to the presence of ephedrine in her body and acknowledged the results of the A and B samples analysis. No objections were raised in relation to the sample collection and the conduct of the analysis according to the IST and the ISL, as well as in relation to the results management process.

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According to the Athlete's submission, after the World Cup in Anterselva, Italy she fell ill with the flu and, therefore, could not travel with the Ukrainian team to the United States to compete in the World Cup in the US. Instead, she stayed in Anterselva and trained. As breathing problems became more serious and coughing deteriorated she contacted the team physician who was in the United States with the Ukrainian team. The physician ordered her to take Broncholytin syrup which he had left in his medicine cabinet in Anterselva and explained to her that she could take that medication for treatment purposes during training. The Athlete took the syrup for one week, three tablespoons a day.

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According to the Athlete she put the Broncholytin syrup in her bag when she left for Khanty Mansiysk. There she felt well and was ready for the Mixed Relay, an event at the beginning of the championships. The next day, again she started coughing and had pain in the bronchia. As a result, she was removed from all individual events and treated her illness. Days later she recovered and was entered for the Womens Relay which was scheduled for March 13, 2011, the last day of the competitions.

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In the morning of March 13, 2011 she felt ill again and took a tablespoon of Broncholytin. The Athlete was not aware that this medication could be taken in training only and the team physician, when he had advised her to take Broncholytin syrup in Anterselva, did not know that Broncholytin was taken by her in competition. The Athlete concluded that she only wanted to compete in the Womens Relay and had no intention to enhance her performance.

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The Athlete considered this “*a real tragedy*” and the FBU emphasized that this is the first and only doping case in the history of the FBU in the independent Ukraine and that the Athlete, as a member of the Athletes’ Commission of the NOC of the Ukraine, performs anti-doping activities.

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No specific claims were submitted on behalf of the Athlete. Instead, the determination of a sanction was left to the discretion of the Panel.

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In reply to the opening statement of the Athlete IBU submitted that, for an anti-doping rule violation under Article 2.1 ADR, a regular sanction of two years ineligibility had to be imposed. However, IBU asked the Panel to consider the circumstances of the Athlete’s case.

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The Panel examined the Athlete about the facts and circumstances which happened in Anterselva when she fell ill and on March 13, 2011, the day of the sample collection, in depth.

III. In Law

1. Applicable Law

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As the introductory “*Scope*” to the ADR indicates the latter apply “*to each participant in the activities of the IBU ... by virtue of the participant’s membership, accreditation, or participation in IBU ... or their activities or Events.*” As a participant of the IBU’s World Championships in Khanty Mansiysk the Athlete, who is an athlete under the jurisdiction of the FBU, is bound by the IBU’s ADR. Therefore, these rules are the law applicable to the case before the Panel.

2. Anti-Doping Rule Violation

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The analysis of the A sample collected from an in-competition test conducted on the Athlete on March 13, 2011 revealed the presence of ephedrine in a concentration of 15 µg/ml which was confirmed by the analysis of the B sample which displayed ephedrine in a concentration greater than 10 µg/ml.

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According to the 2011 WADA Prohibited List ephedrine is a prohibited substance listed as a substance prohibited in-competition under para. S 6 b “*Specific Stimulants*”. However, it is prohibited only when the concentration found is greater than the threshold of 10 µg/ml. The WADA Prohibited List has been incorporated into the IBU ADR by virtue of Article 4.1 ADR.

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Hence, the presence of ephedrine in her body constitutes an anti-doping rule violation under Article 2.1 ADR. According to Article 2.1.1 ADR no intent, fault or negligence or knowing use on the Athlete’s part is necessary, in the particular case. According to Article 2.1.2 ADR sufficient proof of the anti-doping rule violation has been established by the presence of ephedrine in the B sample, which confirmed the results of the A sample. The Athlete did neither object to the results of the sample analysis nor did she challenge the validity of the findings by submitting any deviation from the required procedures. The Athlete expressly acknowledged the anti-doping rule violation.

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3. Elimination or Reduction of the Sanction

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The period of ineligibility to be imposed for a first anti-doping rule violation according to Article 2.1 ADR, i.e. for the presence of a prohibited substance, amounts to two years of ineligibility.

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However, as the Athlete implicitly submitted, this sanction can be eliminated or reduced due to specific circumstances. Article 10.4 ADR provides that, when a *specified substance* has been found and the Athlete establishes (1) how the substance entered her body and (2) that the taking of the substance was not intended to enhance performance or mask the use of a performance-enhancing substance, the applicable sanction ranges from a mere reprimand to, at a maximum, two years of ineligibility. According to this article the absence of an intent to enhance performance or mask the use of a performance-enhancing substance must be proven by the athlete *to the comfortable satisfaction of the hearing panel based on objective circumstances*.

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In case the two elements mentioned in the previous paragraph are met, the door is open to eliminate or reduce the sanction. When assessing any reduction of the regular sanction the Panel must consider the *degree of fault* the athlete bore in the particular situation.

a. Specified Substance

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According to the 2011 Prohibited List ephedrine is a *specified substance* in the sense of Article 4.2.2 ADR and, therefore, Article 10.4 ADR applies.

b. Explanation of how the substance entered the body

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The first element the athlete must establish in order to be entitled to an elimination or reduction of the sanction is to show how the prohibited substance entered the body of the Athlete. The Athlete admitted to have taken Broncholytin which contains ephedrine. In her submission and in her oral evidence given in front of the Panel the Athlete gave a reliable explanation that she took Broncholytin as a medication against the cough and bronchitis in Anterselva in a training period. She contacted Mr. Michael Kulikowski, the physician of the Ukrainian womens team who was in the U.S. with the team, by skype and was advised to take the Broncholytin syrup which he had left in the team hotel. In front of the Panel, the Athlete recognized the bottle containing Broncholytin syrup manufactured in Ukraine when she was confronted with it in the internet. According to her testimony she took three tablespoons of the syrup per day which corresponds to the medically advisable quantity. According to the whereabouts of the Athlete she stayed in Anterselva from January 29 to February 16, 2011 in a training camp whereas the Ukrainian team participated in World Cup events in the U.S.

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By this explanation the Panel is satisfied that the Athlete actually was ill and suffered from cough and most likely a bronchitis and took Broncholytin syrup as a medication in Anterselva. Furthermore, the Panel is satisfied of the Athlete's testimony that she put the bottle with the remainder of the syrup into her bag when she moved from Anterselva and travelled, via Otepaa, Estonia, to Khanty Mansiysk. Here, on March 13, 2011, according to her testimony she took one tablespoon of Broncholytin syrup between 11 h and 12 h and competed around 15 h. As indicated on the Doping Control Form ("DCF") her sample was collected between 17.30 h and 17.50 h. A tablespoon of Broncholytin, which corresponds to approx. 12 mg of ephedrine, is a plausible explanation for the concentration of 15 µg/ml of ephedrine found in her samples.

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The Athlete has established to the comfortable satisfaction of the Panel how ephedrine entered her body.

c. Absence of an intent to enhance performance

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The second element which has to be proved by the Athlete is that she did not take Broncholytin with the intention to enhance her performance. By the explanation provided in her submission and oral testimony at the hearing the Panel is satisfied that the Athlete took Broncholytin for treatment purposes, exclusively, and not in order to enhance her performance.

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As indicated above, during the training period in Anterselva the Athlete was ill and took, on the advice of the team physician, Broncholytin as a medication. Ephedrine is a prohibited substance only in-competition. Due to her illness she did not travel with her team to compete in the US.

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Broncholytin is commonly used in order to cure cough and bronchitis, in particular, in the Ukraine where it is a household remedy. The quantities the Athlete administered in Anterselva correspond to the medically appropriate dose which creates a therapeutic effect.

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The analytical results of the Athlete's samples are reasonably explainable by the quantity of Broncholytin taken by her on March 13, 2011. The concentration of 15 µg/ml found in the Athlete's urine sample can be the consequence of the administration of approx. 15 ml Broncholytin containing 12 mg of ephedrine, which corresponds to the amount of a tablespoon, taken at the time indicated by the Athlete. The quantity of approx. 12 mg ephedrine represents a therapeutically relevant dose and a therapeutic effect can be expected. The analytical findings do not provide any indication that a supra-therapeutical dose was administered.

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According to studies in accessible literature a therapeutical dose of ephedrine alone has little or no ergogenic, performance enhancing effects (P. Van Eenoo and F.T. Delbeke (2010) Beta-Adrenergic Stimulation, in: Thime D, Hemmersbach P (eds) Doping in sports; Handbook of Experimental Pharmacology 195, Springer, Berlin). A performance enhancing co-administration of e.g. caffeine or other substances is not indicated from the analytical data.

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In the concentration found in the Athlete's samples ephedrine has no known masking effect of the use of other substances which enhance performance.

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According to her submission and, in particular, the detailed testimony the Athlete gave during the examination by the Panel, the latter is comfortably satisfied that the Athlete administered Broncholytin as a medication in order to restore her physical health and to be able to compete in the Womens Relay which, according to her, was supposed to be the last race in her career as an active biathlon athlete. The Athlete was one of the most competitive Ukrainian athletes and was expected to perform well in the Khanty Mansiysk World Championships. After the treatment in Anterselva she was nominated to compete in the Mixed Relay at the beginning of the Championships. She fell ill and was removed from all individual events. She recovered and was entered for the Womens Relay on the next day, the last day of the Championships. In the morning of the day of the Relay the cough reappeared. In that situation it is easily understandable that she took the Broncholytin syrup in order to treat the cough, exclusively.

d. Amount of the reduced sanction

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Based on the foregoing the Panel concludes that, according to Article 10.4 ADR the Athlete, in principle, is entitled to an elimination or reduction of the regular sanction of two years of ineligibility. However, the extent of a reduction of the sanction, if any, according to Article 10.4 ADR depends on the degree of fault borne by the athlete. The reduced sanction ranges between no and two years of ineligibility.

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The circumstances which triggered the application of Article 10.4 ADR speak in favour of a significant reduction of the regular sanction: the Athlete admitted the anti-doping rule violation when she was confronted with the AAF and reliably explained how ephedrine entered her body; she did not provide false excuses nor tried to make other persons responsible; she was ill and administered Broncholytin in a quantity which was medically indicated; administered in such a quantity ephedrine has no performance-enhancing effect; Broncholytin was administered as a medication in order to restore her physical health and to give her the opportunity to compete in the last race of the World Championship which was supposed to be the last race in her active career.

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Against the background of the above stated, the Panel, however, has to take in consideration that, according to Article 2.1.1 ADR, the Athlete is fully responsible for any substance which enters her body:

“It is each Athlete’s personal duty to ensure that no Prohibited Substance enters his or her body. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete’s part be demonstrated in order to establish an anti-doping rule violation for Use of a Prohibited Substance or a Prohibited Method.”

The Athlete neglected this fundamental and strict obligation seriously. On March 13, 2011 she took Broncholytin without any consultation with the team physician who was present at the venue. As she admitted before the Panel she did not read the label on the bottle of Broncholytin although it was written in Ukrainian language. Even more seriously, she did not declare the administration of Broncholytin on the Doping Control Form related to her doping test. According to her testimony before the Panel, she forgot the declaration of Broncholytin for no reason but “euphoria”.

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On the account that the Athlete is an experienced international high level athlete who had undergone many doping controls previously and, allegedly, is involved in anti-doping education within the NOC of Ukraine, the Panel states that the Athlete seriously neglected her responsibility under Article 2.1.1 ADR.

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By weighing, in the particular situation on March 13, 2011, the therapeutical administration of Broncholytin with no intent to enhance performance against the clear and serious negligence in respect of the administration of a medication in-competition without consulting the team physician or reading the label of the bottle the Panel concludes that a period of ineligibility of one year is the appropriate sanction in the case under consideration

4. Commencement of the period of ineligibility

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According to Article 10.9 ADR the period of ineligibility begins on the date when the decision of the Panel is pronounced. As the Athlete, after being confronted with the anti-doping rule violation by IBU under letter dated April 21, 2011 “promptly”, i. e. in a letter of FBU dated April 28, 2011, admitted the doping offence, Article 10.9.2 ADR applies. This article stipulates that in such a situation the period of ineligibility may start as early as the date of the sample collection. Therefore, the period of ineligibility begins on March 13, 2011.

IV. Conclusions

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The samples taken from the Athlete on the occasion of an in-competition test conducted on March 13, 2011 revealed the presence of the prohibited substance of ephedrine and, therefore, the Athlete committed an anti-doping rule violation according to Article 2.1 ADR.

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However, the Athlete established how ephedrine, a *specified substance*, entered her body and proved to the comfortable satisfaction of the Panel that she did not intend to enhance her performance. By weighing the responsibility of the Athlete for any prohibited substance found to be present in her body against the special circumstances of the use of Broncholytin prior to and of the ingestion of that medication on March 13, 2011 and taking into account the negligence she demonstrated when she took Broncholytin on that day, the Panel, according to Article 10.4 ADR, considers a reduction of the period of ineligibility to one year appropriate.

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Therefore, Ms Oksana Kvostenko is declared ineligible to compete for a period of one year, commencing on March 13, 2011.

V. Decision

On these grounds the Panel decides:

Ms Oksana Kvostenko is ineligible to compete for a period of one year, commencing on March 13, 2011.

The Doping Hearing Panel
August 11, 2011

Christoph Vedder
Chairman of the Panel

Günter Gmeiner

Juha Viertola