

**Anti-Doping Hearing Panel  
of the  
International Biathlon Union**

Decision  
in the matter of  
**IBU v. Mr. Artem Tyshchenko**

The Anti-Doping Hearing Panel, according to Article 8.1.3 IBU Anti-Doping Rules, in the composition of Christoph Vedder, Professor of Law, Munich, Germany (Chair), Wolfgang Schobersberger, Professor of Sports Medicine, Innsbruck, Austria, and Markus Manninen, Attorney-at-Law, Helsinki, Finland heard the case of the IBU v. Mr. Artem Tyshchenko and, having duly deliberated the facts and the law, renders the following decision:

**I. Statement of Facts**

1

Mr. Artem Tyshchenko (the "Athlete"), an athlete under the jurisdiction of the Federation Biathlon of Ukraine ("FBU"), was submitted to an in-competition doping control initiated by the International Biathlon Union ("IBU") on January 23, 2016 at Bayrisch-Eisenstein, Germany.

2

The Athlete's A sample A 3795754 was received by the WADA accredited laboratory in Cologne on January 26, 2016 and analysed during the following days. The analysis revealed the presence of Meldonium. The Cologne laboratory informed the IBU of the Adverse Analytical Finding ("AAF") via letter of February 11, 2016. The Documentation Package was sent to IBU and forwarded by IBU to the Athlete.

3

By letter of February 16, 2016 IBU notified the FBU and the Athlete of an AAF in the form of the finding of Meldonium in his A-sample. The Athlete was provisionally suspended pending the ADHP's decision.

4

By the said letter of February 16, 2016 the Athlete and the FBU were further notified of:

- the result of the analysis not being consistent with an applicable TUE
- the initial review conducted by the IBU not showing any apparent departure from the WADA International Standards for Testing and for Laboratories ("ISL")
- the initiation, by the IBU, of the result management process for a possible Anti-Doping Rule Violation ("ADRV") in the sense of Article 2.1. IBU ADR
- the right to request the analysis of the B-sample or, failing such request, that the B-sample analysis may be deemed waived
- the costs of the B-sample analysis and the opportunity of the Athlete and/or his representatives as well as representatives of the FBU to attend the B-sample analysis.

The Athlete was given the opportunity to submit a statement no later than March 1, 2016.

5

By letter of February 24, 2016 FBU, on behalf of the Athlete, waived his right to the B sample analysis.

6

On February 25, 2016 the IBU Secretary General referred the matter to the ADHP.

7

On the same day, according to Article 8.1.3 IBU ADR, the particular Panel to hear the Athlete's case was established. Under letters of March 3 and 10, 2016 the IBU served to the Panel the documentation package of the laboratory and the full set of correspondence with the Athlete and the FBU.

## **II. Proceedings before the Anti-Doping Hearing Panel**

### **1. The IBU ADHP**

8

According to Article 8 IBU ADR, the ADHP is the competent body to decide whether or not, in a given case, an ADRV was committed. According to Article 47.3 of the IBU Constitution and Article 8.2.2 IBU ADR, the decisions of the ADHP may be appealed directly to the Court of Arbitration for Sport in Lausanne, Switzerland.

9

Although the ADHP is part of the institutional framework of the IBU and renders, in matters of alleged ADRVs, the final decision for the IBU, it acts in complete independence. As Article 8.1.2 IBU ADR states "*(e)ach panel member must be otherwise independent of the IBU*". The Panel members appointed in the case pending have no prior involvement with the case.

### **2. The Proceedings before the Panel and the Submissions of the Parties**

10

By the above mentioned letter of February 24, 2016 FBU informed the IBU that the Athlete

*"had taken this medicine by himself in November 2015. He did not taken this substance in 2016, since it had been added to the list of prohibited substances starting from January 1, 2016."*

The FBU added that the Athlete

*"participated in the training camp out of the National biathlon team, there was any doctor in the group he was during the training period."*

11

By letter of March 1, 2016 the Chairman of the ADHP notified FBU and IBU of the date of the hearing scheduled for March 30, 2016 and invited IBU to submit a statement no later than March 11, 2016. The Athlete and FBU were given the opportunity to make a statement in response until March 21, 2016.

12

On March 10, 2016, within the time-limit, IBU filed a written statement. IBU submitted that the rules applicable to the case are the IBU ADR 2014, effective as of January 1, 2015 together with the 2016 Prohibited List which applies to doping control, analysis and results management in 2016.

13

According to IBU, it has demonstrated the presence of a prohibited substance in the Athlete's sample and, therefore, exonerated its burden of proving that an ADRV in the sense of Article 2.1 IBU ADR was committed. For that purpose IBU relies on the analysis results provided by the WADA-accredited Cologne laboratory. The substance found was a non-specified substance prohibited both in- and out-of-competition listed under S4 para. 5.3 of

the 2016 Prohibited List. IBU further refers to the fact that the Doping Control Form ("DCF") was signed by the Athlete with no reservation.

14

IBU stated that the Athlete, through FBU's letter dated February 24, 2016, admitted having administered the substance in November 2015. No medical prescription or a description of the reason why the Athlete took Meldonium has been submitted.

15

In reply to the Athlete's defence that he administered Meldonium in 2015 when it was not yet prohibited, IBU claimed that, as the presence of the substance in the Athlete's body on January 23, 2016 was uncontestedly demonstrated,

*"it would be the Athlete's burden to demonstrate by a balance of probability that the positive finding was in fact a consequence of a permitted administration of Meldonium (Art. 3.1 IBU ADR 2014, last sentence). In other words, the Athlete must demonstrate that the positive finding was caused by the administration of Meldonium when this substance was not yet included in the 2016 Prohibited List."*

16

IBU mentioned a study on the metabolism and degradation of Meldonium just initiated by WADA and referred to internet sources which indicate a half-life of Meldonium of a few hours but also to statements that

*"such substances can ... lead to positive analysis results even after a much longer period of time."*

17

IBU concluded that it would be difficult or even impossible for the Athlete to provide reliable information on that issue and, therefore, proposed that the ADHP should collect an expert opinion on the following issue:

*"Is it possible that Meldonium can be identified in the concentration found in the Athlete's sample taken on 23 January 2016 if it has been administered in a yet unknown dosage in November?"*

18

As a procedural request IBU submitted that the hearing should be postponed until a date after the expert opinion, which should also take the WADA study into account, had been communicated to the parties. Nevertheless, the provisional suspension should remain in place.

19

In reply, on March 12, 2016 the Panel issued a procedural order to the effect that, first, Professor Mario Thevis, Cologne, is appointed to give, at the hearing, an expert opinion on the question raised by IBU and, second, the hearing is maintained as scheduled.

20

Neither the Athlete nor the FBU submitted a statement in defence within the time limit or later. Instead, the FBU, by letter of March 22, 2016 forwarded a review by Sjakste and Kalvinsh (2016) on Mildronate.

### **3. The Hearing on March 30, 2016**

21

A hearing took place on March 30, 2016, from 17.00 h until 18.05 h, at the Arcotel Castellani in Salzburg, Austria. Present were:

on behalf of the Athlete:

- the Athlete himself
- Mr. Roman Bondaruk, Secretary General of FBU
- Mr. Vladymir Gerashenko, Interpreter
- Dr. Vladymir Bud, Toxicologist

on behalf of IBU:

- Dr. Stefan Netzie, Counsel to IBU
- Ms. Nicole Resch, Secretary General, IBU

22

In his opening remarks the Chairman of the ADHP stated, first, that the Athlete did not submit a statement in defence and no further arguments are permitted and, second, that the presence of meldonium in the Athlete's sample, the analytical results and the performance of the analysis by the Cologne laboratory in accordance with the ISL were not challenged. As the principal matter of dispute between the parties the Chairman identified the question whether or not the alleged administration of meldonium in November 2015 can result in the finding of the prohibited substance as analysed by the Cologne laboratory. The Parties were invited to consider the elements which constitute an ADRV, the question whether or not the Athlete acted intentionally and whether exceptional circumstances were present. The parties confirmed their satisfaction with the proceedings so far.

23

In its opening statement IBU referred to the facts as described in the statement submitted on March 10, 2016. IBU submitted that it had demonstrated the presence of meldonium as a prohibited substance the relevant date being the presence of meldonium rather than the date of the administration. With regard to the length of the sanction IBU submitted a graph showing the various options from four years to one year of ineligibility. The amount of the sanction to be imposed on the Athlete depends on the question whether the Athlete acted intentionally and without significant fault or negligence due to exceptional circumstances. IBU reserved the right to make particular requests for relief at a later stage.

24

On behalf of the Athlete the representative of the FBU submitted that the FBU had conducted an investigation on the Athlete's case and found out the following. The FBU acknowledged that the Athlete had taken Mildronate. FBU believes that the Athlete had taken the substance from October 28 to November 10, 2015 when he was training with the reserve team of the FBU. No medical personnel was assisting the reserve team at that time. FBU submitted that putting forth this period of intake by the Athlete supports his sincerity: in case the Athlete tried to cheat, he would have declared a later period of time of administering Mildronate. The FBU acknowledged that a violation has taken place but considered that a minimum sanction would be just.

25

In addition to the opening statement presented by FBU, the examination of the Athlete *in persona* by the Panel and IBU revealed the following: The Athlete had taken Mildronate from October 28 to November 10, 2015. He had taken two capsules of 500 mg per day. Taking the substance in fall 2015 was his own decision. The reason to take the substance was that they had a heavy and intensive training camp on the snow and the substance helped his heart problems. Two years before, he had a check on his general health and at that time some changes in his cardiogram were discovered. The personnel of the special sports medical centre recommended the Athlete to take Mildronate, although they did not find any disease. It was recommended to many athletes while performing physical exercise. At that time, he got the medicine from the Ukrainian national team's doctor. The Athlete had some Mildronate still left in 2015 and he decided to take it. For the very first time he had taken Mildronate in the age of 14 when the first changes in his cardiogram were noticed. He has

taken the substance periodically after that. The Athlete acknowledged that he was informed that the substance will become prohibited from January 1, 2016 onwards in the beginning of October 2015. He followed the instructions on the half-life of the medicine and could not imagine that it could still remain in his organism in 2016.

26

Dr. Bud, a toxicologist, who was involved in the investigation conducted by FBU on the Athlete's case, declared, with reference to literature, that meldonium could be accumulated in the body and, because of a non-linear elimination of meldonium, that substance could last in the body longer as mentioned in the information accompanying the medication.

27

Professor Dr. Mario Thevis, head of the Institute for Biochemistry at the Deutsche Sporthochschule Köln, Germany who was appointed as independent expert on the pharmacokinetics of meldonium by the Panel, gave his expert opinion. He evidenced that, according to the state of knowledge published in literature, meldonium is excreted in a non-linear way. In the alpha-phase most of the meldonium is excreted in hours (half-life of 4 to 8 hours) while small quantities of meldonium remain in the body and are, in the following beta-phase (of 120 h), slowly eliminated over several days. Based on that, Prof. Thevis could "not exclude" that the finding of meldonium in the Athlete's samples collected on January 23, 2016 could have been caused by an administration of Mildronate in quantities and during the period of time as declared by the Athlete.

28

Professor Thevis reported on a Pilot Study recently conducted in his institute which revealed the following results. The application of a single dose of 500 mg led to a finding of 0,1 micrograms/ml after 14 days. When meldonium was administered in doses of 1,5 grams per day over 6 days, after 14 days the quantity of 1 microgram/ml was found. This study was made on blood plasma but not on urine as it was the case with the Athlete's samples. Also based on that preliminary research he declared that, at the moment, he could "not exclude" that the administration of Mildronate as put forth by the Athlete could have caused the concentration of 0,6 micrograms/ml of meldonium on January 23, 2016 in the Athlete's case. Prof. Thevis noted that the concentration is not extremely low but he has no scientific evidence to say whether the administration has taken place in 2015 or 2016.

29

Professor Thevis informed the Panel that, with the support of WADA, a research study on the long-term pharmacokinetics of meldonium in urine already started in his laboratory. The results of the study may be expected within three months.

30

In their closing statement IBU referred to the undisputed facts which reveal that an ADRV in the form of the presence of a prohibited substance in the meaning of Article 2.1 IBU ADR 2014 and the 2016 Prohibited List was committed. For the question whether the ADRV was non-intentional the burden of proving a medical justification lies with the Athlete. IBU expressed its serious doubts with regard to the alleged medical justification: there was no medical certification, no opinion and no prescription. Therefore, the IBU found that the use was intentional and, as a starting point, the length of the ineligibility period would be four years. However, IBU would tend to acknowledge exceptional circumstances by taking into account that meldonium was newly introduced to the Prohibited List, that the excretion from the body took longer than the information on the leaflet accompanying the medication and that the Athlete believed to have acted in accordance with the applicable rules. This could lead to a sanction of two years.

31

IBU concluded that the length of the sanction depends on the time-line of the degradation of meldonium and that, according to the present state of knowledge, it cannot be excluded that the finding in the Athlete's sample could have been caused by the administration of

Mildronate as declared by the Athlete. Therefore, the "WADA-Study" which will determine the duration time of meldonium in the body should not be disregarded. Hence, IBU requests for relief:

1. *to suspend the proceedings until the "WADA-Study" is available,*
2. *to grant the parties 20 days simultaneously to comment on the results of the study and to complement their request for relief,*
3. *that no further hearing is held, and*
4. *that the Athlete remains provisionally suspended.*

32

In their closing statement FBU, in the name and on behalf of the Athlete, agreed with IBU's request to suspend the proceedings and to have the opportunity to comment on the results of the study.

33

At the end of the hearing, the Athlete made a personal statement. He declared that he takes full responsibility for the administration of Meldonium and the positive doping test. He requested the Panel to take into consideration the early last date of administration of meldonium and that he took the medicine to improve his health, not sports results.

#### **4. Order of April 4, 2016**

34

Following the hearing the Panel issued the following order on April 4, 2016:

*"The Anti-Doping Hearing Panel, according to Article 8.1.3 IBU Anti-Doping Rules, in the composition of Christoph Vedder, Professor of Law, Munich, Germany (Chair), Wolfgang Schobersberger, Professor in Sports Medicine, Innsbruck, Austria, and Markus Manninen, Attorney-at-Law, Helsinki, Finland on March 30, 2016, held a hearing in the case of Mr. Artem Tyshchenko.*

*At the hearing, the matter of whether or not the alleged administration of Mildronate between October 28 and November 10, 2015 in a dosage of 2 capsules of 500mg each per day could have caused the presence of Meldonium in the Athlete's samples collected on January 23, 2016 was identified as essential. The Expert called by the Panel stated that, according to the present state of literature, most of Meldonium will be excreted from the body within hours. However, according to a pilot study conducted in his laboratory it cannot be excluded that small quantities of Meldonium may remain in the body longer. Based on this, IBU and the Athlete, by common agreement, requested, first, to suspend the proceedings until a study which was called AWADA-study@ will be available and, second, that the parties will be given the opportunity to comment on the results of the study. According to the information available at the hearing the results of the study are expected for no later than September 2016.*

*Based on the above, the Anti-Doping Hearing Panel renders the following order:*

1. *The proceedings are suspended until the results of the scientific studies already initiated by WADA-accredited laboratories on the long-term pharmacokinetics of Meldonium (Mildronate) of healthy humans are available.*
2. *The parties will be granted 20 days from the communication of the studies, simultaneously to comment on the results and to complement their requests for relief. Because the time-limit for the Athlete to submit a statement in*

*defense has elapsed on March 21, 2016 no further factual evidence is permitted.*

3. *The Panel will decide whether a hearing is deemed appropriate.*
4. *The Athlete remains suspended as required by Article 7.11.1 IBU ADR 2014.*
5. *The Panel reserves the right to issue a new order if appropriate."*

35

On April 11, 2016 WADA issued a "Notice - Meldonium" which informed the WADA stakeholders that scientific studies on the urinary excretion of meldonium are being conducted but presently there was a "*lack of clear scientific information on excretion times*" of meldonium. Therefore, WADA notified *recommendations* concerning the results management and adjudication in meldonium cases. Although, according to WADA, the presence of meldonium found in samples collected on or after January 1st, 2016 clearly constitutes an ADRV WADA "*considers that there may be grounds for no fault or negligence on the part of the athlete.*" Depending on the date of the sample collection and the concentration of meldonium found the Notice contains various recommendations.

36

The Notice triggered IBU to file a submission requesting the Panel to lift the Athlete's provisional suspension. By order of April 15, 2016 the Panel invited the FBU and the Athlete to submit a statement including requests for relief, no later than April 25, 2016. FBU, on behalf of the Athlete, replied on the same day and, based upon the Notice, requested to lift the provisional suspension because of the low concentration measured.

37

Taking into account that the Athlete's sample was collected on January 23, 2016 and showed a concentration of 0,6 which is a situation covered by B.3 of the Notice the Panel issued the following order on April 18, 2016 :

*"The Anti-Doping Hearing Panel, according to Article 8.1.3 IBU Anti-Doping Rules, in the composition of Christoph Vedder, Professor of Law, Munich, Germany (Chair), Wolfgang Schobersberger, Professor in Sports Medicine, Innsbruck, Austria, and Markus Manninen, Attorney-at-Law, Helsinki, Finland having received applications by IBU dated April 14 and on behalf of the Athlete dated April 15, 2016, respectively and having considered the Notice - Meldonium issued by WADA on April 11, 2016 renders the following order:*

1. *The Athlete's provisional suspension, imposed by IBU according to Article 7.1.1 IBU ADR by letter of February 16, 2016, is lifted with immediate effect.*
2. *The remaining parts of the order of April 4, 2016 are upheld."*

38

After WADA, on June 30, 2016, had released a second "Notice - Meldonium", the IBU, in the light of the new Notice, filed a submission on July 11, 2016. IBU noted that the Notice took into account recently received results from studies on the urinary excretion of meldonium and provides updated guidance for cases where athletes claim that the substance was taken before January 1, 2016. Taking into consideration the alleged period of administration of meldonium, the date of the sample collection and the concentration found in the Athlete's sample the WADA Notice would suggest that the ADRV was committed with no fault. Based on that recommendation the IBU requested "*to issue an award based on the written*

evidence and the statements made at the hearing on 30 March, 2016". IBU's prayers for relief are:

- "1. to find Mr. Tyshchenko guilty of an anti-doping rule violation (presence of a prohibited substance, Art. 2.1 ADR);
2. because of no fault (Art. 10.4 ADR), no period of ineligibility shall be imposed.
3. to annul the results of Mr. Tyshchenko at the event of Bayrisch-Eisenstein (GER) on 23 January 2016 (Art. 10.1 ADR)."

39

Having considered the situation after the issuance of the new WADA Notice the ADHP, by order of July 27, 2016, granted the Athlete and the FBU the opportunity to respond, no later than August 10, 2016, to IBU's submission and to declare whether they wanted to have a hearing. Furthermore, the panel stated that the order dated April 4, 2016 was upheld until further decision. No reply was received within the time limit set.

40

As the Panel already had informed the parties in its abovementioned order the Panel was of the view that the dispute could be decided upon the written evidence and material before it and, therefore, the Panel decided not to hold a hearing.

### **III. In Law**

41

The Panel considered the facts and the law as discussed in the written proceedings and at the hearing.

#### **1. Applicable Law**

42

The Athlete who is an athlete under the jurisdiction of the FBU is bound by the IBU ADR which, according to their introductory "Scope"

*"apply to the IBU and each of its member federations. They also apply to the following athletes ... each of whom is deemed, as a condition of his/her membership, accreditation and/or participation in the sport, to have agreed to be bound by these Anti-Doping Rules, and to have submitted to the authority of the IBU to enforce these Anti-Doping Rules and to the jurisdiction of the hearing panels specified in Article 8 and Article 13 to hear and determine cases and appeals under these Anti-Doping Rules..."*

Therefore, the IBU ADR are the law applicable to the dispute before the Panel.

43

The law applicable consists of the rules applicable at the time when the alleged ADRV was committed, i.e. on January 23, 2016. Hence, the IBU ADR 2014 as in force as of January 1, 2015 apply. They include the edition of WADA Prohibited List which is in force at the date of the alleged ADRV, i.e. on January 23, 2016, which is the 2016 WADA Prohibited List.

#### **2. Anti-Doping Rule Violation: presence of a prohibited substance**

44

By virtue of Article 1 IBU ADR, doping is defined as the occurrence of one or more of the ADRVs set forth in Article 2 IBU ADR.

45

According to Article 2.1 IBU ADR,



*"the presence of a prohibited substance or its metabolites or markers in an Athlete's sample"*

constitutes an ADRV. The prohibited substances are listed in the WADA Prohibited List which, according to Article 4.1 IBU ADR, is incorporated into the IBU ADR.

46

The 2016 WADA Prohibited List, which applied at the time of the sample collection, lists "Meldonium" under S4 par. 5.3 "*Hormone and Metabolic Modulators*".

47

The analysis of the Athlete's A-samples performed by the Cologne laboratory after January 26, 2016 shows the presence of meldonium. This analysis was conducted in conformity with the ISL.

48

In a situation where the Athlete waived the analysis of the B-sample the finding of a prohibited substance in the Athlete's A-sample, according to Article 2.1.2 IBU ADR, establishes sufficient proof of an ADRV.

49

Based upon the laboratory's documentation the IBU has discharged its burden of demonstrating the presence of a prohibited substance "*to the comfortable satisfaction*" of the Panel, according to Article 3.1 IBU ADR. According to Article 3.2.2 IBU ADR, WADA accredited laboratories are presumed to have conducted the sample analysis in accordance with the ISL. The initial review in the course of the results management conducted by the IBU did not reveal any departure from the ISL. No TUE was present.

50

The Athlete, in his statement dated February 24, 2016 did not challenge the finding of meldonium nor did he claim that a departure from the ISL occurred which reasonably could have caused the AAF actually detected.

51

Therefore, the presence of meldonium, which is a prohibited substance listed under S4 par. 5.3 of the 2016 WADA Prohibited List, in the Athlete's A-sample has been proven. According to Article 2.1.1 IBU ADR no intent, fault, negligence, or knowing use is required in order to constitute an ADRV. Therefore, the elements of an ADRV under Article 2.1 IBU ADR are met.

52

By virtue of the 2016 WADA Prohibited List, the presence of meldonium is prohibited by law from the first day of the effectiveness of the new list, i.e. January 1, 2016. The applicable rules do not explicitly or implicitly provide for a transitional period after January 1, 2016 for the ongoing effects of the administration of substances which were not on the list prior to the end of 2015. Moreover, following the information issued by WADA on September 29, 2015 the athletes were informed about the inclusion of meldonium into the List.

53

The WADA Meldonium Notice of June 30, 2016 starts out from the fact that the finding of meldonium after January 1, 2016 constitutes an ADRV. In his statement of February 24, 2016 and at the hearing the Athlete admitted to have taken meldonium.

54

Based on the foregoing the Panel concludes that the mere presence of meldonium found in the Athlete's A-sample collected on January 23, 2016 constitutes an ADRV in the sense of Article 2.1 IBU ADR in conjunction with the 2016 Prohibited List. The time of the administration of meldonium is irrelevant in this respect.

## **2. Determination of the Sanction**

### **a. Regular sanction**

55

For a first ADRV in the form of the presence of a non-specific prohibited substance Article 10.2.1 in conjunction with Article 10.2.1.1 IBU ADR provides for a regular sanction of a four-years period of ineligibility "*unless the athlete ... can establish that the anti-doping rule violation was not intentional.*" Then the sanction would be a two-years period of ineligibility. The doping offence under consideration is the Athlete's first ADRV.

56

The issue of intent was raised by the IBU in the hearing. However, the Panel will not proceed to examine the matter as the question of whether a four-years or a two-years period of ineligibility applies is moot because, of what will be determined below in relation to "no fault", the ineligibility period to be imposed upon the Athlete will be eliminated irrespective of its original length.

### **b. Elimination or Reduction of the Sanction for no fault or negligence**

57

According to Article 10.2 IBU ADR the regular period of ineligibility to be imposed for an ADRV under Article 2.1 IBU ADR is "*subject to potential reduction or suspension pursuant to Art. 10.4, 10.5 or 10.6.*"

58

If an athlete establishes by a balance of probability, as required by Article 3.1 IBU ADR, that, due to exceptional circumstances, he or she bears no fault or negligence Article 10.2 in conjunction with Article 10.4 IBU ADR allows to eliminate the period of ineligibility otherwise applicable. Although the Athlete did not specifically claim that he bears no fault or negligence the Panel, against the background of the Meldonium Notice of June 30, 2016 and in fairness to the Athlete, applies Article 10.4 IBU ADR in the present dispute.

59

According to the definition of "No fault or negligence" in Appendix 1 to the IBU ADR it is required that the athlete establishes "*how the prohibited substance entered his or her body*". The Athlete admitted to have administered a medication which contained the prohibited substance and explained the circumstances thereof. Therefore, the first requirement of Article 10.4 IBU ADR is met.

60

The Athlete claims that the finding of meldonium in his sample collected on January 23, 2016 is the consequence of the administration of Mildronate in dosages of 500 mg per day from October 25 until November 10, 2015, i.e. at a time when meldonium was not yet forbidden by the 2016 WADA Prohibited List. This defence contends that, first, traces of meldonium taken prior to November 10, 2015 still remained in his body on January 23, 2016 and, second, he actually stopped the administration of the substance because meldonium was included in the 2016 WADA Prohibited List from January 1, 2016.

61

An assumption that substances can be taken "legally" until the entry into force of the Prohibited List which lists them would not find any ground in the applicable anti-doping rules. The fact that a substance is not listed is not to be understood as a kind of silent positive list which allows its administration until the new list comes into effect notwithstanding the ongoing effects of the administration. Instead, the ADRV is constituted by the mere presence, i.e. the possible effects, of a substance in the athlete's body.

62

When the many AAFs for meldonium occurred in early 2016 athletes generally claimed that they stopped the use of that substance before January 1, 2016 and that, according to the information available at that time, meldonium would be excreted within hours or in a few days time at the latest. The explanation delivered by most athletes was that, against that expectation, small detectable concentrations of meldonium would remain longer in the athletes' system. Therefore, WADA commissioned studies on the urinary excretion of meldonium which are still underway. However, for the time being WADA issued two Notices on Meldonium to assist the federations in the handling of meldonium cases.

63

The second and presently applicable Notice, dated June 30, 2016, was issued when WADA received the results from some urinary excretion studies. With this Notice WADA intends to *"provide(...) guidance regarding the Results Management and Adjudication process to be followed ... for cases where athletes claim that the substance was taken before 1 January 2016."* WADA denotes *"this guidance (to) be helpful to all anti-doping organizations that are managing meldonium cases."*

64

Although the Notice has no legally binding effect as such the Panel understands it as an interpretation of the applicable rules adopted with the authority of the WADA to clarify its rules which must be taken into consideration as *"guidance"* when adjudicating a meldonium case. The wording of Article 10.4 IBU ADR does not provide any positive indication of what is meant by *"no fault or negligence"*. The Comment attached to Article 10.4 IBU ADR names one positive example and rules out three other situations. The only useful clarification given by the Comment is that there must be *"exceptional circumstances"*. In such situation of a complete openness of a rule WADA has the inherent authority to provide clarification for the uniform application of a given rule.

65

In fairness to the Athlete and for the sake of legal certainty as well as equal treatment of the athletes concerned the Panel comes to the view that the Notice on Meldonium issued by WADA on June 30, 2016 should apply to the case before it. IBU as the competent anti-doping organization relied its prayers for relief on the Notice while its application is obviously beneficial to the Athlete. IBU complies with the WADA Code when it follows the *"guidance"* recommended by the WADA itself.

66

According to the Notice, the legal consequences of the finding of meldonium differ following the time of the sample collection and the concentration of meldonium found. The Athlete's sample was collected on January 23, 2016 and the analysis revealed a concentration of 0,6 microgram/ml which is less than the threshold of 5 microgram/ml. For such situation the Notice in its first table provides:

*"In the absence of other evidence of use on or after 1 January 2016, a finding of no fault may be made."*

As there is no evidence that the Athlete administered meldonium on or after January 1, 2016 the Panel accepts that the Athlete bears no fault and, therefore, the otherwise applicable period of ineligibility of four years will be eliminated according to Article 10.4 IBU ADR.

67

Since the value of the specific gravity of the Athlete's sample was 1.016 no correction of the concentration of meldonium measured on his sample would be in favour of the Athlete and is, hence, not necessary. Therefore, the specific gravity requirement included at the end of the Meldonium Notice is respected.

### **3. Disqualification of results**

68

As the Athlete underwent an in-competition doping control, according to Article 9 IBU ADR, the result obtained by him in that competition, if any, is automatically disqualified with all resulting consequences such as forfeiture of any medals, points and prizes.

69

According to Article 10.8 IBU ADR which applies in- and out-of-competition

*“ all ... competitive results obtained from the date a positive sample was collected ..., through the commencement of any provisional suspension ..., shall, unless fairness requires otherwise, be disqualified .... ”*

Therefore, all competitive results the Athlete may have obtained from January 23 through February 16, 2016 shall be disqualified with all resulting consequences including forfeiture of any medals, points and prizes. Since the Athlete admitted to have used Meldonium after 29 September 2015 this conclusion is in line with the Notice which, for the Athlete's circumstances, in its first table provides:

*“In the absence of other evidence of use after 29 September 2015, no disqualification of results.”*

### **IV. Conclusions**

70

The Athlete committed an ADRV in the form of the presence of a prohibited substance, according to Article 2.1 IBU ADR.

71

Due to exceptional circumstances concerning the uncertainties with regard to the urinary excretion time of meldonium which gave rise to the “Notice - Meldonium” issued by WADA on June 30, 2016, the Panel, in application of that Notice, finds that the Athlete bears no fault. Therefore, the period of ineligibility otherwise applicable will be eliminated.

72

All competitive results obtained by the Athlete, if any, from January 23 through February 16, 2016 are disqualified. All medals, points, and prizes are forfeited.

**V. Decision**

On these grounds the Panel decides:

1. Mr. Artem Tyshchenko is found guilty of an anti-doping rule violation in the form of the presence of a prohibited substance, according to Article 2.1 IBU ADR.
2. Since Mr. Artem Tyshchenko bears no fault the otherwise applicable period of ineligibility is eliminated, according to Article 10.4 IBU ADR.
3. All competitive results obtained by Mr. Artem Tyshchenko, if any, from January 23 through February 16, 2016 are disqualified with all resulting consequences for medals, points and prizes.

**The Anti-Doping Hearing Panel**

September 7, 2016

  
Christoph Vedder  
Chairman of the Panel

  
Wolfgang Schobersberger  
Member of the Panel

  
Markus Manninen  
Member of the Panel