

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

**Decision
in the matter of
IBU v. Ms. Eva Tofalvi**

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. Ms. Eva Tofalvi and, having duly deliberated the facts and the law, renders the following decision:

I. Statement of Facts

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Ms. Eva Tofalvi (the "Athlete"), an athlete under the jurisdiction of the Romanian Ski Biathlon Federation ("RSBF"), was submitted to an out-of-competition doping control initiated by the International Biathlon Union ("IBU") on March 8, 2016 in Oslo, Norway.

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The Athlete's A sample A 1419978 was received by the WADA accredited laboratory in Oslo on the same day and analysed during the following days. The analysis revealed the presence of meldonium. The Oslo laboratory informed the IBU of the Adverse Analytical Finding ("AAF") under letter of March 21, 2016. The Documentation Package was sent to IBU on the same day.

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By letter of March 29, 2016 IBU notified the RSBF and the Athlete of an AAF in the form of the finding of meldonium in her A-sample and forwarded the Documentation Package. The Athlete was provisionally suspended pending the ADHP's decision.

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By the said letter of March 29, 2016 the Athlete and the RSBF 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 ("ISTL")
- 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 her representatives as well as representatives of the RSBF to attend the B-sample analysis.

The Athlete was given the opportunity to submit a statement no later than April 12, 2016.

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By letter of April 11, 2016, the Athlete waived her right to the B-sample analysis and provided an explanation.

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By letter of June 2, 2016 the IBU Secretary General referred the matter to the ADHP. By the

same letter the Athlete and the RSBF were provided the relevant documents and notified that a hearing will most likely take place in September after a WADA commissioned study on meldonium is available. Moreover, IBU stated that the provisional suspension is upheld.

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On June 3, 2016, according to Article 8.1.3 IBU ADR, the particular Panel to hear the Athlete's case was established. By e-mail of June 2, 2016 the IBU had served to the Panel the documentation package of the laboratory and the full set of correspondence with the Athlete.

II. Proceedings before the Anti-Doping Hearing Panel

1. The IBU ADHP

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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 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.

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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 for the pending case have no prior involvement with the case.

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

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By the above mentioned letter of April 11, 2016 the Athlete explained

"I was taking the medicine named Mildronat at the recommendation of my cardiologist, starting between September 2015 until 28th of December 2015."

She further submitted that she was diagnosed with mitral valve prolapse grade I - II in September 2015 and, based on a medical prescription, she used Mildronate *"for therapeutic purposes, not in order to increase my performance."* On the occasion of another routine examination in December the doctor modified the treatment

"mindful that starting from January 2016, this medicine that contains the substance meldonium will be included in the WADA prohibited list."

The Athlete concluded that she *"respected the provisions of the international codes and standards of the prohibited list of WADA"* and considered herself *"innocent"*.

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On June 6, 2016 the ADHP issued a procedural order. The IBU was requested to make, no later than June 13, 2016, a statement on whether, first, the case should be adjudicated only after the WADA initiated meldonium study is available and, second, whether the provisional suspension should be upheld. The Athlete and the RSBF were invited to reply to IBU's submissions and to present reasoned requests on the issues no later than June 20, 2016.

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IBU filed its submission on June 10, 2016. Neither the Athlete nor the RSBF submitted a statement in response within the time limit fixed.

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After WADA, on June 30, 2016, had released a second Notice on Meldonium the IBU, in the

light of the new Notice, filed a further submission on July 11, 2016. The Notice takes 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 available."* IBU's prayers for relief are:

- "1. *to find Ms. Tofalvi 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."*

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Having considered the situation after the issuance of the new WADA Notice the ADHP, by letter of July 27, 2016, granted the Athlete and the RSBF the opportunity to respond, no later than August 10, 2016, to IBU's submission and to declare whether they wanted to have a hearing. No reply was received within the time limit set.

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As the Panel already had informed the parties in its order dated July 27, 2016, the Panel was of the view that the dispute can be decided upon the written evidence and material before it and, therefore, the Panel decided not to hold a hearing.

III. In Law

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

1. Applicable Law

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The Athlete who is an athlete under the jurisdiction of the RSBF 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 AntiDoping Rules..."

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

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The law applicable consists of the rules applicable at the time when the alleged ADRV was committed, i.e. on March 8, 2016. Hence, the IBU ADR 2014 as in force as of January 1, 2015 apply. They include the WADA Prohibited List which is in force at the date of the alleged ADRV, i.e. on March 8, 2016, which is the 2016 WADA Prohibited List.

2. AntiDoping Rule Violation: presence of a prohibited substance

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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.

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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.

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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*".

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The analysis of the Athlete's A-sample performed by the Oslo laboratory after March 8, 2016 shows the presence of meldonium. This analysis was conducted in conformity with the ISL.

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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.

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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.

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The Athlete, in her letter of April 11, 2016, did not challenge the finding of meldonium nor did she claim that a departure from the ISL occurred which reasonably could have caused the AAF actually detected.

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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.

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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. Furthermore, following the information issued by WADA on September 29, 2015 the athletes were informed about the inclusion of meldonium into the List.

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Although the Athlete claims to have followed the rules and considers herself "*innocent*" she admitted to have taken Mildronate which contains meldonium. 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.

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Based on the foregoing the Panel concludes that the mere presence of meldonium found in the Athlete's A-sample taken on March 8, 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

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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 ineligibility. The doping offence under consideration is the Athlete's first ADRV.

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The issue of intent was not raised by the Parties. Furthermore, the Panel will not proceed to examine the matter because 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

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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.*"

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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 she 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.

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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 identified Mildronate as the substance which contained the prohibited substance and explained how the substance entered her body. Therefore, she met the first requirement of Article 10.4 IBU ADR.

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The Athlete claims that the finding of meldonium in her sample collected on March 8, 2016 is the consequence of the administration of Mildronate, following the prescription of her doctor, from September until December 28, 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 December 28, 2015 still remained in her body on March 8, 2016 and, second, she actually stopped the administration of Mildronate because meldonium was included in the 2016 WADA Prohibited List from January 1, 2016.

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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.

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When the many AAFs for meldonium occurred in early 2016 the 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 dosages of meldonium would remain longer in the athlete's 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.

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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 organisations that are managing meldonium cases."*

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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.

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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 organisation 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.

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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 March 8, 2016 and the analysis revealed a concentration of 0,2 microgram/ml which is less than 1 microgram/ml. For such situation the Notice 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 Mildronate 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.

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Since the value of the specific gravity of the Athlete's sample was 1.008 no correction of the concentration of meldonium measured on her 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

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As the Athlete underwent an out-of-competition doping control Article 9 IBU ADR does not apply. 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 March 8 through March 29, 2016 shall be disqualified with all resulting consequences including forfeiture of any medals, points and prizes. Since the Athlete admitted to have used Mildronate after 29 September 2015 this conclusion is in line with the Notice which, for the Athlete's circumstances, provides:

"In the absence of other evidence of intake after 29 September 2015, no disqualification of results."

IV. Conclusions

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

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

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All competitive results obtained by the Athlete, if any, from March 8 through March 29, 2016 are disqualified. All medals, points, and prizes are forfeited.

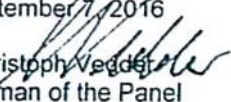
V. Decision


On these grounds the Panel decides:

1. Ms. Eva Toflavi is 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 Ms. Eva Toflavi bears no fault the otherwise applicable period of ineligibility is eliminated, according to Article 10.4 IBU ADR.
3. All competitive results obtained by Ms. Eva Toflavi, if any, from March 8 through March 29, 2016 are disqualified with all resulting consequences for medals, points and prizes.

The Anti-Doping Hearing Panel
September 7, 2016


Wolfgang Schobersberger
Member of the Panel


Christoph Veeder
Chairman of the Panel


Markus Manninen
Member of the Panel