

Doping Hearing Panel
of the
International Biathlon Union

The Doping Hearing Panel, sitting in the composition of Christoph Vedder (Chair), Edward G. Williams and Walter O. Frey, according to Rule 8.1.3 IBU Anti-Doping Rules, heard the case of Mr Dimitri Yaroshenko on May 9, 2009 at the headquarters of International Biathlon Union in Salzburg, Austria. The following persons were present:

- Ms Nicole Resch, General Secretary of IBU, representing IBU
- Mr Martin Kuchenmeister, Executive Director, representing IBU
- Mr Dimitri Yaroshenko
- Mr Tagir Samakayev, Legal Representative of the Athlete
- Mr Dmitry Loev, Representative of the Russian Biathlon Union, as observer
- Ms Natalia Maryanchik, Interpreter for Mr Yaroshenko

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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Mr Dimitri Yaroshenko (hereinafter referred to as "the Athlete"), an Athlete under the jurisdiction of the Russian Biathlon Union (hereinafter referred to as "RBU"), was tested by the International Biathlon Union (hereinafter referred to as "IBU") during the Biathlon World Cup at Östersund, Sweden, in December 2008. He was submitted to an in-competition test ("ICT") on 3 December 2008 and to an out-of-competition test ("OOCT") on 5 December 2008. Further to the test in Östersund in Mr Yaroshenko was submitted to an in-competition test (ICT) on 6 January 2009 during the IBU World Cup in Oberhof, Germany.

1. Analysis and Results Management of the Samples Collected in December 2008

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The A samples collected from the athlete in December 2008 were analysed in the WADA accredited laboratory in Lausanne, Switzerland on 10 December and the following days. The samples A 2283948 and A 2283558, taken on 3 December and 5 December 2008 respectively, showed the presence of recombinant EPO ("rEPO").

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The second opinion given by the director of the WADA accredited laboratory in Vienna, Austria, Dr. Günter Gmeiner, in a report dated 13 January 2009, confirmed the presence of rEPO.

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The results of the analysis of both A samples, together with the full package of documents, were reported by the Lausanne laboratory to the IBU on 28 January 2009.

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Upon receipt the IBU Anti-Doping Administrator, Ms. Nicole Resch, conducted the initial review of the two adverse analytical findings ("AAF") on 29 January 2009 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.

6

On the same day, by letter of 29 January 2009 which included the full documentation package, the Athlete, the RBU, the WADA and the RUSADA 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 (which shall be in the time period specified in the ISL), if the athlete or IBU chooses to request the analysis of the B sample (9 or 10 February 2009)
- 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 athlete's right to request copies of the A and B sample laboratory documentation package which includes information as required by the ISL as soon as those are available;
- g. the possibility to request a provisional hearing by sending a written statement until 7 February 2009.

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In a letter dated 31 January 2009, the Athlete declared

"I have never used forbidden substances. I cannot explain the presence of erythropoietin in my samples. During the entire training process I only used medication administered by the team physician".

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As the laboratory informed the IBU Anti-Doping Administrator that it was not possible to conduct the B sample analysis within the time frame of seven days provided for by IBU's Anti-Doping Rules ("ADR"), the time windows of 9 to 11 February or 10 to 12 February were offered to the Athlete. By letter of 2 February, the Athlete choose the second date for the B sample analysis.

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The opening and analysis of the B samples took place on 10 to 12 February in the WADA accredited laboratory in Lausanne. As representatives of the Athlete were present: Ms. Larissa Zhukovskaya, Mr. Nikolay Durmanov, Mr. Michael Geistlinger and Mr. Takhir Samankaev.

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The analysis of the samples B 2283948 and B 2283558, taken on 3 and 5 December 2008 respectively, revealed the presence of rEPO and, therefore confirmed the results of the A samples. The analysis results were reported to IBU under letter of 12 February 2009.

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By letter of 13 February 2009, sent by IBU's Anti-Doping Administrator from Pyeong Chang, Korea where the Biathlon World Championship took place, the Athlete, the RBU and the WADA were notified of the results of the B sample analysis. They were further informed that

"a disciplinary process before the IBU Doping Hearing Panel will be initiated, as soon as the complete documentation package from the laboratory will be received by IBU, according to Art. 8 of the IBU Anti-Doping Rules."

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As a consequence of the adverse analytical finding based on the A samples which had been reported to the IBU on 28 January and after the initial review made by the IBU Anti-Doping Administrator on 29 January 2009, by letter of 4 February, IBU already had notified the Athlete of his provisional suspension. He was informed that

"In case of non specified substances found in an A sample a provisional suspension is mandatory, Art. 7.6.1 of the IBU Anti-Doping Rules. The suspension shall take immediate effect. A provisional suspension means that you are barred temporarily from participation in any IBU competition."

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The complete documentation of the B samples analysis was sent by IBU to the Athlete and RBU under letter of 31 March 2009.

2. Analysis and Results Management of the Sample Collected in January 2009

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The A sample 2283592 collected from the athlete on 6 January 2009 in Oberhof was analysed in the WADA accredited laboratory in Châtenay-Malabry, France on 15 January 2009 and the following days and revealed the presence of recombinant EPO ("rEPO").

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The laboratory reported these findings to the IBU on 6 February 2009.

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Upon receipt the IBU Anti-Doping Administrator, Ms. Nicole Resch, conducted the initial review of the two adverse analytical findings ("AAF") on 7 February 2009 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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On the same day, by letter of 7 February 2009 which included the full documentation package, the Athlete, the RBU, the WADA and the RUSADA 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 (which shall be in the time period specified in the ISL), if the athlete or IBU chooses to request the analysis of the B sample (16-18 February 2009)
- 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 athlete's right to request copies of the A and B sample laboratory documentation package which includes information as required by the ISL as soon as those are available;

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By the same letter of 7 February 2009, as a consequence of the adverse analytical finding based on the A sample, IBU notified the Athlete of his provisional suspension based on the AAF resulting from the analysis of the samples collected on 6 January 2009.

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The laboratory proposed 16 to 18 February 2009 for the opening and conducting the B sample analysis. As the deadline to request the B sample analysis given to the Athlete expired on 10 February 2009 IBU extended the deadline twice, until 13 and 14 February 2009, respectively.

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By email of 14 February 2009 the Athlete waived his right to request the B sample analysis.

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By letter of 14 February 2009 the Athlete was informed by IBU that

"A disciplinary process before the IBU Doping Hearing Panel will be initiated according to Art. 8 of the IBU Anti-Doping Rules".

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 2009 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 2009, the decisions of the DHP may be appealed to IBU's Court of Arbitration or, according to Article 13.2.1 ADR 2009, if both parties agree, directly 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 6 February 2009 established the DHP according to Article 8.1.1 ADR 2009. It consists of a list of eight "*experts with experience in anti-doping*" (Article 8.1.1 ADR 2009) duly elected in accordance with the requirements of Article 8.1.1 ADR 2009.

24

Although the DHP is part of the institutional framework of the IBU and renders, in matters of alleged anti-doping rule violations, the final decisions for the IBU, it acts in complete independence of the IBU. According to Article 8.1.1 sentence 3 ADR 2009 "*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 2009 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 2009 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 before the Hearing

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By letter of 31 March 2009, according to Article 8.1.2 ADR 2009, the IBU referred the alleged anti-doping rule violation of Mr Yaroshenko to the DHP.

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The Chairman of the DHP, according to Article 8.1.3 ADR 2009, appointed Mr. Edward Williams, Mr. Walther Frey and himself as the particular Panel to hear the case of Mr Yaroshenko. As required by Article 8.1.3 ADR 2009 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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According to Article 8.1.4 ADR 2009 a hearing

“shall be held in Salzburg within 30 days after the IBU has sent the complete documentation to the federation of the athlete of the positive ... B sample from the laboratory”.

The 30 days time limit had started on 31 March 2009 after the IBU had sent the complete documentation to both the athlete and the RBU. The RBU requested to delay the hearing and the IBU agreed to postpone the hearing in order to facilitate a fair hearing for the Athlete. Accordingly, the date of the hearing was fixed for 8 May 2009.

29

Corrections of a “mistake” in the laboratory’s report concerning the athlete’s A samples collected on 3 and 5 December 2008 were provided by the Lausanne laboratory and sent to the DHP, the Athlete and the RBU on 6 May 2009.

3. The Hearing and the Submissions of the Parties

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The hearing was held on 9 May 2009 at the headquarters of IBU in Salzburg, Austria. The parties were present as indicated above. The RBU attended the hearing as an observer according to Article 8.1.5 ADR 2009. After the opening of the hearing the parties made their opening statements.

a. Submission of IBU

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IBU’s oral submissions with regard to the facts and the law were summarized in written form and handed over to the Panel and the Athlete. Based on the facts and the applicable rules the IBU submitted that

“the presence of a prohibited substance was detected at first in two of his A samples which were confirmed by the respective B samples, collected at the IBU WC 2 in Östersund in December 2008. A third sample was also reported as an adverse analytical finding with the presence of the same substance from a test that was conducted one month later at the WC 4 in Oberhof in January 2009. The athlete waived the B sample analyses for this sample.”

“The IBU requests a period of 4 years of ineligibility for the athlete Dmitri Yaroshenko for the following reasons:

- a. *Two samples were conducted in 2008. One sample was conducted in 2009. The athlete was NOT notified by the IBU about the AAFs from December*

2008 before the third sample was taken in January 2009 due to the fact that the IBU was only informed later, namely on 28th of January 2009. The three samples are therefore to be treated as a single first anti-doping rule violation, Art. 10 WADA Code.

- b. The IBU ADRs 2009 and the WADA Code 2009 are therefore applicable for all three samples.
- c. The occurrence of multiple violations may be considered as a factor in determining Aggravating Circumstances (Article 10.6).
- d. The following circumstances were considered before requesting a period of 4 years ineligibility: The same substance was found in three samples and reported by two independent WADA accredited laboratories. While the first two samples were collected in the beginning of December, more than 4 weeks later the same substance was detected in a sample collected at the WC in Oberhof in 2009. This proves that a doping plan or scheme was used when committing the ADR violation.
- e. The athlete did, until now, not provide any substantial assistance in discovering or establishing an ADR violation by another person."

IBU's prayers for relief were:

"The IBU therefore requires a suspension period of 4 years for Dmitri Yaroshenko."

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IBU, as already in the results management process, applied the ADR 2009 and the WADA Code 2009.

b. Submissions by the Athlete

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The Athlete's oral statement was summarized and, together with related documents, most in Russian language, submitted to the Panel and to the IBU in written form.

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The Athlete submitted that, according to the transitional rule, the anti-doping rules in force in December 2008 apply to his case.

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The Athlete acknowledged the facts and the results of the sample analysis.

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By waiving the B sample analysis on the samples collected in Oberhof the Athlete accepted the result of the A sample analysis but

"believed that the prohibited substance revealed in the "B" sample was the prolongation of his positive samples from Osternund."

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The Athlete submitted that the finding of a prohibited substance in the samples collected in Oberhof cannot be considered a second violation because the notification of the adverse analytical finding based on the samples collected in Osternund were notified on 29 January 2009 only. No further objections were made with regard to the AAF on the samples taken at Oberhof.

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The Athlete further submitted that some irregularities occurred in respect to the samples collected in December 2008. It was submitted that the process of analysing of the A samples took 49 days instead of about 10 and that the package of documentation was prepared in more than 1 1/2 month instead of the usual 14 days. In particular, the "typographic mistakes" corrected by the Lausanne laboratory in a later amendment to its report were causing doubts with regard to the results of the analysis.

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In particular, the Athlete relied on the submission that exceptional circumstances must be taken into consideration. The RBU had set up a commission to investigate the anti-doping rule violation of the Athlete. Part of the proceedings before that commission and its "decision" were submitted in order to defend the athlete's case.

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First, it was submitted that the Athlete, as the commission of RBU stated, bears no fault or negligence because he did not intentionally take any prohibited substance. He was informed by the team physician, Mr. Dimitriev, that the medication "Cardio-Protector", he was given by him, did not contain any prohibited substances.

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Secondly, it was submitted that the Athlete provided substantial assistance in discovering "anti-doping rule violations by athlete's support personnel (the physician)". According to this submission, before the commission set up by the RBU the athlete „declared his wish to provide substantial assistance in the investigation“ and declared that the physician of the Russian national biathlon team, Mr. Dimitriev, committed anti-doping rule violations. This was stated in the "decision" of the RBU commission.

42

It was further submitted that Mr Dimitriev declared before the RBU commission that he recommended and prescribed to the Athlete to take the product "Cardio-Protector" in November 2008. During the hearing before the Panel the Athlete confirmed that he had taken "Cardio-Protector" some days before 4 December 2008 and that the last injection was made on 30 November 2008 and, therefore, not mentioned on the Doping Control Form. The Athlete declared that "Cardio-Protector" may have been contaminated. The Athlete's submission was, that the product "Cardio-Protector" may have contained prohibited substances which have lead to the positive doping test. That is why the Athlete did not intentionally take any prohibited substance in order to get advantage in sport's competition.

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Furthermore, the Athlete submitted that, if the case may be, the period of ineligibility should start on the day of the sample collection which, according to him, was 3 December 2008.

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In summary the athlete submitted the following:

"Taking into consideration the above described:

- the Athlete's Yaroshenko D. substantial assistance in establishing Anti-Doping Rules violations by other persons (the physician) (Art. 4.6 of the IBU Disciplinary Rules, Art. 10.5.3 of the WADA World Anti-Doping Code);

- absence in the Athlete's conduct fault or negligence, that is the Athlete Yaroshenko D. bears no fault or negligence for the prohibited substance found in his sample (Art. 4.4 of the IBU Disciplinary Rules, Art. 10.5.1 of the WADA World Anti-Doping Code). Thus we consider it necessary to apply to this case of the Anti-Doping rules violation Art. 4.4 of the IBU Disciplinary Rules and Art. 10.5 of the WADA World Anti-Doping Code "Elimination or reduction of period of ineligibility based on exceptional circumstances".

c. In the Course of the Hearing

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In reply to the opening statement of the Athlete IBU submitted that the substantial assistance, if any, must have been provided to the IBU as the prosecuting Anti-Doping Organisation. Till today neither the Athlete nor the RBU provided a report of the proceedings before the RBU Commission to the IBU. In addition, according to IBU, the information provided before the DHP is neither sufficient in substance nor proved.

46

In the course of the hearing the Panel asked the Athlete to explain how the rEPO came into his body after having taken "Cardio-Protector". The Athlete submitted that "Cardio-Protector" had been injected five times in November 2008 (last injection on 26 November 2008) and five times in December 2008 (last injection on 27 December 2008).

47

The Athlete was given ample opportunity to provide substantial assistance in establishing an anti-doping rule violation committed by the team physician. The Panel heard some information about the hearing of the athletes Yaroshenko, Akhatova and Iourieva before the RBU commission. It was further submitted that Mr Dimitriev was dismissed from the team. But no information was given about an investigation or sanction against Mr Dimitriev.

III. In Law

1. Applicable Law

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As the introduction to the WADA Code in either version of 2004 and 2009 states the rules of the WADA Code are mandatory to the stakeholders, including the International Federations such as the IBU, and must be adopted, implemented and enforced by the International Federations. However, the WADA Code is not directly applicable to athletes in a particular case. Therefore, the rules and regulations of the IBU which are adopted in order to implement the WADA Code, *i. e.* IBU's ADR, in particular, apply exclusively.

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With regard to the first series of alleged anti-doping rule violations occurred in early December 2008 the ADR as in force at that time apply, *i.e.* the IBU's ADR as amended in September 2008 ("ADR September 2008"). This is confirmed by Article 19.7.1 ADR 2009. However, according to the transitional provision of that Article 19.7.1 ADR 2009, the ADR 2009 apply retroactively if the *lex mitior* principle¹ so requires. Hence, with regard to the anti-doping rule violation allegedly committed in December 2008 the Panel applies the ADR and IBU's Disciplinary Rules in force at the material time, except for those rules of the ADR 2009 which are more favourable to the Athlete as the predecessor rules. However, the Panel observes that the rules relevant to the case, in particular with regard to the anti-doping rule violation, the sanctions and the elimination or reduction of a sanction, in substance are the same in the ADR 2009, on the one hand, and the ADR September 2008 together with IBU's Disciplinary Rules as amended in September 2008 ("DR September 2008") which contain the rules on the sanctions, on the other hand. Prior to the entry into force of the ADR 2009 IBU's Anti-Doping Rules were divided between ADR September 2008 and DR September 2008.

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The Panel is of the view that that Article 8 ADR 2009 which provide the Athlete the right to a fair, independent and impartial hearing before the DHP is rule more favourable to the Athlete and, therefore, apply according to the *lex mitior* principle which is enshrined in Article 19.7.1 ADR 2009. Moreover, the Athlete accepted the hearing offered by IBU under Article 8 ADR 2009 without making objections. The same applies the results management process which was handled according to Article 7 ADR 2009, in particular the initial review and the notification.

51

With regard to the alleged anti-doping rule violation on 6 January 2009, according to Article 19.7 ADR 2009, the new anti-doping rules of IBU laid down in the ADR 2009 apply. Therefore, the anti-doping rule violation allegedly occurred on 6 January 2009 and the sanction thereof must be established in accordance with the ADR 2009.

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For the determination of a sanction to be imposed on the Athlete due to the test conducted in January 2009 the earlier anti-doping rule violations occurred in December 2008 shall be taken into account according to Article 19.7.4 ADR 2009 which reads:

¹ The *lex mitior* principle is a fundamental principle of law which applies generally and, within the framework of IBU's rules, is specifically mentioned in Article 19.7.1 ADR 2009. In the particular circumstances of the case to which, of course, the edition of IBU's rules apply which were in force in December 2008, the application of the *lex mitior* principle leads to the conclusion that those rules of the IBU ADR 2009 must be applied which are more favorable to the Athlete than the previous ones.

“Subject always to Article 10.7.5, anti-doping rule violations committed under the rules in force prior to the Effective Date [i.e. 1 January 2009] shall be taken into account as prior offenses for purposes of determining sanctions under Article 10.7.”

This means that the effects of the December anti-doping rule violations in combination with January anti-doping rule violation are to be considered under the new rules, *i.e.* Article 10.7. ADR 2009. However, the AAFs on the samples collected in December 2008 must constitute anti-doping rule violations under the rules in force in December 2008.

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The athlete did not raise any objection with regard to the proceedings after IBU had received the laboratory report, including the results management and the B samples analysis, and before the DHP.

2. Anti-Doping Rule Violation

a. Samples Collected on 3 and 5 December 2008

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The analysis of the athlete's B samples collected on 3 and 5 December 2008 revealed the presence of rEPO. "rEPO" is a prohibited substance on the WADA Prohibited List. This constitutes a doping offense in the sense of Rule 1.2.2 ADR September 2008. No intent, fault or negligence or knowing use on the athlete's part must be demonstrated. In the particular case, according to Rule 1.2.2. (a) ADR September 2008, sufficient proof has been established by the presence of rEPO in the B samples, which confirmed the results of the A samples. The athlete did not object the results of the sample analyses.

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According to Rule 3.1.1 ADR September 2008, WADA-accredited laboratories are deemed to have conducted the analysis and custodial procedures in accordance with the ISL. This presumption and, hence, the reliability of the results can be rebutted by the Athlete by establishing that, first, a departure from the ISL occurred which, second, could reasonably have caused an adverse analytical finding.

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The alleged irregularities, submitted by the Athlete, however, are not of a kind to be able to cause a false positive. Furthermore, the expert testimony of Dr. Gmeiner confirmed to the comfortable satisfaction of the Panel that the errors which were corrected later do not affect the original results of the analysis and, hence, the adverse analytical finding. Moreover, these corrections pertain to the A samples analysis, exclusively.

57

The Panel had heard the expert evidence of Dr. Günter Gmeiner, Director of the WADA accredited laboratory in Vienna, Austria, during the hearing in the case of Ms Iourieva. According to his testimony the Vienna laboratory is a WADA accredited laboratory specialized for EPO research. In particular, Dr. Gmeiner explained the mistakes corrected at a later stage. According to his testimony, the errors, which were later corrected by the laboratory, only appear in the package of documentation which was prepared after obtaining the results from the analysis. The original results are taken from the raw data obtained from the analysis directly. These data unambiguously reveal the presence of rEPO in the athlete's samples.

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Therefore, the Athlete committed an anti-doping rule violation according to Rule 1.2.2 ADR September 2008.

b. Samples Collected on 6 January 2009

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The Athlete had waived the B sample analysis with regard to his samples taken on 6 January 2009 in Oberhof and accepted the adverse analytical finding based on the relevant A sample. No defense specific to the adverse analytical finding concerning the January test was

submitted. Furthermore, no specific defense at all was submitted with regard to the adverse analytical finding based on the test conducted on 6 January 2009.

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Therefore the Athlete committed an anti-doping rule violation according to Article 2.1 ADR 2009.

3. Elimination or Reduction of the Sanction

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The Athlete chiefly submitted that the sanction must be eliminated or reduced due to exceptional circumstances. As the Panel already had stated in par. 49 the rules on exceptional circumstances are identical in substance under both the old and the new IBU rules.

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As provided in Rule 4.4 DR September 2008 a sanction can be eliminated if the Athlete establishes that he bears no fault or negligence. As a prerequisite the Athlete must establish "*how the Prohibited Substance entered his system*". The Athlete failed to establish and, hence, did not discharge his burden of proof to demonstrate how rEPO came into his body. The "Cardio-Protector" which he admittedly had taken some days before the doping control does not contain rEPO or related substances. Furthermore, none of the instances contained in the Comments to Article 10.5.2 WADA Code 2003 have been involved or proved.

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According to Rule 4.5 DR September 2008 the sanction may be reduced if the Athlete would have had established that he bears no significant fault or negligence. In connection with the general obligation of the Athlete laid down in Rule 1.2.3 (a) ADR September 2008 which reads

"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."

Rule 4.5 DR September 2008, as explained in the Comment to Article 10.5.2 of the WADA Code 2003, requires "truly exceptional" circumstances in order to be applicable.

64

This Comment which is to be taken in consideration in interpreting IBU's relevant anti-doping rules indicates illustrative instances none of which has been submitted or proved by the Athlete. No other similar truly exceptional circumstances which may indicate that the Athlete bears no significant fault or negligence have been established before the Panel.

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The Athlete further submitted to have provided substantial assistance. Rule 4.6 DR September 2008 requires that the substantial assistance provided to the IBU or any other Anti-Doping Organization must have resulted in discovering or establishing an anti-doping rule violation committed by another person. The Panel leaves the question open whether or not the commission set up by RBU or RBU itself is an Anti-Doping Organization in the sense of the rules, in the case of an anti-doping proceedings initiated and conducted under the jurisdiction of IBU.

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In any event no assistance has been given to IBU prior to the hearing nor has the Athlete established before the Panel that he had provided substantial assistance before the commission of RBU which, in fact, has lead to establish an anti-doping rule violation committed by the team physician, Mr Dimitriev. Mere allegations without proof have been submitted to the Panel. No information was given in relation to any anti-doping proceedings or sanctions against Mr Dimitriev or other athletes.

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Although, during the hearing, the Panel gave the Athlete ample opportunity to provide relevant information the Athlete did, until now, not provide any substantial assistance which resulted in discovering or establishing an anti-doping rule violation by another person. The Panel observes that the written explanations submitted during the hearing before the Panel are almost identical in substance and even in wording for Ms Jourieva, Ms Akhatova and Mr Yaroshenko against whom parallel anti-doping proceedings were before the Panel. [Although it is outside its jurisdiction the Panel notes, as a result of the identical defense heard in the cases of all three athletes Ms Jourieva, Ms Akhatova and Mr Yaroshenko, that it is hard to escape the conclusion that systematic and deliberate anti-doping rule violations and attempts to evade the consequences of those violations took place].

4. Single First Anti-Doping Rule Violation According to Article 10.7.4 ADR 2009

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The athlete was tested on two occasions: on 3 December and 5 December 2008 and on 6 January 2009. Both the A and B samples collected in December 2008 and the A sample collected in January 2009 revealed the presence of rEPO.

69

The adverse analytical findings based on the samples collected on 3 and 5 December 2008, respectively, constitute two separate anti-doping rule violations. However, according to Rule 5.1 DR September 2008, the second of these anti-doping rule violations, for the purpose of the imposition of the sanction, can be considered as a second violation only if the Athlete had received notice of the first violation before the second one occurred. IBU notified the Athlete of both adverse analytical findings by letter of 29 January 2009 whereas the second violation already had taken place on 5 December 2008. Therefore, the two anti-doping rule violations committed by the athlete on 3 and 5 December 2008, respectively, are considered a single first anti-doping rule violation according to the Rule 5.1 DR September 2008.

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The anti-doping rule violation committed by the athlete on 6 January 2009 could be considered a second violation in relation to the single first violation in December 2008. According to Article 10.7.4 ADR 2009, anti-doping rule violations committed before 1 January 2009 shall be taken into account as prior offenses for purposes of determining sanctions under Article 10.7, *i.e.* the sanction for the anti-doping rule violation committed on 6 January 2009 under the new rules (see above par. 51, 52). This leads to the conclusion that, in the Athlete's case, Article 10.7 ADR 2009 applies to his anti-doping rule violations committed in December 2008, which constitutes a single first anti-doping rule violation, and in January which may constitute a second anti-doping rule violation.

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According to Article 10.7.4. ADR 2009 an anti-doping rule violation will be considered a second violation under the condition that the athlete had been notified of the prior violation before the second one was committed. In the case before the Panel the Athlete was informed about the previous anti-doping rule violation on 29 January 2009. Therefore the doping offence committed on 6 January 2009 does not constitute a second anti-doping rule violation in the sense of Article 10.7.1 ADR 2009.

5. Aggravating Circumstances

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However, those multiple anti-doping rule violations may be considered, according to Article 10.7.4. ADR 2009 which is applicable by virtue of Article 19.7.4. ADR 2009, as a factor in determining aggravating circumstances under Article 10.6 ADR 2009.

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Article 10.6. ADR 2009 allows the imposition of a period of ineligibility greater as the standard sanction, which is a two year ban, increased up to a maximum of 4 years. The presence of aggravating circumstances must be established by the IBU. The Comment to Article 10.6 ADR 2009 lists examples for aggravating circumstances such as the commission of an anti-doping rule violation „*as part of a doping plan or scheme*“. IBU submitted that „*a doping plan or scheme was used when committed the ADR violation*“. However, IBU did not establish to

the comfortable satisfaction of the Panel that the Athlete's anti-doping rule violations are part of systematic doping.

74

Although the Athlete committed a multiple anti-doping rule violation according to Article 10.7.4 ADR 2009 the Panel, having duly taken into consideration all relevant facts and circumstances of the Athlete's case, concludes that no aggravating circumstances are present. The Athlete admitted the anti-doping rule violation occurred on 6 January 2009 by waiving the B sample analysis. This attitude makes it possible not to apply Article 10.6 ADR 2009. Furthermore, the Panel observes that Article 10.6 ADR 2009 dealing with aggravating circumstances had no predecessor rule.

6. Sanction According to Rule 7.7.1 DR September 2008 and Article 10.2 ADR 2009

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For anti-doping rule violations which consist in the presence of a prohibited substance under Rule 1.2.2 DR September 2008 and Article 2.1 ADR 2009 a sanction of two years is provided for by Rule 7.7.1 DR September 2008 and Article 10.2 ADR 2009.

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The commencement of the period of ineligibility is to be determined according to the rules applicable to the first of the three violations, *i.e.* the ADR and DR September 2008. According to Rule 7.7.5 DR September 2008 the period of ineligibility begins on the day when the sample on which the sanction is based had been collected. The Panel considers the first sample collection as relevant for the commencement of the sanction and, therefore, fixes the beginning of the two years period on 3 December 2008.

IV. Conclusions

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The samples taken from Mr Yaroshenko on 3 and 5 December 2008 and on 6 January 2009, respectively, revealed the presence of the prohibited substance of rEPO. According to Article 19.7.4 and 10.7. ADR 2009 Mr Yaroshenko committed a single first anti-doping rule violation.

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The Panel did not find exceptional circumstances in the sense of Rules 4.4, 4.5, and 4.6 DR September 2008 and Articles 10.5.1, 10.5.2 and 10.5.3 ADR 2009 which could justify an elimination or reduction of the regular sanction. The Panel found no aggravating circumstances according to Articles 19.7.4, 10.7.4, and 10.6 ADR 2009.

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Therefore, according to Rules 7.7.1 DR September 2008 and Article 10.2 ADR 2009 Mr Yaroshenko must be declared ineligible to compete for a period of two years commencing on 3 December 2008.

V. Decision

On these grounds the Panel decides:

Mr Yaroshenko is ineligible to compete for a period of two years commencing on 3 December 2008.

The Doping Hearing Panel

11 August 2009

Christoph Vedder
Chairman of the Panel

Edward G. Williams

Walter O. Frey

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