

27. Juil 2009 15:24 Tribunal Arbitral du Sport /

N°5959 P. 2/32



Tribunal Arbitral du Sport  
Court of Arbitration for Sport

CAS 2008/A/1744 UCI v. Schachl & ÖRV

**AWARD**

rendered by

**COURT OF ARBITRATION FOR SPORT**

sitting in the following composition:

President: Mr. Romano Subiotto QC, Solicitor-Advocate, Brussels, Belgium and  
London, United Kingdom

Arbitrators: Mr. Beat Hodler, Attorney, Berne, Switzerland  
Mr. Ulrich Haas, Professor, Zurich, Switzerland

**INTERNATIONAL CYCLING UNION**, Aigle, Switzerland  
Represented by Mr. Philippe Verbiest, Leuven, Belgium

-Appellant-

and

**MS. MONIKA SCHACHL**, Mondsee, Austria  
Represented by Dr. Karlheinz Demel, Vienna, Austria

- First Respondent-

and

**ÖSTERREICHISCHER RADSPORT VERBAND**, Vienna, Austria  
Also represented by Dr. Karlheinz Demel, Vienna, Austria

- Second Respondent-

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## AWARD

### I. PARTIES

1. The International Cycling Union ("UCI"), the appellant, is an international sporting federation and the world governing body for cycling, headquartered in Aigle, Switzerland. The UCI oversees competitive cycling events internationally and maintains a calendar of races in which professional cyclists compete. Among the cycling races administered by the UCI is the Sparkassen Giro (the "Race"), a two-day stage race conducted in and around Bochum, Germany. The 2008 Race took place on August 2 and 3. Part 14 of the UCI Cycling Regulations are the Anti-Doping Rules of the UCI (the "UCI Rules"). The UCI Rules implement the World Anti-Doping Code (the "WADA Code"), but are not in all instances identical to the WADA Code, and, in important instances applicable in this case, contain supplementary provisions.
2. Monika Schachl ("Schachl"), the first respondent, is an Austrian professional cyclist and the 2008 Austrian women's road cycling champion. Schachl is a registered member of and holds a UCI license through her national cycling federation, the Österreichischer Radsport Verband ("ÖRV", and together with Schachl, the "Respondents"). Schachl competed in the 2008 Race on behalf of her professional team, Uniqqa. As Austrian national champion, Schachl competes in professional races, such as the 2008 Race, and occasionally wears the Austrian national champion's jersey rather than her professional team's jersey. She also qualified for and competed in the Beijing 2008 Olympic Games in August 2008.
3. The ÖRV, the second respondent, is the national cycling federation of Austria. The ÖRV is a member of the UCI. Under the UCI Rules, the ÖRV has authority to issue licenses to its registered members that permit its members to participate in UCI calendar events.

### II. PROCEDURAL BACKGROUND

4. Following a missed anti-doping test by Schachl at the 2008 Race and an investigation by the UCI, addressed in more detail in Section V of this Award, the UCI wrote to the ÖRV by letter dated August 27, 2008, and requested that the ÖRV initiate proceedings against Schachl for violation of the UCI Rules.
5. The ÖRV referred the prosecution of Schachl to the National Anti-Doping Agency of Austria GmbH ("Austrian NADO"). On September 18, 2008, the Legal Commission of the Austrian NADO conducted a hearing to determine whether Schachl had breached anti-doping rules. The Legal Commission issued its decision at the close of that hearing, finding that Schachl had not committed an anti-doping

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rule violation. By order dated November 30, 2008, the Legal Commission issued the formal reasons for its decision (the "NADO Decision"), which was then transmitted with the case file to the UCI.

6. The UCI filed a Statement of Appeal with the Court of Arbitration for Sport ("CAS") against the NADO Decision by letter dated December 19, 2008. Following extensions granted by the CAS, the UCI filed its Appeal Brief by correspondence dated January 26, 2009. The Respondents filed a joint Answer by letter dated February 18, 2009.
7. In its Statement of Appeal the UCI nominated Mr. Beat Holder as arbitrator. By letter dated January 29, 2009, the Respondents jointly nominated Mr. Ulrich Haas as arbitrator. By letter dated March 9, 2009, counsel to the CAS advised the parties that the President of the CAS Appeals Arbitration Division had nominated Mr. Romano Subiotto QC as President of the Panel. The Panel was provided with a copy of the file by letter dated March 9, 2009.

### III. INTERLOCUTORY PROCEDURAL ISSUES

8. Prior to the submission of the UCI's Appeal Brief, by letter dated December 30, 2008, the ORV wrote to the CAS and requested that these proceedings take place in German. By letter dated January 8, 2009, the UCI wrote to the CAS withholding its consent to these proceedings being conducted in a language other than French or English. By letter dated January 15, 2009, the President of the CAS Appeals Arbitration Division issued an order confirming English to be the language of these proceedings under Rule 29 of the Statutes of the Bodies Working for the Settlement of Sports-related Disputes, which govern proceedings before the CAS, including these proceedings (the "CAS Rules").
9. By letter dated February 27, 2009, the Respondents requested that a hearing be conducted in this matter. The UCI advised in correspondence dated March 3, 2009 that though it did not consider a hearing in these proceedings to be necessary, it would not object. A hearing attended by the UCI and the Respondents took place on May 11, 2009 in Lausanne, Switzerland.

### IV. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

10. Rule 47 of the CAS Rules provides, in part, as follows:

*Rule 47 Appeal*

*An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the*

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*said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body.*

11. Discussed in more detail, below, is the fact that the UCI Rules apply to these proceedings. Article 224 and 225 of the UCI Rules delegate to the national sporting federation (in this case, ÖRV) the obligation to prosecute cyclists for alleged anti-doping rule violations that occur during the course of UCI organized events.<sup>1</sup> As previously noted, at the conclusion of its investigation the UCI wrote to the ÖRV and requested that it initiate proceedings against Schachl for violation of the UCI Rules. In accordance with its obligations as a member of the UCI, the ÖRV instructed the Austrian NADO to commence proceedings against Schachl, and the Austrian NADO issued its NADO Decision as authorized by Article 242 of the UCI Rules.<sup>2</sup> Articles 280 and 281 of the UCI Rules<sup>3</sup> permit the UCI to appeal decisions issued by National Anti-Doping Organizations under Article 242 to the CAS. As the UCI Rules permit the UCI to lodge appeals, such as the present case, with the CAS, this Panel has jurisdiction to arbitrate this appeal.
12. Article 284 of the UCI Rules mandates that the UCI lodges any appeal against the decision of a National Anti-Doping Organization within one "month of receipt of the full case file from the hearing body."<sup>4</sup> The UCI received a copy of the NADO Decision and the case file by email dated December 2, 2008.<sup>5</sup> The UCI submitted its Statement of Appeal against the NADO Decision by letter dated December 19, 2008. As the CAS received the UCI's appeal within one month, the UCI's appeal is admissible.
13. Rule 58 of the CAS Rules provides as follows.

*Rule 58 Law Applicable*

*This Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.*

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<sup>1</sup> See Articles 249 and 251 of the 2009 UCI Rules.

<sup>2</sup> See Article 272 of the 2009 UCI Rules.

<sup>3</sup> See Articles 329 and 330 of the 2009 UCI Rules.

<sup>4</sup> See Article 334 of the UCI Rules.

<sup>5</sup> Exhibit 16 to the UCI's Appeal Brief.

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14. The Austrian NADO issued its decision, against which this appeal is brought, pursuant to the WADA Code. Although the UCI maintains separate anti-doping rules from the WADA Code, and which contain substantive differences from the WADA Code, the Austrian NADO reasoned that, "*The UCI, the ÖRV and the accused... have accepted the WADC... It follows that the WADC is applicable in the present instance to ascertain and assess whether the accused was in breach of the anti-doping provisions.*" However, the Austrian NADO also noted that, "*The UCI has also accepted the WADC so that, in the view of the Legal Commission, in the event of any existing or acknowledged contradictions or gaps between the WADC and the "New UCI anti-doping examination regulations (AER)" of the UCI the WADC must primarily be consulted to clarify and resolve such contradictions or gaps or to verify and take decisions in the proceedings concerned.*"
15. This Panel takes note of the fact that the UCI has proclaimed its implementation of the WADA Code. The Introduction of the UCI Rules states that, "*the UCI Management Committee decided to accept the World Anti-Doping Code and to incorporate the Code in UCI's Regulations.*"<sup>6</sup> Moreover, other provisions within the UCI Rules are indicative of the UCI's intention to have the UCI Rules adhere to WADA Code and its affiliate protocols, such as the WADA International Standard for Testing ("IST").<sup>7</sup>
16. However, a close comparison between the UCI Rules on the one hand and the WADA Code and the IST on the other hand reveals that in fact a certain number of substantive differences exist (discussed in greater detail below). Rule 58 of the CAS Rules is mandatory: it obliges the Panel to apply the set of rules chosen by the parties to a dispute. All UCI license holders, such as Schachl, have agreed to and are bound by the UCI Rules.<sup>8</sup> In addition, as explained above, these proceedings were initiated by the UCI through its right under the UCI Rules to obligate national sporting federations to institute proceedings against their members for anti-doping rule violations. As the Panel is obligated to decide these proceedings according to the rules selected by the parties, namely the UCI rules, and in view of the fact these proceedings were initiated under the UCI Rules, the Panel finds that the UCI Rules apply to this appeal. To the extent that there are substantive differences between the UCI Rules and the WADA Code, contrary to the finding of the Austrian NADO, the UCI Rules must apply.

<sup>6</sup> See Article 1 of the Introduction of the 2009 UCI Rules.

<sup>7</sup> Article 96, UCI Rules: "*The Anti-Doping Commission of the UCI shall issue Procedural Guidelines for different aspects of Testing conducted under these Anti-Doping Rules. Procedural Guidelines shall be in conformity with these Anti-Doping Rules and in substantial conformity with the International Standards for Testing...*" [emphasis added]. See also Article 121 of the 2009 UCI Rules.

<sup>8</sup> Article 1, UCI Rules.

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17. However, where ambiguity or *lacunae* exist in the UCI Rules, or when interpreting the UCI Rules, it is open to the Panel to consider the persuasive value of other sports laws and jurisprudence decided under other sports laws. Indeed, the broad implementation of the WADA Code by sports organizations around the world has given rise to a rich *lex sportiva* of statutes and jurisprudence that is frequently cited by sports arbitration panels.<sup>9</sup> In order to give effect to the intention of the UCI Management Committee in enacting the WADA Code, as described in the Introduction of the UCI Rules, quoted above, and so as to obtain the benefit of other arbitral decisions based on similar sporting regulations, for the purposes of interpreting the UCI Rules, the Panel attaches significant persuasive value to the WADA Code, the IST, and decisions from other arbitration panels rendered under those or similar rules.
18. The UCI Rules applicable at the time of the alleged infraction are a modified version of the rules that entered into force on August 13, 2004, known as version "E0108". All references in this Award to the UCI Rules are to the E0108 UCI Rules. A new set of UCI Rules became effective as of January 1, 2009 (the "2009 UCI Rules"); for the convenience of the reader, this Award also makes parallel citation to the corresponding article in the 2009 UCI Rules.
19. With one exception, Article 373(a) of the 2009 UCI Rules states that they are not to apply retrospectively to cases pending or brought prior to January 1, 2009 under the predecessor UCI Rules (*i.e.*, the E0108 UCI Rules). That exception is where the principle of *lex mitior* is applicable. Accordingly, to the extent that the 2009 UCI Rules afford Schachl more lenient treatment, the Panel will apply the 2009 UCI Rules instead of the E0108 UCI Rules.

## V. FACTS

20. The parties are in substantial agreement about the facts that give rise to this appeal.
21. Over a hundred professional cyclists started the 2008 edition of the women's Race, 86 of whom crossed the finish line at the close of the Race's second and final stage on August 3, 2008. Of the 86 finishers, the first 77 cyclists finished the final stage together as a single peloton. Each rider within the peloton received the same finishing time of 2:13:35. Schachl wore bib 95 during the Race and was among the athletes who crossed the finish line in the main peloton. She finished in 72<sup>nd</sup> position.

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<sup>9</sup> See CAS 2002/O/373 *Canadian Olympic Committee & Beekie Scott v. IOC*, at para. 14 ("*CAS jurisprudence has notably refined and developed a number of principles of sports law, such as the concepts of strict liability (in doping cases) and fairness, which might be deemed part of an emerging 'lex sportiva'.*")

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22. Mr. Ingo Rees ("Rees") had been appointed and served as the Anti-Doping Inspector at the 2008 Race.<sup>10</sup> Consistent with his obligations as Anti-Doping Inspector, Rees selected a group of five female cyclists for anti-doping testing, including Schachl.<sup>11</sup> Schachl contests neither the validity of Rees's appointment as Anti-Doping Inspector, his right to select her for anti-doping testing, nor the fact that Rees selected her for anti-doping testing.
23. According to the post-race report prepared by Rees, as well as the No-Show Report he also prepared, the Doping Control Station was 600 meters from the Race's finish line. Rees posted signs that were approximately the size of A4 paper at the finish line and at the Doping Control Center, indicating which cyclists would be required to undergo anti-doping controls.<sup>12</sup> Among the athletes identified on these signs was the cyclist wearing bib number 95, Schachl. Rees also posted other signs indicating the location of the doping control station.
24. In addition to posting signs with the names of cyclists required to report for testing, Rees appointed chaperones to notify cyclists in person of their obligation to report for anti-doping control.<sup>13</sup> During the course of the UCI's investigation of the events that occurred at the 2008 Race, Rees advised the UCI that he had been obligated to train the chaperones at the men's Race, because they had never before worked as anti-doping chaperones.<sup>14</sup> It is not clear from the documents or from the hearing what training Rees provided to the chaperones for the women's race, or those chaperones' level of experience in identifying and escorting athletes for doping control. In any event, Mrs. Anja Müller ("Müller") was one of the chaperones appointed by Rees for the women's Race. Rees assigned Müller to notify Schachl of her obligation to report for anti-doping control at the Race's finish line.

<sup>10</sup> See Article 123 of the UCI Rules.

<sup>11</sup> Rees selected the stage winner in addition to four other cyclists, identified by their bib numbers. Appendix 2 to the UCI Rules specify at Article IV that for stage races, the general rule is that the inspector is to test the stage winner, the leader on general classification, and "two riders selected at random by the inspector." However, Doping Control Inspectors such as Rees, "may test other Riders that he finds at the place and time of the test he was appointed for." See Article 121 of the UCI Rules, and Articles 135 of the 2009 UCI Rules.

<sup>12</sup> Exhibits 10 and 11 to the UCI's Appeal Brief.

<sup>13</sup> Anti-Doping Inspectors are required to appoint chaperones for every rider to be tested under Article 129 of the UCI Rules and Article 178 of the 2009 UCI Rules.

<sup>14</sup> Exhibit 20 to the UCI's Appeal Brief, email of Ingo Rees of August 7, 2008 ("No. 3 I started to test the Men Elite riders at 18:00 H, but due to the fact that I have brand new Chaperons (never done this before, also young guys) I need 45 minutes before the finish to explain the job of a Chaperon.").

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25. According to Rees, at the Race's end *"the chaperones positioned very well just 150 meters after the finish line. The riders cross the finish line in a big pack so that she [Müller] can't see all the members."*<sup>15</sup> Despite the fact that Schachl was uniquely dressed among all cyclists that day, wearing the jersey of the Austrian national champion, Müller could not find Schachl. As a result, Müller did not advise Schachl of the need to report to the Doping Control Center. As Müller noted on the day of the race, *"I could not find the rider. She arrived in a very large group. I could not find the team vehicle either. After making enquiries at the start and finish and consulting the anti-doping inspector, Mr Rees, I tried to find the rider in the showers but could not find her there either."*<sup>16</sup> Rees noted Müller's inability to find Schachl in his Report of the Anti-Doping Inspector, *"The chaperon couldn't find the rider after the rider crossing the finish line. After the chaperon contact me, he tried to find the rider or the team manager. She couldn't find neither the rider nor the team manager, because the team already left the venue."*<sup>17</sup>
26. According to testimony at the hearing, Müller was indeed in a good position to spot Schachl, as she was stationed at an exit to the racecourse. The 2008 Race organizers, however, created two exits to the final stage, one at 150 meters from the finish line, where Müller was waiting, and one at 400 meters from the finish line, where Schachl exited the racecourse.
27. Schachl testified before the Austrian NADO and at the hearing that at the end of the Race, having crossed the finish line in the main peloton, she *"continued to slow down for another 500 meters or so and then went to the showers where I wanted to meet my trainer. I did not see any chaperones at the entrance to the finishing line, but I did not make a particular search for them. I assumed that I would be informed by a chaperone of any doping control that I was required to undergo... I did not see any chaperone near me and when I took a shower I did not see a chaperone there either. I did not know that Mrs Anja Müller had been allocated to me as a chaperone."*<sup>18</sup>
28. Schachl met her trainer, Mr. Gerhard North ("North"), at the showers provided for the cyclists' use. North drove Schachl's Team Uniqqa car during the race, and after the race parked that car outside the showers, away from the other teams' cars. North's car was identifiable by the prominent logo and other conspicuous promotional insignia on the car's exterior. According to North, *"While I was*

<sup>15</sup> Exhibit 20 to the UCI's Appeal Brief, email of Ingo Rees of August 6, 2008.

<sup>16</sup> Exhibit 9 to the UCI's Appeal Brief, the Supplementary Report Form completed by Anja Müller on August 3, 2008.

<sup>17</sup> Exhibit 6 to the UCI's Appeal Brief, the Report of the Antidoping inspector, completed by Ingo Rees on August 5, 2008.

<sup>18</sup> Exhibit 13 to the UCI's Appeal Brief, the tape recording of the Austrian NADA hearing, translation page 3.

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*waiting there no chaperone nor any staff member of the organizer or the UCI Commissaire came to the shower area and asked me where Mrs Schachl was.*"<sup>19</sup>

29. Having failed to win a prize and having showered, 45 minutes after finishing the race Schachl and North began the drive home to Austria. According to Schachl, she was eager to leave for Austria as soon as possible because of the distance of the drive and because of her obligation to work the next day.<sup>20</sup> Sometime around or after the time of Schachl's and North's departure, Müller reported her inability to locate Schachl to Rees. According to Rees, he tried to contact Schachl by telephone at or about 2:25 p.m., approximately one hour after the 2008 Race's end, but the phone number Rees dialed was not in service. Rees then contacted an Austrian official, who in due course provided Rees with Schachl's correct phone number. Rees phoned Schachl at or about 3:17 p.m. and advised her of the fact that she had missed an anti-doping control test.<sup>21</sup> According to the testimony of Schachl, North and Rees, after Rees' phone call North and Schachl immediately returned to the site of the Race and arrived at the doping control center at or about 4:30 p.m., approximately three hours after the conclusion of the stage.
30. Upon her arrival at the Doping Control Center, Schachl requested that an anti-doping test be administered. Rees refused to administer a test. According to Rees, he explained that he could not administer the test because Schachl had not arrived at the Doping Control Center in time. In addition, the female doctor appointed to supervise the collection of urine samples from women had left the Doping Control Center, which would presumably complicate or make impossible the sample collection process.<sup>22</sup> However, Rees also advised the UCI in answer to questions that he could not have performed a doping control test on Schachl even if he had wanted to. Set out below are the UCI's email questions to Rees,<sup>23</sup> and his answers:

Q. If Schachl offered to be tested, why did you not test her?

A. *"I don't test the rider in fact of three Problems:*

*1: no Chaperon was available and the Doctor was also not longer reachable*

<sup>19</sup> Exhibit 13 to the UCI's Appeal Brief, the tape recording of the Austrian NADA hearing, translation page 5.

<sup>20</sup> Exhibit 13 to the UCI's Appeal Brief, the tape recording of the Austrian NADA hearing, translation page 3; Exhibit 20 to the UCI's Appeal Brief, email from Ingo Rees of August 6, 2008.

<sup>21</sup> Exhibit 20 to the UCI's Appeal Brief, email from Ingo Rees of August 6, 2008.

<sup>22</sup> Exhibit 20 to the UCI's Appeal Brief, email from Ingo Rees of August 7, 2008

<sup>23</sup> The questions set out in this Award are paraphrased from the emails of Davide Delfini of the UCI dated August 6 and August 7, 2008, enclosed as Exhibit 20 to the UCI's Appeal Brief.

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*2: I prepared the Doping control for the Men Elite. I didn't have enough time to do the control. (She can't go to toilet directly)*

*[3]: I ordered the Doping Material for the control from the National Federation but on Sunday I missed all Materials, due to the fact that the National Post need to long to send the Samples to the organizer. So I used the rest of my stock. I need 3 Samples for the women and also 3 for the men. I have had just 8 Samples for the complete control. That means that I had just the minimum of samples."*

Q. What time did you start to test the male riders?

A. *"I started to test the Men Elite riders at 18.00 H, but due to the fact that I have brand new Chaperons (never done this job before, also young guys) I need 45 Minutes before the finish to explain the job of a Chaperon. As well I had a briefing with the doctor for the men riders. And at least I had to fill in the notice to the rider."*

Q. When Schachl came back to the Doping Control Center, did you not still have one kit available to administer a test, even though no female doctor or chaperone was present?

A. *"I didn't have an extra kit, because one of the women riders broken down a bottle, after she lost the lid of the A-Sample (the black ring in the bottle fall out of the lid). That means I had just four kits for the men test."*

31. Finally, after refusing to administer anti-doping control on Schachl, Rees commented that Schachl had only been selected as a substitute for doping control; had she attended for doping control at the correct time, she would have been excused and not tested.

VI. SCHACHL'S DEFENCE, THE NADO DECISION AND THE UCI'S POSITION

32. Schachl's defence before the Austrian NADO is identical to the defence she relies upon in the present proceedings.
33. Schachl's principle submission is that a letter from the UCI, dated April 9, 2008, and addressed to all UCI race organizers (the "Letter") had the effect of modifying the UCI Rules in such a way that notification of cyclists to report for anti-doping control would henceforth take place only through the use of authorized chaperones. Other ways of notifying riders (such as race radio) were no longer acceptable. Schachl's interpretation of the Letter's effect and meaning was endorsed by the Secretary-General of the ORV in oral testimony before the Austrian NADO and at the hearing.

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Schachl submits that the failure of the chaperone to notify her at the end of the Race constitutes a "*compelling justification*" for her not having attended the anti-doping control.

34. Schachl herself was not an addressee of the Letter, and she did not read its contents prior to the 2008 Race. In support of her "*compelling justification*" argument, Schachl also argued that her coach, North, had been advised of the same rule change by UCI race organizers at other UCI events, and that she had relied on her coach. She additionally submitted that it would be unjust to suspend her for missing an anti-doping test when (1) Rees unjustifiably refused to administer an anti-doping test, and (2) Rees did not intend to test her as she had only been designated as a substitute for doping control.
35. In the alternative, if she is found not to have a compelling justification, Schachl submits that she failed to appear for doping control without having committed significant fault or negligence under Article 265 of the UCI Rules,<sup>24</sup> and that her period of ineligibility should be reduced to a one year suspension.
36. The NADO Decision, which applied the WADA Code and the IST to the dispute, accepted Schachl's argument about the applicable method for notifying cyclists of their obligation to report for doping control.

*According to the international standards for WADC tests, the appropriate anti-doping organization must inform the sportsperson of the doping control ordered against him or her via a supervisory person (known as a chaperone) and ask for the relevant form concerning information about a doping control to be signed or keep the sportsperson under constant observation from that point in time until his or her arrival at the doping control station.*

37. The Austrian NADO then held that there exists a "*duty for the chaperone to make appropriate efforts to find the sportsperson*" and that in this case, "*the chaperone who had been appointed for the accused failed to respect that duty.*" Moreover, "*the proceedings have not shown that the accused, by her conduct, sought to evade a doping control either deliberately or by negligence.*" For these and other reasons, Schachl was found to have presented a compelling justification for her failure to attend anti-doping control at the 2008 Race.
38. In addition, the Austrian NADO also concluded on the basis of the WADA Code that:

*If a sportsperson arrives late at the doping control station but before the doping control body leaves the station, the latter must itself decide whether a doping control is still to be performed or proceedings taken on grounds of*

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<sup>24</sup> See Article 297 of the 2009 UCI Rules.

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*potential misconduct. As far as possible, however, the doping control body should take the sample and simply make a written record of all details of the late appearance of the sportsperson at the doping control station.*

39. Though the NADO Decision does not make additional explicit findings of fact based on this legal conclusion, it does accept as persuasive Schachl's contention that it would be unjust to administer sanctions for missing an anti-doping control when Rees did not intend to administer an anti-doping control on Schachl had she reported within the permitted time of finishing the 2008 Race.
40. The crux of the UCI's submission is that the UCI Rules and not the WADA Code apply to these proceedings, a legal conclusion already accepted in this Award, and that the Letter did not modify the UCI Rules such that notification of cyclists of anti-doping testing would henceforth take place only by chaperone. Instead, the UCI says that the UCI Rules must be read as a whole, and that the UCI Rules put the onus on cyclists to determine whether or not they are subject to anti-doping control, whether or not they are notified by chaperone. It is therefore submitted that Schachl's failure to report for testing constituted a breach of Article 15(3) of the UCI Rules.<sup>25</sup> A breach of Article 15(3) is punishable by a two-year suspension. The effect of the Letter was only to "clarify practical aspects of the system of notification via chaperones already provide for in article 130, version in force before the 1<sup>st</sup> of January 2004."<sup>26</sup> The UCI also submits that had Schachl or her coach attended the pre-race meeting held before the night of the 2008 Race, she would have been well-informed of the notification procedures to be used for Post-Competition Testing.

## VII. ANTI-DOPING VIOLATION

41. The UCI Rules provide as follows:

*15. The following constitute anti-doping violations:*

*3. Evading Sample collection or, after notification as authorized under these Anti-Doping Rules, refusing, or failing without compelling justification, to submit to Sample collection.*

### A. Burden of Proof

42. The UCI bears the burden of proving that Schachl has failed to submit to an anti-doping sample collection.<sup>27</sup> Unlike cases involving positive analytical tests, there is no provision in the UCI Rules that explicitly shifts the burden of proof to the athlete

<sup>25</sup> See Article 21(3) of the 2009 UCI Rules.

<sup>26</sup> UCI Appeal Brief, page 8.

<sup>27</sup> See Article 16 of the UCI Rules and Article 22 of the 2009 UCI Rules.

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after the showing of a basic set of minimum facts.<sup>28</sup> The Panel attaches considerable significance to the absence of such a provision. Absent a similar provision in the UCI Rules that shifts the burden of proof in missed test cases after the showing of a basic set of facts, this Panel's view is that the burden upon the UCI encompasses more than just the showing of the fact of the missed test. The UCI is also obligated to demonstrate that the doping control testing was conducted in a manner consistent with the requirements in the UCI Rules. A holding otherwise would compromise the right of athletes to be presumed innocent, and would be contrary to the burden of proof placed upon the UCI by its own rules and the WADA Code.

43. That said, proving that doping control took place in a manner consistent with the UCI Rules is not a requirement that the UCI actively proves that every article in the UCI Rules about the organization of doping control was followed. The UCI Rules contain a plethora of articles describing how doping control should be organized and conducted, from the important to the mundane, such as how best to layout furniture in doping control stations.<sup>29</sup> The UCI's obligation to prove that doping control was organized and administered in a manner consistent with the UCI Rules extends only to a showing of facts that demonstrate that doping control was conducted in a way that did not compromise the athlete's rights.<sup>30</sup> To the extent that race organizers failed to follow the UCI Rules, it only bears upon a missed test allegation to the extent that the failure compromised Schachl's ability to comply with the rules or otherwise make full answer and defense to the allegations she faces.
44. The UCI's burden does not include the obligation to prove that there was no compelling justification for failing to submit to the anti-doping test. A "*compelling justification*" is a defence that is for athletes to raise and substantiate if and after the UCI has successfully discharged its burden of proof under Article 15(3) of the UCI Rules.

B. Requirements of Doping Control

45. The UCI Rules establish different procedures for doping control administered in different situations, including specific procedures to be applied in a post-competition setting. These "Post-Competition Testing" provisions are applicable in this case.<sup>31</sup> The UCI's Post-Competition Testing rules are not part of and impose more onerous obligations on athletes than the IST. The UCI maintains the Post-Competition Testing rules, and in particular the publication of a list of chosen athletes at the

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<sup>28</sup> See, for instance, Article 15(1.2) of the UCI Rules and Article 2.1.2 of the 2009 WADA Code which shift the burden of proof to athletes in the case of positive analytic doping tests.

<sup>29</sup> See Appendix 4 to the UCI Rules.

<sup>30</sup> See *WADA v. FILA & Mohamed Ibrahim Abdelfattah*, CAS 2008/A/1470, para 91.

<sup>31</sup> See Article 112 and forward in the UCI Rules. In the 2009 UCI Rules, see Article 164 and forward, where the provisions are called "Post-Finish Testing".

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finishing line and at the doping control centre, due to the difficulties potentially associated with chaperones notifying cyclists of doping control at the end of a race, where press, team vehicles and officials, and even the general public may well crowd the finish area. Due to these complexities, in essence, in Post-Competition Testing if athletes are not contacted by a chaperone they are nevertheless obligated to consult the list and to locate the doping control center and check whether they are subject to doping control, or else face sanctions.

46. The relevant provisions of the UCI Rules that describe the doping control requirements for Post-Competition Testing are set out below.

Article 99 *The Anti-Doping Inspector is responsible for the on site management of the Testing.*<sup>32</sup>

Article 106 *If needs be for the test to take place... the Anti-Doping Inspector may appoint a Medical Inspector and/or a nurse on the spot or the Anti-Doping Inspector may conduct the Post-Competition Test alone, provided he appoints, where applicable, a person of the same gender as the Rider to witness the delivery of the sample.*<sup>33</sup>

Article 115 *The National Federation of the organizer of the Event shall be responsible for the practical aspects of the organization of the Post-Competition Testing session, including the obligations of the organizer. It must insure that all staff and all infrastructure and equipment are available so that Testing can be carried out in accordance with these Anti-Doping Rules and the Procedural Guidelines.*<sup>34</sup>

Article 116 *... In the event of negligence in the practical organization of the Testing session the National Federation of the organizer shall be liable to a fine not exceeding 10,000 CHF. In events which last more than one day, the fine may be multiplied by the number of days for which the negligence occurs.*<sup>35</sup>

Article 118 *Premises suitable for the taking of Samples must be provided in the immediate vicinity of the finish line. The location must be clearly signposted from the finish line.*<sup>36</sup>

<sup>32</sup> See Article 123 of the 2009 UCI Rules.

<sup>33</sup> See Article 122 and the comment to Article 132 in the 2009 UCI Rules.

<sup>34</sup> See Article 167 of the 2009 UCI Rules.

<sup>35</sup> See Article 170 of the 2009 UCI Rules.

<sup>36</sup> See Article 172 of the 2009 UCI Rules.

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*Article 152 If the Rider reports to the doping control station after the minimum waiting time and prior to the departure of the Anti-Doping Inspector and/or the Medical Inspector, if any, from the doping control station, they or he shall if at all possible proceed with collecting a Sample and shall document the details of the delay in the Rider reporting to the doping control station.<sup>37</sup>*

47. The file shows that the doping control station was located approximately 600 meters from the finish line and that signs were posted indicating the location of the doping control center.<sup>38</sup> Schachl does not contest that the doping control station was visible or sign-posted, and indeed, after she returned to the race site after having been contacted by Rees, Schachl did not report any difficulty in locating the doping control center, where the list was affixed. The UCI has shown and the Panel is satisfied that the 2008 Race organizers discharged their obligation to make clear the location of the doping control center.
48. When Schachl returned to the doping control station she requested that she be administered a doping control test, but Rees refused. Rees offered three reasons for his refusal to administer that test. Rees' first reason for not administering the test is that he did not have a chaperone or medical personnel to supervise the test. However, Article 106 of the UCI Rules states that only a person of the same sex as Schachl (*i.e.*, a woman) need be appointed to witness the delivery of the sample; chaperones and medical personnel are not strictly necessary. Second, Rees said that he did not have sufficient time to perform the test on Schachl. This is not a valid reason for refusing to administer doping control; the rights of athletes must be respected and take precedence over the administrative needs of anti-doping inspectors. Rees could have explained the difficulty to Schachl and asked that she wait in the doping control center until Rees was ready to proceed with sample collection. Finally, Rees explained that he could not administer a test to Schachl because he did not have a sufficient number of testing kits in his possession, due to the failure of the National Federation to send him the necessary medical equipment by post in time. That Rees did not have the equipment necessary to administer the testing is indicative of the race organizer's or the National Federation's negligence.
49. None of the reasons offered by Rees are sufficiently compelling to have justified refusing to administer a test on Schachl. Rees and the race organizers are at fault for this error.
50. However, Rees' failure to administer a test on Schachl has no bearing on whether Schachl committed an infraction under Article 15.3 of the UCI Rules, or on her ability to defend herself against that charge. There is no suggestion that Schachl ingested prohibited substances or otherwise sought to avoid doping control for any

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<sup>37</sup> See Article 151 of the 2009 UCI Rules.

<sup>38</sup> See Exhibit 11 to the UCI's Appeal Brief.

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reason other than negligence. Absent a more direct connection to the actual charge against her, which concerns Schachl's failure to report for doping control, Rees' and the race organizers' failure to properly organize aspects of doping control under the UCI Rules is not sufficiently serious as to invalidate the charges against Schachl.

C. Obligation to Submit to Doping Control

51. The UCI Rules establish a complex scheme for notifying cyclists of their obligation to report for Post-Competition Testing. Excerpts from those rules are set out below:

Article 122 *For each Competition or Race for which a Post-Competition testing session is organized, the Anti-Doping Inspector shall draw lots for a first and a second reserve Rider who will be subjected to testing in that order if a Rider drawn by lot is required to undergo tests as a result of his placing or if a Rider meets two criteria for selection simultaneously or if one such Rider is unable for practical reasons to undergo Sample taking, so that the number of tests called for by the Anti-Doping Commission is carried out.*

*The reserve Riders must check in for Sample collection within the prescribed time limit, even if they would not be required to submit to Sample collection.<sup>39</sup>*

Article 124 *Any Rider including any Rider who has abandoned the Race, shall be aware that he may have been selected to undergo Testing after the Race and is responsible for ensuring personally whether he is required to appear for Sample collection.*

*To this end, the Rider, immediately after finishing or abandoning the Race shall locate and proceed to the place where the list of Riders who are required to appear for Sample collection, is displayed and consult the list.<sup>40</sup>*

...

Article 125 *The Organizer and the Anti-Doping Inspector shall ensure that a list of the Riders who are required to appear for Sample collection shall be displayed at the finish line and at the entrance of the doping control station before the finish of the winner.*

... *Comment: Riders that can't find the list at the finish line, shall always proceed to the doping control station.<sup>41</sup>*

Article 127 *Riders shall be identified on the list by their name or their race number or their place in the ranking.<sup>42</sup>*

<sup>39</sup> See Article 175 and Appendices 2 and 3 to the 2009 UCI Rules.

<sup>40</sup> See Article 177 of the 2009 UCI Rules.

<sup>41</sup> See Article 180 of the 2009 UCI Rules.

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Article 128 *No Rider may take the absence of his name, race number or placing from the displayed list as an excuse if he is identified in another manner or if it is established that he had learnt in another way that he was required to appear for Sample collection.*

*Comment: No additional form of notification (for example: audio announcement) has to be used. The absence of an additional form of notification may never be interpreted as an indication that no Testing will take place and is no excuse for failing to submit to Sample taking.*

*When a rider does not appear for Sample taking, there is no obligation for the Anti-Doping Inspector, the organizer or anyone else to try to contact or notify the Rider.<sup>43</sup>*

Article 129 *A Rider may be notified in person by chaperone for Testing at a Post-Competition Testing session in the same way as for Individual Testing.*

*The organizer is required to provide at least one chaperone for every rider selected to undergo Testing.<sup>44</sup>*

Article 131 *... [E]ach Rider to be tested must present himself at the doping control station within 30 (thirty) minutes of the finishing the Race...<sup>45</sup>*

Article 149 *Where a Rider does not report to the doping station within the time-limit, the Anti-Doping Inspector shall use his judgment whether to attempt to contact the Rider.<sup>46</sup>*

Post-Competition Testing *In-Competition testing session that is organized following a Race or Competition for the purpose of testing Riders that participated in that Race or Competition.<sup>47</sup>*

52. The most important part of Schachl's defence is that the Letter modified the UCI Rules, removing all forms of notification for Post-Competition Testing other than by chaperone. Before applying the UCI Rules, this Panel considers it opportune to assess the effect of the Letter on the UCI Rules in detail. It states as follows:

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<sup>42</sup> See Article 181 of the 2009 UCI Rules.

<sup>43</sup> See Article 182 of the 2009 UCI Rules.

<sup>44</sup> See Article 178 of the 2009 UCI Rules.

<sup>45</sup> See Article 183 of the 2009 UCI Rules.

<sup>46</sup> See Comment to Article 182 of the 2009 UCI Rules.

<sup>47</sup> Definition unchanged in 2009 UCI Rules. See Appendix 1 (Definitions) of 2009 UCI Rules.

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"UCI Regulations – Notification of Riders"

*Dear Madam, Sir,*

*By this letter, the UCI would like to advise all Organisers of the UCI regulations to be applied as of 01.01.2008.*

*Please be advised that, according to the UCI Anti-Doping Regulations – Chapter VI, for testing, the articles below concerning the different forms of notification and the chaperones have to be enforced. Therefore, we would ask you to implement the mentioned articles as soon as possible.*

**Comment of Article 128**

*"No additional form of notification (for example: audio announcement – Radio tour) may be used".*

**Article 129**

*"The organizer is required to provide at least one chaperone for every rider selected to undergo Testing".*

**Article 130**

*"The chaperone shall remain close to the Rider and observe him at all times, and accompany him to the doping control station.*

*At all times the rider shall remain within sight of the chaperone from the time of notification to the completion of the Sample collection procedure. The Rider's Support Personnel must not hinder the chaperone from continuously observing the Rider".*

*The Organizer shall provide access (i.e. accreditation) to the chaperone to insure that he/she is able to observe the rider at all times.*

*In order to ensure riders can be notified correctly at the end of the race, it is important that the finish line area includes an area suitable for the chaperones to locate the riders for notification.*

*UCI Anti-doping Inspectors have been trained in the chaperone procedure. They will assist you in meeting your obligations when discussing arrangement for the race.*

*[...]"*

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53. The Letter has an official appearance and there is no obvious reason for the reader to question the Letter's legitimacy or effect. The Letter is signed by Anne Gripper, whose title is given as "*Manager of the UCI's Anti-Doping Services*". It was written on official UCI letterhead and was addressed to all organizers of UCI races.
54. The Letter refers to certain of the UCI Rules. Confusingly, the Letter does not make clear whether the articles it has excerpted are quoted in their entirety or not. The only other exception element and difference between the UCI Rules quoted in the Letter and the E0108 UCI Rules is in the comment to Article 128.
55. Schachl's position is that the difference in wording in Article 128 between the UCI Rules and the Letter served to modify the UCI Rules such that notification of cyclists would be exclusively by chaperone. Indeed, on its face the Letter indicates that the provisions it mentions concern "*the different forms of notification*", and that "*No additional form of notification [other than chaperones] ... may be used*" to notify cyclists of the obligation to submit to doping control. This would represent a change of language from Article 128 in the E0108 UCI Rules, which permissively said, "*No additional form of notification [other than chaperones] ... has to be used*". In reply, the UCI says that the Letter's purpose was merely to call race organizers' attention to the systems for notification in the UCI Rules, and that the difference in wording between the UCI Rules and the Letter is attributable to an error of translation.
56. The test for whether Schachl's submission as to the effect of the Letter on the UCI Rules is persuasive is to read the words of the Letter and the UCI Rules in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the UCI Rules, the object of the UCI Rules, and the intention of UCI Management Committee in promulgating the UCI Rules.<sup>48</sup> The more harmoniously Schachl's interpretation of the words of the Letter and the UCI Rules fit with the UCI Rules' scheme and object, the more likely this Panel will find in her favor. If Schachl's contention about the words and meaning of certain articles within the UCI Rules does not fit with the scheme and object of the UCI Rules, this Panel is less likely to accept Schachl's argument unless the UCI Rules are so confusing or contradictory to be overly vague as a matter of law and unenforceable.
57. Having considered Schachl's interpretation of the Letter and its effect on the UCI Rules, and separately having considered the UCI Rules as a whole, this Panel does not find Schachl's interpretation to be in harmony with the scheme or object of the UCI Rules. Even if the Letter were to have modified Article 128, it would have had no effect on other provisions of the UCI Rules, including Articles 124 and 125, which impose clear and unequivocal obligations on cyclists to check whether they are subject to doping control by proceeding to the finish line and/or the doping control station. In Schachl's submission, the modification to a single word in

<sup>48</sup> See *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, para. 22.

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Article 128 would have the effect of silently rendering ineffective Articles 124 and 125, which would largely eliminate the purpose of maintaining separate procedures for Post-Competition Testing. This would be a drastic result that would be inconsistent with the scheme and purpose of the UCI Rules. It is not a result this Panel is prepared to reach without clearer wording in the Letter, which would require, at minimum, a reference to other provisions in the UCI Rules such as Articles 124 and 125.

58. Additionally, this Panel does not consider the Letter's content, were it to have the effect alleged by Schachl, to be so contradictory or confusing that the UCI Rules would be overly vague and unenforceable. While a contradiction between Articles 124 and 125 on the one hand, and Article 128 on the other hand, would arise, that contradiction would be found only in a comment to Article 128, rather than an article of the UCI Rules itself. This single contradiction is not so confusing or distracting as to render the entire Post-Competition Testing scheme unenforceable. On an objective standard, the level of confusion created by the Letter should have been no greater than to cause an interested party to review the UCI Rules on the UCI's website in order to determine whether any changes had been implemented, or otherwise to contact the UCI in order to determine what notification procedures were in place.
59. Therefore this Panel finds that the rules by which Schachl's conduct must be assessed are the E0108 UCI Rules. Although it naturally caused a certain degree of confusion, the Letter did not modify the UCI Rules.
60. Rees selected Schachl as a reserve cyclist for doping control at the 2008 Race, and posted lists at the finish line and the doping control station identifying Schachl by her bib number as being subject to doping control. Schachl was obliged to report for doping control within thirty minutes of finishing the race. Contrary to her obligation to report for doping control, Schachl did not report within the allotted time. She has therefore committed a doping offence under Article 15.3 of the UCI Rules, subject to this Panel's ruling on whether her failure to submit for doping control is excused on account of a compelling justification, addressed in Section VIII, below.
61. As an aside, this Panel rejects Schachl's contention that a finding under Article 15.3 of the UCI Rules cannot be entered against her because she was only a reserve rider selected for testing, and had she attended she would not have been tested. Article 122 of the UCI Rules clearly provides that, "*The reserve Riders must check in for Sample collection within the prescribed time limit, even if they would not be required to submit to Sample collection.*"
62. As a further aside, this Panel also rejects the UCI's contention that Schachl bears full responsibility for her confusion because neither she nor North failed to attend the pre-race meeting the night before the 2008 Race. At the hearing, North testified that he attempted to contact the 2008 Race organizers on three occasions (twice by email

and once by phone) to obtain information about the pre-race meeting, but did not receive any reply to his inquiries. This Panel has no reason to doubt the truthfulness of North's testimony, and accepts as a matter of fact his version of events. As a result, Schachl cannot bear responsibility for having missed the pre-race meeting. More importantly, however, there is no obligation in the UCI Rules to attend any pre-race or other meeting. This Panel cannot hold an athlete responsible for failing to meet an obligation that is not contained within the UCI Rules.

### VIII. MERITS OF SCHACHL'S DEFENCES

63. Schachl raises two defences against the UCI's allegations. First, Schachl claims that she had a compelling justification for failing to submit to doping control on a timely basis. Second, and in the alternative, Schachl submits that she failed to submit to doping control on a timely basis in spite of the fact that her fault or negligence was not significant, and asks for a reduced sanction under Article 265.<sup>49</sup>
64. Some commentators have doubted whether it is possible to raise alternative defences in cases involving a breach of Article 2.3 of the WADA Code or other equivalent provisions (such as Article 15.3 of the UCI Rules). According to Joseph de Pencier, commenting on an award in a recent CAS case, "*how could the same pressures from club officials that justify "exceptional circumstances" and a finding of "no significant fault or negligence" not provide "compelling justification" to excuse the athletes' failure to ignore club officials in the first place? It seems to me that if a set of facts cannot provide "compelling justification" it cannot be "exceptional circumstances." To put it the other way, if the facts establish "exceptional circumstances," one would think they would also be "compelling" enough to "justify" the delay in reporting in the first place.*"<sup>50</sup>
65. This Panel is sympathetic to de Pencier's arguments about the semantic closeness of "*compelling justification*" and "*exceptional circumstances.*" Indeed, other CAS cases have implicitly accepted de Pencier's criticisms, and found athletes to have demonstrated a "*compelling justification*" whose failure to submit to doping control was caused by "*fault or negligence when viewed in light of all the circumstances, was not significant in relation to her anti-doping rule violation.*"<sup>51</sup> [emphasis added].

<sup>49</sup> See Article 297 of the UCI Rules.

<sup>50</sup> See *WADA v. CONI, FIGC, Maninni and Possanzani*, CAS 2008/A/1557; and Joseph de Pencier, *ANADO Legal Note 7: More Anti-Doping Decisions 2008 and 2009*, February 9, 2009, online at: <http://www.anado.org/documents/ANADO%20Legal%20Note%207.pdf>.

<sup>51</sup> See *WADA v. USADA and Scherf*, CAS 2007/A/1416 at para. 9.13.

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66. This semantic argument, however, does not comfortably accord with the scheme of the UCI Rules or the WADA Code. The UCI Rules, like the 2003 WADA Code, do not provide for a separate and complete defence against a charge under Article 15.3 of the UCI Rules, such as “*No Fault or Negligence*” under Article 264 of the UCI Rules. Nevertheless, a complete defence is embedded in Article 15.3 of the UCI Rules itself, namely the “*compelling justification*” defence. By contrast, the “*No Significant Fault or Negligence*” defence, which can be raised against an allegation under Article 15.3 of the UCI Rules, permits only a reduction of a sanction for an anti-doping violation; it is not a complete defence.
67. There is a clear and understandable hierarchy between the sanctions available to the Panel under the “*compelling justification*” defence and the “*No Significant Fault or Negligence*.” This Panel, like other previous CAS panels,<sup>52</sup> has no difficulty or objection to assessing Schachl’s defences with an appreciation for the hierarchy that exists between these defences, despite the defences’ semantic similarities.<sup>53</sup>
- A. Compelling Justification
68. Due to its place in the hierarchy of defences as a complete defence, the Panel will only find Schachl’s justification for missing doping control to be compelling if it shows that Schachl is as blameless for her anti-doping rule violation as if she were to have proven that she ingested performance enhancing substances despite “*No Fault or Negligence*” on her part, as provided for in Article 10.5.1 of the WADA Code or Article 264 of the UCI Rules.<sup>54</sup> Other CAS panels have emphasized the strictness inherent in the word “*compelling*”, an approach that this Panel adopts.<sup>55</sup>
69. Because this Panel considers the level of blamelessness for the “*compelling justification*” defence to be equal to that which must be shown under the “*No Fault or Negligence*” defence, it is not necessary to separately consider a “*No Fault or Negligence*” defence. Schachl was entitled to raise a “*No Fault or Negligence*” defence under the 2009 UCI Rules, which apply in this case only to the extent that the principle of *lex mitior* is applicable. As the 2009 UCI Rules would have afforded Schachl an additional defence, *lex mitior* can be invoked. However, due to the similarities between “*compelling justification*” (as described by this Panel) and

<sup>52</sup> See *WADA v. FILA & Mohamed Ibrahim Abdelfattah*, CAS 2008/A/1470 at para 101.

<sup>53</sup> This hierarchy of defences has been modified in the 2009 WADA Code and the 2009 UCI Rules. Under both sets of rules, athletes found to have failed to submit to anti-doping control can now claim (1) a compelling justification, (2) an absence of fault or negligence, and (3) an absence of significant fault or negligence. Although the first two defences are different in that the first is applicable to the determination of whether an anti-doping rule violation has occurred, and the second is not, the effect of these first two defences is the same: a complete elimination of sanction against the athlete.

<sup>54</sup> See Article 296 of the 2009 UCI Rules.

<sup>55</sup> See *WADA v. CONI, FIGC, Maninni and Possanzani*, CAS 2008/A/1557, para. 80.

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"*No Fault or Negligence*", Schachl stands to gain no substantive advantage from raising this defence, and thus this defence is not considered any further.

70. For a number of reasons, this Panel does not consider Schachl's justification for missing doping control to be so compelling as to necessitate an acquittal. Those reasons are set out below:

- For Schachl to be blameless, she should have made some efforts to independently verify whether the rules regarding Post-Competition Testing had indeed been modified. This would have, at minimum, required a review of the UCI's website and the UCI Rules posted online. Indeed, upon questioning at the hearing, Schachl acknowledged that she made no independent efforts to verify the status of the notification provisions in the UCI Rules. Had Schachl checked the UCI website, she would have noticed that the UCI Rules indeed had not changed. Instead, Schachl relied exclusively upon her coach, North. Schachl failed in her obligation to be well informed.<sup>56</sup>
- Schachl's belief in the changes to the notification system for post-competition testing was based upon information provided to her by her coach; she did not herself see the Letter. According to her, following receipt of the Letter, at several races (the Flèche Wallonne, Berner Rundfahrt, the Tour of Flanders, Le Tour du Grand Montréal) organizers advised North at the corresponding pre-race meeting that post-competition notification of athletes would henceforth take place exclusively through the use of chaperones. The UCI submitted signed statements from the organizers of Le Tour du Grand Montréal, of the Berner Rundfahrt, and of the Tour of Austria 2008 denying any statement to the effect that chaperones would be the only notification system for riders. No signed statements were submitted for the other races. Nevertheless, regardless of whether such statements were made to North, it does not assist Schachl's position. In the first instance, it is trite to say but nevertheless true that ignorance on the part of North of the proper law of cycling is not a defence. Second, and more importantly, athletes cannot escape culpability for anti-doping rule violations by delegating all of their responsibilities to their coaches and their support personnel;<sup>57</sup> such a result

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<sup>56</sup> See *WADA v. FILA & Mohamed Ibrahim Abdelfattah*, CAS 2008/A/1470, para. 85 ("In practice, as a very experienced world-class wrestler, he also had additional reason to be well informed.").

<sup>57</sup> See *WADA v. CONI, FIGC, Manimmi and Possanzani*, CAS 2008/A/1557, para. 79. Athletes are not generally able to excuse their conduct based on their doctor's or coach's poor advice, whether that failure is to submit to doping notification or involves the ingestion of a prohibited substance. For examples of sports tribunals rejecting defences based on a coach's or doctor's error in doping cases, see *ITF Independent Anti-Doping Tribunal, IFT v. Koubek* (18.01.2005); *Torri Edwards v. IAAF*, CAS OG 04/003; *UCI v. Bastianelli & CONI*, CAS

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would eviscerate the fight against doping in sports. Athletes must therefore select their coaches or doctors with significant care, provide them with the necessary information, and supervise them to a certain extent, because errors by support personnel will be attributable to them in all but the most exceptional circumstances. Schachl must, therefore, bear responsibility for her coach's mistake.

B. No Significant Fault or Negligence

71. In this Panel's view, there are a number of exceptional circumstances in this case that contributed significantly to the occurrence of Schachl's anti-doping rule violation. Those circumstances are listed below. By comparison to these exceptional circumstances, Schachl's fault or negligence that contributed to the anti-doping rule violation was not significant.

- The "*Post-Competition Testing*" UCI Rules are difficult to read, confusing, and contain contradictions. For example, the first paragraph of Article 129 permits race organizers to notify riders in a post-competition setting in person through the use of a chaperone. Despite the fact that the first paragraph of Article 129 is merely permissive, the second paragraph requires race organizers to appoint at least one chaperone for every rider selected to undergo anti-doping control. By further example, the second paragraph of Article 130 requires that cyclists remain within sight of their chaperone at all times, but the third paragraph says that the absence of a chaperone is not a defence. It would be impossible to remain within sight of a chaperone at all times where none has been appointed, just as it would be absurd to prevent an athlete from using the absence of a chaperone as a defence where a chaperone has had to take leave of the cyclist due to, for instance, a personal emergency or illness. These irregularities in the Post-Competition Testing scheme merit review by the UCI Management Committee.<sup>58</sup>
- The Letter, though we have found as a matter of law did not change the UCI Rules, did contribute to the level of confusion surrounding the procedure for Post-Competition Testing, both at the athlete and at the race organizer level. The UCI should be extremely mindful of the content of its communications, especially when those communications have an official appearance.

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2008/A/1712 and CAS 2008/A/1742, at para. 41. See also the commentary to the WADA Code, Article 10.5.

<sup>58</sup> The confusing nature of a sports federation's anti-doping rules are a recognized reason for mitigating a penalty against an athlete for failing to submit to doping control; see *WADA & IAAF v. USADA & Scherf*, CAS 2007/A/1416 at para. 9.10.

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- The UCI Rules mandate only that a list of athletes for testing be posted at the finish line and at the doping control center. For practical purposes, these rules are not effective and also merit review by the UCI Management Committee. Many cycling events, such as the 2008 Race, often end with a sprint by the single peloton. In such circumstances, returning to the finish line to inspect the doping control list would be both dangerous (because of those cyclists in behind who may still be sprinting head long toward the finish line) and impractical (the peloton cannot simply stop and reverse direction in order to inspect a single piece of paper). The UCI Management Committee should review the Post-Competition Testing notification rules and devise a new, more practical system that permits cyclists a more reasonable opportunity to determine whether they are subject to doping control, without having to attend at the doping control station. For instance, it might be more practical for the UCI Rules to require that the list of cyclists to be tested be posted at a single exit to the race course, and that all cyclists have a responsibility to exit by that single exit, which would have to be clearly signposted. The chaperones would also be stationed at that exit. Such a system would be especially effective because it would not require that cyclists leave the racecourse to travel to the doping control station in order to ensure they are not designated for testing.
- Finally, the mistakes of the 2008 Race organizers have contributed to a significant degree to the finding of no significant fault or negligence on the part of Schachl. Schachl did not avoid doping control, but instead took the exit from the racecourse other than the exit where her chaperone was stationed. Schachl's rule violation is due in significant part to the inadequate design of the racecourse by the 2008 Race organizers. As the Letter warned, "*In order to ensure riders can be notified correctly at the end of the race, it is important that the finish line area includes an area suitable for the chaperones to locate the riders for notification.*" The 2008 Race organizers did not properly heed this warning. In addition, the 2008 Race organizers failed to respond to North's inquiries about the location and timing of the pre-race meeting. This Panel finds as a matter of fact that had race organizers responded to North, North and/or Schachl would have attended the pre-race meeting and been advised of the procedures for Post-Competition Testing to be employed.

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**IX. SANCTION**

**A. Length of Ineligibility**

72. This Panel has found Schachl to be in violation of Article 15.3 of the UCI Rules, but that the violation occurred despite an absence of significant fault or negligence on her part under Article 265 of the UCI Rules.<sup>59</sup> Article 265 of the UCI Rules provides that the Panel may reduce the period of ineligibility to no less than one-half of the minimum period of ineligibility otherwise applicable. In this case the minimum penalty otherwise applicable is two years.<sup>60</sup>
73. This Panel has explained above the real confusion created by the Letter, the irregularities in the doping control notification process at the 2008 Race, and the areas of the UCI Rules that are inadequate or contradictory and merit review. In light of these circumstances, this Panel elects to exercise its full discretion, and declares Schachl to be ineligible to compete in all sporting competitions for a period of one year.

**B. Commencement of Ineligibility**

74. Article 275 of the UCI Rules provides the Panel with some discretion as to when to commence Schachl's period of ineligibility: "*Where required by fairness, such as ... aspects of Doping Control not attributable to the License-Holder, the hearing body imposing the sanction may start the period of Ineligibility at an earlier date commencing as early as the date of the anti-doping violation.*"<sup>61</sup> This Panel is mindful of the reasons why it has already reduced Schachl's period of ineligibility, and the circumstances outside of Schachl's control which contributed to the occurrence of the anti-doping rule violation. For these reasons, this Panel finds that it is required by fairness to start the period of ineligibility at an earlier date. The UCI initiate proceedings against Schachl on August 27, 2008. For reasons set out in more detail below, this Panel considers August 27, 2008 to be the most fair date upon which to commence the period of ineligibility.

**C. Disqualification of Results**

75. Article 256 of the UCI Rules<sup>62</sup> is mandatory and provides that:

*"A violation of these Anti-Doping Rules in connection with an In-Competition test automatically leads to Disqualification of the individual result obtained in that Competition".*

<sup>59</sup> See Article 21.3 and Article 297 of the 2009 UCI Rules.

<sup>60</sup> See Article 263(1) of the UCI Rules and Article 294(1) of the 2009 UCI Rules.

<sup>61</sup> See Article 314-319 of the 2009 UCI Rules.

<sup>62</sup> See Article 288 of the 2009 UCI Rules.

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76. Article 274 of the UCI Rules<sup>63</sup> provides that:

*In addition to the automatic Disqualification of the results in the Competition pursuant to article 256, all other competitive results obtained from the date a positive Sample was collected (whether In-Competition or Out-of-Competition), or other doping violation occurred, through the commencement of any Ineligibility period, shall, unless fairness requires otherwise, be Disqualified.*

*Comment: it may be considered as unfair to disqualify the results which were not likely to have been affected by the Rider's anti-doping rule violation.*

77. After the Race, Schachl competed at the Beijing 2008 Olympic Games. Competing at the Olympic Games is an extremely important moment in the lives of athletes, and due to their infrequency and the level of performance required to qualify, many athletes are able to compete in the Olympic Games only once in their lives. There has been no suggestion or evidence to indicate that Schachl has ever ingested performance-enhancing substances, or that her results at the Olympic Games were affected in any way by her anti-doping rule violation on August 8, 2008 at the Race. Finally, at the time of the Olympic Games, Schachl had no reason to believe that the UCI's investigation would have led to a recommendation that proceedings be initiated against her; the UCI did not send its letter to the Austrian NADO until August 27, 2008.
78. In view of these factors, this Panel considers that it is required by fairness to exercise its discretion and order that Schachl's results between August 8, 2008 and August 27, 2008 be maintained. However, Ms. Schachl's results from the second stage of the Sparkassen Giro on August 3, 2008, must be disqualified.
79. The final matter regarding the disqualification of Schachl's results concerns the results earned after August 27, 2008 and the date of this Award, during which Schachl has been declared ineligible. The Panel notes that there is a lacuna in the UCI Rules on this issue; there is no express requirement that results earned after a retrospective ineligibility period is imposed be disqualified. The practice of previous CAS panels in UCI cases has, however, been to disqualify such results<sup>64</sup>.
80. In addition, Article 257(4) of the UCI Rules<sup>65</sup> provides that:

*"Except as provided in articles 258 and 259, an anti-doping violation occurring during or in connection with an Event leads to Disqualification of*

<sup>63</sup> See Article 312 of the 2009 UCI Rules.

<sup>64</sup> See e.g. CAS 2008/A/1675 UCI v/ Richeze & UCRA, at para. 97.

<sup>65</sup> See Article 289(4) of the 2009 UCI Rules.

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*the Rider's individual results obtained in that Event according to the following rules:[...]*

*4. If the violation is a failure to submit a Sample collection and if the Rider establishes that he bears No Significant Fault or Negligence, the Rider's results obtained in other Competitions shall not be disqualified.*

The Panel notes that Article 257(4) applies in the context of an Event encompassing several competitions. Its rationale is that results in other competitions within one and the same Event are presumed not to have been affected by a failure to submit to sample collection with no significant fault or negligence in a competition within that Event. This rationale would seem to apply *a fortiori* to competitions that have taken place outside the scope of an Event in which an athlete has failed to submit to sample collection with no significant fault or negligence. As a result, the Panel considered at length whether it should refrain from disqualifying Schachl's results during the period of ineligibility prior to this award. (This issue does not arise with respect to prospective ineligibility because it implies disqualification by virtue of the bar on the athlete's participation in competitions during the prospective period of ineligibility). The Panel has concluded that ineligibility cannot be severed from disqualification in the absence of a clear provision in the applicable rules supporting such severance, for example, in cases, such as the present one, in which the period of ineligibility begins before the date of the award and where the nature of the violation of the applicable rules is such that it can be presumed that the violation has not affected the results in other competitions in which the athlete has participated during the period of ineligibility prior to the award. Consequently, this Panel will make an order in accordance with what it believes is required as a matter of fairness,<sup>66</sup> and disqualifies Schachl's results between August 27, 2008 and the date of this Award.

D. Conclusion on Sanction

81. Article 255 of the UCI Rules requires the Panel reach its conclusions about sanctions against Schachl based on "*human rights and general principles of law, among which proportionality and individual case management.*"<sup>67</sup> The Panel considers the length of the period of ineligibility imposed upon Schachl to be proportionate to, among other things, Schachl's level of culpability.

<sup>66</sup> Which is also consistent with the practice of prior CAS tribunals in cases involving the UCI Rules.

<sup>67</sup> See Article 286 of the 2009 UCI Rules.

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X. COSTS

82. The UCI is the successful party in these proceedings. In connection with its success, it requests that Schachl be ordered "to pay to the UCI an amount of CHF 2'000 – for costs under art. 245.2 ADR" and that Schachl and the ORV "reimburse to the UCI the Court Office fee of CHF 500.- and to pay all other costs, including a contribution to the UCI's legal costs."
83. Article 245 of the UCI Rules indeed says that cyclists found guilty of an anti-doping violation are to bear certain costs associated with the proceedings.<sup>68</sup> Article 245.2, which the UCI relies upon, specifies that cyclists are to bear the "cost of the result management by the Anti-Doping Commission." This case did not involve any analytic doping tests, so the UCI should not have incurred any such expense. This Panel therefore declines to make any order under Article 245.2. The UCI may have intended to request costs from Schachl under Article 245.1, which permits the UCI to recover the "cost of the proceedings as determined by the hearing body." Had the UCI requested costs under Article 245.1, the request would also be denied. Article 245 appears in Chapter IX of the UCI Rules, a section of the UCI Rules that clearly concerns anti-doping proceedings at first instance, *i.e.*, at the NADO level. By contrast, Chapter XI of the UCI Rules concerns appeals to the CAS, a section of the rules which is undoubtedly applicable at this stage of the proceedings. Article 282 of the UCI Rules,<sup>69</sup> which falls in Chapter XI, states:
- Article 282 *The appeal of the UCI shall be made against the License-Holder and against the National Federation that made the contested decision and/or the body that acted on its behalf. The National Federation or body concerned shall be liable for costs if the hearing body which made the decision against which the appeal has been made has applied the regulations incorrectly. [emphasis added]*
84. There are no provisions in the UCI Rules under which athletes can be held liable for the UCI's costs in appeals to the CAS such as the present case. In view of Article 282's clear language, the UCI's request for costs from Schachl is declared inadmissible and will not be considered further.
85. Article 282 does mandate, however, that because of the result reached in this appeal, the ORV pays costs to the UCI. The CAS Rules provide a number of factors that this Panel is obliged to consider when setting the appropriate level of costs.<sup>70</sup>

<sup>68</sup> See Article 275 of the UCI Rules.

<sup>69</sup> See article 331 of the 2009 UCI Rules.

<sup>70</sup> See Articles 64.5 and 65.3 of the CAS Rules. The Panel notes that the CAS Rules do not refer back to the UCI Rules on the issue of costs, and that the CAS Rules take precedence

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86. With respect to the circumstances of the case, the Panel must emphasize that, even if the UCI was largely successful in its appeal, the UCI's confusing communication to athletes about the notification system for Post-Competition Testing generated serious difficulties in the management of the anti-doping control procedure at the second stage of the Sparkassen Giro on August 3, 2008 (see para. 71 above) and contributed to increase the complexity of this matter. In view of these factors, to the extent that the Austrian NADO's application of the rules was "incorrect", the Austrian NADO's "errors" were modest, and as a result this Panel will order only that the ORV pays the UCI a correspondingly modest amount in costs under Article 282 of the UCI Rules.
87. Costs are therefore fixed in the amount of CHF 1,000 (one thousand Swiss Francs), payable by the ORV to the UCI within 90 days of the date of this Award. The Court Office fee of CHF 500 already paid by the UCI is retained by the CAS. All other legal costs are to be borne by the parties.

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over divergent federation rules (see CAS OG 04/003 in CAS Awards Salt Lake City 2002 and Athens 2004, 2004, S. 89, 93).

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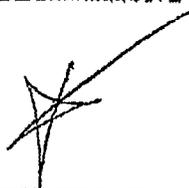
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**ON THESE GROUNDS**

The Court of Arbitration for Sport rules that:

1. The award of the Rechtskommission of the Nationale Anti-Doping Agentur Austria GmbH of September 18, 2008, case number 2/2008 in the case of Ms. Monika Schachl, is set aside.
2. Ms. Monika Schachl is declared ineligible for a period of one year, commencing on August 27, 2008, and concluding on August 26, 2009.
3. Ms. Monika Schachl's results from after August 27, 2008, until the date of this Order are disqualified. Ms. Schachl's results from the second stage of the Sparkassen Giro on August 3, 2008, are also disqualified.
4. This award is pronounced without costs, except for the Court Office fee already paid by the Union Cycliste Internationale, to be retained by the Court of Arbitration for Sport.
5. The Österreichischer Radsport Verband shall pay costs to the Union Cycliste Internationale, fixed in the amount of CHF 1,000 (one thousand Swiss Francs), within 90 days of the date of this Order.
6. To the extent specified in paragraphs 2, 3 and 4 of this Order, the appeal filed by the Union Cycliste Internationale on December 19, 2008, is upheld.
7. All other requests for relief are rejected.

Lausanne, done on 27 July 2009

**THE COURT OF ARBITRATION FOR SPORT**

Romano Subiotto QC  
President

