



**Arbitration CAS 2020/A/6918 Cristina Iovu v. International Weightlifting Federation (IWF), award of 4 February 2021**

Panel: Prof. Peter Grilc (Slovenia), President; Prof. Ulrich Haas (Germany); Mrs Carine Dupeyron (France)

*Weightlifting*

*Admissibility of an appeal*

*Establishment of the date of reception of a decision sent by email*

*General obligation to daily check the spam folder of one's e-mail box*

1. Receipt of the decision for the purposes of art. R49 of the CAS Code means that the decision must have come into the relevant party's sphere of control (party her/himself or her/his representative or agent authorized to take receipt). Receipt does not imply that said party actually took note of the content of the decision. Instead, it suffices that the party concerned had a (reasonable) possibility of taking note of the decision. It is recognized in Austrian case law that a recipient's e-mail box belongs to his/her sphere of control, at least if s/he has indicated that s/he can be reached *via* such e-mail address.
2. Under German and Austrian case laws, there is a general obligation for e-mail recipients to check their spam box on a daily basis. In particular, if a recipient indicated, by making her/his e-mail address available, that s/he communicates by e-mail, then a declaration is deemed to have been received, even if it is located in said recipient's spam box. The risk that a wrong "triage" is made by a recipient's computer is said recipient's risk, in particular in case of a business-related use of e-mails.

**I. THE PARTIES**

1. Cristina Iovu ("the Athlete" or "the Appellant") is a Romanian weightlifter, who was born in Moldova. She successively represented Azerbaijan and Romania in international competitions, and presently is a resident in Moldova.
2. The International Weightlifting Federation ("the IWF" or "the Respondent") is the international governing body for the sport of weightlifting and is recognized as such by the International Olympic Committee. The registered seat of the IWF is in Lausanne, Switzerland, and the registered office in Budapest, Hungary.

3. The Appellant and the Respondent are hereinafter referred to individually as a “Party”, and together, as the “Parties”.

## **II. FACTUAL BACKGROUND**

4. This Award focuses on the sole question of admissibility from the point of view of the Appeal against the IWF Hearing Panel Decision based on IWF Anti-Doping Policy (“IWF ADP”) of 3 March 2020. Therefore, below is a summary of the main issues, as established on the basis of the Parties’ written submissions and the evidence examined in the course of present arbitration proceedings. The purpose of the factual background is to provide a synopsis and the overview of the matter in dispute. Although the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.
5. On 3 March 2020, the IWF Hearing Panel rendered a decision (the “Appealed Decision”), which is subject to the present CAS arbitration proceedings. The above decision was sent by Mrs Lilla Sagi of the IWF on 3 March 2020 at 21:25 by email to the following email recipients:
  - a. Mr Christof Wieschmann, the Appellant’s Attorney;
  - b. Mrs Cristina Iovu, the Appellant;
  - c. Mr Alex Padure of Federatia Romana de Haltere;
  - d. office address of Federatia Romana de Haltere;
  - e. recipient named “frh” of Federatia Romana de Haltere;
  - f. Mr Milan Mihajlovic;
  - g. Mr Tryggve Duun; and
  - h. Mrs Lilla Sagi of the IWF.
6. On 30 March 2020, as authorized in Article 13 of the IWF ADP, the Athlete appealed the above Appealed Decision.
7. The current Award focuses on the jurisdiction and the admissibility of the appeal, as set forth below.

## **III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT (CAS)**

8. On 30 March 2020, the Athlete filed her Statement of Appeal against the decision of the IWF Hearing Panel, accompanied by a power of attorney to Mr Christof Wieschmann (authorizing

the Attorney in the matter of “*Cristina Iovu vs. WADA & IWF regarding alleged anti-doping rule violation 2016*”), Attorney-at-law, and appointed Professor Ulrich Haas as arbitrator.

9. On 6 April 2020, the Appellant requested an extension of time of two weeks in accordance with the (CAS) Covid-19 Emergency Guidelines (valid from 16 March 2020).
10. On 8 April 2020, the CAS Court Office (i) granted the extension of time, (ii) acknowledged the receipt of the Statement of Appeal dated 30 March 2020 and (iii) informed the Parties that pursuant to Article S20 of the Code of Sports-related Arbitration (“CAS Code”) (edition 2019), the present arbitration has been assigned to the Appeals Arbitration Division of the CAS and shall therefore be dealt with according to Articles R47 *et seq.* of the CAS Code.
11. On 14 April 2020, the IWF sent an objection to the admissibility of the appeal from the point of view of its timeliness, together with the power of attorney to Mr Nicolas Zbinden, Attorney-at-law.
12. By letter dated 16 April 2020, the CAS Court Office invited the Appellant to (i) state her position on the Respondent’s objection to admissibility by 20 April 2020 (re: IWF correspondence of 14 April 2020) and (ii) temporarily suspended the Respondent’s deadline to nominate an arbitrator until further notice from the CAS Court Office.
13. On 20 April 2020, the Appellant (i) sent her position relating to the Respondent’s objection to admissibility and (ii) requested that the question of admissibility be decided by the Panel and not the President of the Appeals Arbitration Division of the CAS.
14. On 22 April 2020, the CAS Court Office informed the Parties that the issue of admissibility has been transmitted to the President / Deputy President of the CAS Appeals Arbitration Division.
15. On 23 April 2020, the CAS Court Office informed the Parties that the deadline to file the Appeal Brief was suspended as from 20 April 2020, pending a decision of the CAS Appeals Arbitration Division President on the issue of admissibility of the present appeal.
16. On 4 June 2020, the CAS Court Office informed the Parties, on behalf of the President of Appeals Arbitration Division, that, pursuant to Article R49 CAS Code, the issue of admissibility would be decided by the Panel, upon its constitution. A new deadline of one week from 4 June 2020 was granted to the Appellant to file her Appeal Brief, while the Respondent was asked to nominate its arbitrator.
17. On 4 June 2020, the Respondent nominated Mrs Carine Dupeyron as arbitrator.
18. On 9 June 2020, the Appellant filed her Appeal Brief in accordance with Article R51 of the CAS Code.

19. On 17 August 2020, pursuant to Article R54 of the CAS Code, the CAS Court Office, on behalf of the Deputy President of the CAS Appeals Arbitration Division, informed the Parties that the Panel appointed to decide the present matter is constituted as follows:
  - Prof. Peter Grilc, Professor in Ljubljana, Slovenia;
  - Prof. Ulrich Haas, Professor in Zurich, Switzerland;
  - Mrs Carine Dupeyron, Attorney-at-law in Paris, France.
20. On 2 September 2020, the CAS Court Office, on behalf of the Panel, invited the Appellant to state on or before 14 September 2020 i) why and ii) for what reasons he noticed the Appealed Decision on 9 March 2020 only and not at an earlier point in time.
21. On 8 September 2020, the Counsel for the Appellant explained that his office was in a process switching to another exchange server for email communication in 2019 and 2020, now operating on cloud. While checking his local folder named "*deleted elements*" on 9 March 2020 for other reason, the Counsel for the Appellant noticed a mail from Mrs Marianne Saroli "*dated*" 3 March 2020, because it was marked as unread. The system notified the security certificate of the sender to be expired and not valid, therefore the mail was opened with the assistance of the IT services at 15:06. The Counsel for the Appellant cannot explain why the email of Mrs Saroli was considered as expired / not valid, and nevertheless considers that this issue is definitely not in the sphere of the recipient to be solved and remains in the sphere of the sender.
22. On 9 September 2020, the Respondent commented the Appellant's reply from 8 September, recalling that the Appellant has initially claimed that the deadline to appeal was triggered by receipt of the full case file on 10 March 2020, which was wrong. The Appellant changed his position only after the Respondent intervened with its opposing interpretation. The email attaching the Appealed Decision was sent on 3 March 2020. According to the Respondent it is on that day that the Appealed Decision entered into the sphere of control of the Appellant. This position is also supported in CAS jurisprudence and consistent with Article 14.3.8 of the IWF ADP. The IWF email was sent to several addressees, including the Athlete herself. Consequently, the IWF maintains that the appeal was manifestly late and that the proceedings should be terminated, or the appeal be declared inadmissible.
23. On 1 October 2020, the Appellant provided the CAS Court Office with a copy of the Decision of the IWF Hearing Panel, mentioning that such decision was also attached to her e-mail of 30 March 2020.
24. By letter of 14 October 2020, following the aforementioned exchange of correspondence, the CAS Court Office, on behalf of the Panel, informed the Parties that the Panel has decided to render a preliminary decision on the issues of admissibility and bifurcation of the appeal.

#### IV. SUBMISSIONS OF THE PARTIES

25. This section of the Award does not contain an exhaustive list of the Parties' contentions, its aim being to provide a summary of the substance of the Parties' main arguments related to the issues of admissibility and bifurcation. In considering the above, the Panel has carefully considered and taken into account all of the evidence and arguments submitted by the Parties related to the issues of admissibility, from the angle of timeliness of the appeal, and bifurcation of the present appeal in the present Award.
26. Since the Respondent is filing the objection to admissibility, the Respondent's position is coming first in the following part of the Award, followed by the Appellant's arguments.

##### A. Respondent's submissions

##### 1. *On the deadline for Appeal*

27. In accordance with Art. 13.7.1. of the IWF ADP, the time to file an appeal to CAS is twenty-one days from the date of receipt of the decision by the appealing party. The Appealed Decision was notified to the Athlete on 3 March 2020, and not on 9 March 2020, when it was noticed by the Appellant, which results in not meeting the twenty-one day deadline for the Appeal, which was filed on 30 March 2020.

##### 2. *On the deadline for the Appeal and request for a copy of the case file*

28. The Appellant's request dated 10 March 2020 for a copy of the case file in accordance with Article 13.7.1. of IWF ADP and consequently, fixing the twenty-one day for filing the appeal from 10 March 2020 is incorrect because the Appellant overlooks the fact that this particular regime for the deadline from the receipt of the case file is an exception to the general rule, only applicable "*in connection with appeals filed by a party entitled to appeal but which was not a party to the proceedings that led to the decision being appealed*". This is not the case for the Appellant, who was obviously a party to the first-instance proceedings. Consequently, the deadline for the Appeal was twenty-one days from the notification of the appealed decision on 3 March 2020. Therefore, the Appeal filed on 30 March 2020 is late.

##### 3. *On the receipt of the IWF decision.*

29. The Respondent does not agree with the explanations provided by the Appellant's Counsel, who alleged that he only noticed the Appealed Decision on 9 March 2020, and not on 3 March 2020. Firstly, the Appellant initially claimed, in her Statement of Appeal, that the deadline to appeal was triggered by her receipt of the full case file on 10 March 2020 and only after the Respondent pointed to the fact that her interpretation of the rules was wrong, resulting in a belated Appeal, the Appellant alleged that the Appealed Decision was first noticed on 9 March 2020. Such an explanation by Counsel for the Appellant is unsubstantiated. Appellant's Counsel explicitly confirms that the email sent by Mrs Saroli, who notified the decision on behalf of the

IWF, was dated 3 March 2020. Therefore, had there been a technical issue or not, he should have known when he noticed the email that the deadline had started to run from that date.

30. As per consistent CAS case law, the *dies a quo* of the deadline to appeal is when the decision enters the “sphere of control” of its addressee or representative, which is the principle, consistent with Art. 14.3.8 of the IWF ADP. The Appealed Decision was in Appellant’s Counsel’s sphere of control on 3 March 2020, which is not disputed by the Counsel for the Appellant.
31. The Appealed Decision was also sent to the Athlete’s personal email address on 3 March 2020, and was specifically addressed to her; therefore, the deadline to appeal was also triggered by the receipt of the email by the Athlete herself.
32. The IWF concludes that the appeal was manifestly late and requests that the proceedings should therefore be terminated, or the appeal be declared inadmissible.

## **B. Appellant’s submissions on timeliness of the appeal**

33. According to the Appellant, the Statement of Appeal should be considered filed on time, *i.e.* within the deadline of twenty-one days as set in Art 13.7.1 of the IWF ADP. In this respect, the Appellant’s statements in support of that are the following:

### **1. On the request of a copy of the case file**

34. The Appellant first requested by email of 9 March 2020 a copy of the case file in accordance with Art. 13.7.1. IWF ADP. Implicitly, the Appellant appears to consider that the limit of twenty-one days for filing the appeal started on 10 March 2020, the day of receipt of the case file.
35. The Appellant agrees with the Respondent’s statement that the appeal was not filed within the deadline that would have started on 3 March and would have expired 21 days later. It is correct that the 15 days time limit in Article 13.7.1 IWF ADP is not applicable. Appellant’s Counsel noticed the decision on 9 March 2020 and requested a copy of the case file on the same day, because he was not sure that he was in possession of all documents, required for the filing of an appeal before CAS. In the meantime, Appellant’s Counsel waited for confirmation that the Appellant would be able to pay the CAS Court Office fee and calculated a fifteen-day time limit starting on 10 March 2020 and not a twenty-one-day time limit starting on 3 March 2020.

### **2. On the receipt of the IWF Decision**

36. The appeal is not late because the relevant time limit did not start on 3 March 2020. The Appellant relies on Article R49 CAS Code and a similar provision of the IWF ADP. Hence, the relevant action for starting the time limit is “*the receipt*” of the decision. In contrast, the Respondent refers only to the date of “*notification*” which is in fact referring to the date of sending. This is not the starting point for the time limit.

37. Further, neither IWF ADP nor WADA Code define in which form a decision must be notified and when it will be deemed to be received under IWF ADP and the CAS Code. The Appellant in light of the above relies on HAAS U., *“The Time Limit for the Appeal in Arbitration Proceedings before CAS”*; SchiedsVZ 2011, 1 (Chapter IV. Calculation of Time Limit).
38. According to the Appellant, the issue of calculation of deadlines is governed by the applicable procedure, *i.e.* the CAS Code. Absent any provision to the contrary, only the CAS Code may be consulted on whether or not the deadlines are met and not the rules of the international federations. Therefore, *“7.14 IWF ADP is not admissible for determination when the time limit for the appeal starts whereby 7.14 refers anyway only to notification and not to receipt”*. Furthermore, the scope of application of the IWF ADP is restricted to the internal proceedings before the IWF. Thus, if Athletes are deemed according to the above provision to be validly notified, this refers to IWF internal proceedings only and not to proceedings governed by the CAS Code.
39. In general, Article R31 CAS Code is applicable to notifications by CAS as well as submissions by the parties. In all cases in which a time limit starts, the notification must be made by courier and/or by facsimile and/or by email but at least in a form permitting proof of receipt and the filing is valid upon receipt of email by the CAS Court Office. If one were to allow international federations to set their own standards, this would result in an unjustifiable unequal treatment.
40. Finally, none of the regulations determines whether notification must be made to the athlete itself or its representative. Further, the Appellant refers to Article R58 CAS Code and Articles 137 and 138 of the Swiss Code of Civil Procedure. According thereto the time limit of 21 days to file an appeal would not start before the Appealed Decision would have been served by registered mail or by other means towards confirmation of receipt, which was evidently not the case in the present procedure. Hence, the Appeal cannot be late.

### **3. On the receipt and the SPAM folder**

41. With her statement of 8 September 2020, Counsel for Appellant reacted to the Panel’s invitation of the Panel to explain, (i) why and (ii) for what reasons he noticed the Appealed Decision on 9 March 2020 only and not at an earlier point of time. Appellant’s Counsel alleges that in his law office both, the individual spam folder and the spam folder on the server are regularly checked to avoid that emails remain unnoticed. While checking his *“deleted elements”* folder on 9 March 2020, he noticed the email of 3 March 2020 sent by Mrs Saroli, being accompanied with the system notification that the security certificate of the sender was expired and not valid. This was the first time he noticed the IWF decision. He is not in the position to explain why this particular email was filed in that specific folder, and why he was notified that the certificate of the sender was marked as expired / not valid. According to Appellant’s Counsel, the issue is definitely not in the sphere of the recipient to be solved but remains in the sphere of the sender.

**4. On the IWF decision, sent from private account**

42. The Appellant raises also the question whether the use of a private email account of a member of the IWF doping panel for sending the IWF Hearing Panel decision met the requirements of “notification by a federation”. Sending by email with an invalid or expired security certificate is not even proper notification, which is the reason why under Article R31 CAS Code any notification of a decision by a federation requires at least a form permitting proof of receipt and any unequal treatment must be considered unlawful.
43. The Appellant concluded that the appeal is admissible, and CAS has jurisdiction to entertain the present dispute, therefore requesting, that the Appellant’s Appeal was filed within the deadline set in Article 13.7.1 of the IWF ADP.

**V. JURISDICTION OF CAS**

44. Article R47 of the CAS Code provides as follows:

*An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body. An appeal may be filed with CAS against an award rendered by CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules of the federation or sports-body concerned.*

45. Article 13.2.1 IWF ADP on Appeals involving International-Level Athletes, IWF Events or IWF decisions provides as follows:

*In cases arising from participation in an IWF Event, in cases involving International-Level Athletes or in cases when a decision is issued by IWF concerning International-Level Athletes or National-Level Athletes, the decision may be appealed exclusively to CAS.*

46. In this respect, an athlete shall be considered an International-Level Athlete if such athlete participates in an IWF Event. IWF Events are registered as such on the IWF website. The Appellant result at the 2012 European Championships, where she won a gold medal, being on the IWF’s website, it is the Panel’s position that such an event is an IWF event. Therefore, the Panel concludes that the Athlete is an International-Level Athlete.
47. None of the Parties disputed the jurisdiction of the CAS. Accordingly, the Panel is satisfied that the CAS has jurisdiction to hear this dispute.



## VI. MERITS

### A. The matter in dispute

48. In summary and according to the Appellant, as (i) from the Statement Appeal, filed against a decision of IWF Hearing Panel dated 3 March 2020, and as (ii) from the Appeal Brief, the primary matter of the Parties' disagreement focuses on *"assessment of the fact that on 1 June 2016 the Athlete's sister provided a sample in a doping test procedure in her place and without her knowledge at first and that the athlete disclosed the knowledge thereof for the first time immediately prior to the first oral hearing in the disciplinary procedure"*.
49. However, as from 17 August 2020, when the present arbitration proceeding has been bifurcated to the extent that the issues of admissibility would be decided as a threshold matter, this Award only examines the issue of admissibility from the point of view of its timeliness. There was no objection from the Parties that, for the purpose of the bifurcated procedure, the present dispute has narrowed in the above sense.

#### 1. *The "receipt": was the Athlete in "receipt" of the IWF Hearing Panel decision?*

##### a. *Facts and positions of the Parties*

50. The Appellant submits that she was not in *"receipt"* of the IWF Decision within the meaning of Article R49 CAS Code. Her objection that the decision was served by meeting the conditions for receipt was first, however limited to implicit and not explicit statement, raised in the Statement of Appeal from 30 March 2020, stating that *"For the sake of completeness, we would like to highlight that the signatory on behalf of the appellant requested by email of 9 March 2020 a copy of the case file in accordance with Art. 13.7.1. IWF Anti Doping Policy. The limit of twenty-one days for filling the appeal started on March 10, the day of receipt of the case file"*. This statement cannot yet be construed by the Panel as a formal objection. The issue of the receipt is problematized by the Respondent, stating, that *"in accordance with Art. 13.7.1. of the IWF ADP the time to file an appeal to CAS shall be twenty-one days from the date of receipt of the decision by the appealing party"*. However, Counsel for Appellant's argumentation in respect of the receipt goes further in the direction of its timeliness and not in the direction of the receipt within the meaning of Article R49 CAS Code.
51. As far as the proper communication of the Challenged Decision is concerned, the Panel notes that the Appellant alleges that the IWF Decision was not properly communicated, the time limit to file an appeal has thus not expired when she lodged her appeal to CAS. She raises the issue of the receipt within the meaning of Article R49 CAS Code in the context of the timeliness of the Statement of Appeal submitting that Article 13.7.1. of the IWF ADP sets twenty-one days from the date of receipt of the decision to appeal. The Appellant further contends that the relevant action for starting the time limit should be the receipt of the decision appealed against, not the date of the notification, as referred by the Respondent. Neither the IWF ADP nor the WADA Code define in which form a decision must be notified and when it will be deemed to be received under IWF ADP and namely CAS Code. IWF is only able to set such provisions within its own procedure, but not for the procedure before the CAS. The wording of Article 7.14 IWF ADP limits the applicability correctly and *"athletes shall be deemed to be validly notified if*

*any notifications under this Anti-Doping Policy*” means exclusively under this the IWF ADP and not the CAS Code. Article R31 CAS Code is applicable for notifications by CAS as well as submissions by the parties. In all cases where a time limit starts with a notification or where a submission must meet a deadline, the Appellant contends that it must be “*notified by a courier and/or by facsimile and/or by electronic mail but at least in a form permitting proof of receipt*” and the “*filing invalid upon receipt of the facsimile or the electronic mail by the court office*”. It would be an unjustifiable unequal treatment, if requirements to start the deadline to file an appeal would be different to the requirements to meet the time limit. Hence, any notification of a decision by a federation requires at least a form permitting proof of receipt. Counsel for the Appellant insists that was not the case in the present procedure. Finally, none of the regulations determines whether the notification must be made to the athlete itself or its representative. In the event the athlete is represented whether the receipt by the athlete or the representative starts the time limit is not determined. Accordingly, Counsel for Appellant alleges that articles 137 and 138 of the Swiss Procedural Code must be applied, concluding that the time-limit of 21 days to file an appeal did not start before the IWF would have served by registered mail or by other means towards confirmation of receipt the decision to athletes’ representatives, which was not the case in the present procedure. Based on the above, the Appellant’s position is that IWF Decision was not properly communicated to her and that, therefore, the time limit to file an appeal has not expired when she lodged her appeal to CAS.

52. The Respondent objects to the above Athlete’s statement concerning the effectiveness of the notification of the appealed decision. It is not correct, that “*neither IWF nor WADA code defines in which form a decision must be notified*” and therefore it should have been notified by registered mail in accordance with the Swiss Procedural Code, being not applicable in CAS proceedings, as asserted by the Appellant. Beside that Article 14.3.7 of the IWF ADP expressly sets out that “*a notice under these Anti-Doping Rules shall only be effective if it is in writing. Faxes and email are permitted*”. In addition, it is consistent with CAS case law that *dies a quo* of the deadline to appeal is when the decision enters the “*sphere of control*” of its addressee or representative. This principle is also consistent with Article 14.3.8 (e) of the IWF ADP. Therefore, the fact that the Appellant noticed the decision of the IWF ADP on 9 March 2020, is irrelevant, because it was sent to the Athlete and her representative, and was in their sphere of control from 3 March 2020, which is a *dies a quo* for the purposes of the deadline of the appeal.
53. The Respondent concludes from the above that the time limit to file the appeal against IWF Decision has expired, when the Appellant lodged her appeal to CAS.

*b. Conclusions of the Panel*

54. Receipt of the decision for the purposes of Article R49 CAS Code means that the decision must have come into the sphere of control of the party concerned (party her/himself or of her/his representative or agent authorized to take receipt).
55. The Panel’s assessment is based on extensive case CAS jurisprudence whereby “*receipt*” does not imply (HAAS U., “*The Time Limit for Appeal in Arbitration Proceedings before the Court of Arbitration for Sport*”, CAS Bulletin 2/2011, p. 11) that the party concerned actually took note of the content

of the decision concerned (CAS 2006/A/1153, no. 40; see also CAS 2004/A/574, no. 60; MAVROMATI/REEB, “CAS Code Commentary”, Art. 49 no. 95; RIGOZZI/HASLER, Article R49: Time Limit for Appeal, in ARROYO M., *Arbitration in Switzerland*, Wolters Kluwer 2013, p. 1003 at 9; HAAS U., op. cit. *supra*).

56. Instead, it suffices that the party concerned had a (reasonable) possibility of taking note of the decision (Swiss Federal Tribunal ATF 118 II 42 at 3b; see also CAS 2004/A/574, no. 60), broadly: “As a basic rule, it is unanimously recognized by the Swiss legal doctrine and the Swiss Tribunal Federal that under Swiss law a decision or other legally relevant statement are notified, if a person had the opportunity to obtain knowledge of the content irrespective of whether such a person has in fact obtained knowledge (ATF 118 II 44; Huguenin, *Obligationenrecht, Allgemeiner Teil, Zurich et al.* 2004, note 166). Thus, the relevant point in time is when a person receives the decision and not when it obtains actual knowledge of its content” (HAAS U., “The Time Limit for Appeal” in *Arbitration Proceedings before the Court of Arbitration for Sport (CAS)*, in Schields VZ, *Zeitschrift fur Schiedsverfahren*, German Arbitration Journal, 1/2011, p. 8).

57. The Parties may agree – in principle – that only certain routes of notification allow for a message to enter the recipient’s sphere of control. The Respondent submits in its letter of 9 September 2020 that sending the decision by email is a permissible route of notification which may establish the Appellant’s sphere of control. The Respondent refers insofar to Article 14.3.8 of the IWF ADP. The provision reads as follows:

*Any notice given under these Anti-Doping Rules shall, in the absence of earlier receipt, be deemed to have been duly given as follows:*

- a) if delivered personally, on delivery;*
- b) if sent by first class post, two clear business days after the date of posting;*
- c) if sent by airmail, six clear business days after the date of posting;*
- d) if sent by facsimile, at the expiration of 48 hours after the time it was sent;*
- e) if sent by email, at the time at which it was sent.*

58. The Appellant relies on the argument, that Article 14.3.8 of the IWF ADP should not apply, because proceedings before the CAS are solely governed by the CAS Code. In this respect she relies on Article R49 of the CAS Code.

59. Article R49 of the CAS Code refers for the length of the deadline to the autonomy of the federations, which results that the scope of the provision is limited only to that. The provision of Article R49 of the CAS Code, therefore does not relate to all other matter, as *i.e.* receipt or form of notification and does not preclude the application of Article 14.3.8 of the IWF ADP. Sending the IWF ADP decision by email, being a permissible route of communication, therefore established the sphere of Appellant’s control (Article 14.3.8 *litera e*). Thus,

undoubtedly, the Athlete was, in principle, in receipt of the IWF Decision within the meaning of Article R49 CAS Code when the email from 3 March 2020 entered into her (her Counsel's) sphere of control, specifically, when it came into, even both, her and his computer folder. Consequently, when the Athlete lodged her Statement of Appeal on 30 March 2020, the twenty-one day-deadline to file an appeal with the CAS had elapsed.

**2. *SPAM: Relevance of the fact that the IWF decision was allegedly located in Applicant's SPAM/ deleted folder from 3 March 2020 until 9 March 2020***

*a. Facts and positions of the Parties*

60. On 2 September 2020, based on Appellant's Counsel's letter of 20 April 2020, whereby he noticed "*the decision of the IWF Doping Panel on 9 March*", the Panel invited him to state "*(i) why and (ii) for what reasons he noticed the Appealed Decision on 9 March 2020 only, and not at an earlier point of time?*" On 8 September 2020, the Appellant's Counsel explained that certain IT migration having been implemented in his law office during the years 2019 and 2020, this led to the automatic storing of certain emails into the SPAM folder.

*b. Conclusions of the Panel*

61. The question here is whether the storing of the Appealed Decision in the SPAM folder of Appellant's Counsel, as explained by the Appellant, affects the notion of "*receipt*" by the Appellant, and accordingly the starting point of the deadline to appeal.
62. There is, to the best of the Panel's knowledge, no jurisprudence in Switzerland and in CAS case law on the issue, *i.e.* whether, when a declaration is deemed to be received, if sent by email and classified as SPAM by the recipient's computer, this is the responsibility of the sender or of the recipient.
63. Consequently, comparative law was examined, mainly German (Landgericht Bonn, Urteil vom 10.01.2014 (Az: 5 O 189/13)) and Austrian jurisprudence (OGH 3 Ob 224/18i). In both countries, the jurisprudence indicates that there is a general obligation of the recipient to check the SPAM box on a regular, *i.e.* daily basis. In particular, if a recipient has indicated (by making her/his email address available) that she/he communicates *via* email, then the declaration is deemed to have been received, even if located in the SPAM box. It is then expected that the recipient is able to read said email (*i.e.* during business hours).
64. In Switzerland, a declaration becomes known to the recipient if it accesses the sphere of control of the recipient and the latter can be reasonably expected to read it. For the access of electronic declarations into the recipient's sphere of control, it is recognized in case law that the recipient's mailbox belongs to his/her sphere of control, at least if he/she has indicated that he/she can be reached *via* the email address (OGH 3 Ob 224/18i, judgment from 20 February 2019). The Panel is of the opinion that this criterion is fulfilled in the present arbitration proceeding, because it is obvious that the IWF Hearing Panel was in possession of the Counsel's and the Appellant's email addresses through former communication with the IWF Hearing Panel. If the

declaration is contained in an email, the sphere of control is accessed once the email is saved on the recipient's computer (SCHWENZER I., Schweizerisches OR - Allg. Teil, 7. Aufl. 2016: note 27.23; JÖRG F. in ARTER/JÖRG, Internet-Recht und Electronic Commerce Law (2001), Vertragsschluss im Internet und neue Geschäftsmodelle: Ausgewählte Rechtsfragen: p. 8 f.). Authors differentiate between business and private recipients, *i.e.* whether or not the email is part of the business activity or not. When in the context of business contacts, the recipient has a higher duty to control and check the emails, a private recipient is treated slightly differently. The latter receives the email, only once she/he checks the email. This means that in private communication that period may be quite long, because checking the email is a matter of habit, opportunity, decision of the user *etc.* Things may be different where the private recipient advised the other party to send the declaration *via* email. In such case also the private recipient is treated like a business recipient. For this reason, despite the private e-mail connection, receipt does not rely on the effective opening of the e-mail, but on its storage on the respective server.

65. Considering that the legal starting point in Switzerland is the same as in Austria and Germany, the Panel finds above solutions persuasive. According thereto, the risk that a wrong "triage" is made by the computer of the recipient (into SPAM or deleted items folder) is the risk of the recipient, in particular in case of a business relationship. The commercial recipient is obliged to retrieve information, so that messages are stored on the respective server.
66. At the time of receipt and in the previous phases of the case as well, the Counsel for the Appellant was in possession of the Appellant's power of attorney (valid from 22 August 2019), therefore he was empowered to receive the IWF Hearing Panel Decision. He was the person, entrusted by the client. Consequently, there is no need for further exploration of legal consequences of the fact that the IWF Hearing Panel decision was sent to the athlete herself and several other recipients, which could have informed the athlete about the existence and the contents of said decision (and her counsel), following the IWF ADP (Mr Alex Padure of Federatia Romana de Haltere, office address of Federatia Romana de Haltere, recipient named "frh" of Federatia Romana de Haltere).
67. Communication between IWF and the counsel, authorized with the power of attorney, is a relationship akin to two business entities in the meaning of the above delimitation between private and business relationships. For this reason, attorneys are expected to check the SPAM on a daily basis. In this respect (LG Bonn, Urteil vom 10.1.2014 - 15 O 189/13):

*Ein Rechtsanwalt verletzt seine Pflichten aus dem Mandatsvertrag dann, wenn er seinen Spam-Filter nicht täglich kontrolliert, obwohl er seine Mail-Adresse für den geschäftlichen Verkehr eröffnet hat.*

*(A lawyer violates his obligations under the mandate contract if he does not check his spam filter daily, although he has opened his e-mail address for business transactions. - free translation by the Panel - )*

68. The Panel is aware that the above is a high threshold that is difficult to meet in daily practice. However, the expectations of the business community are such that an attorney shall at least try to open an email that was otherwise located in the deleted / SPAM folder, on the day or at least the very next day after receipt. Doing so, he would have achieved the same result as by

opening it on 9 March 2020, when, after failing to open the IWF Hearing Panel decision, he was able to fix the problem by early afternoon of the same day. Consequently, the deadline for filing an Appeal Brief has started to run on 3 March 2020, keeping in mind the late hour of receiving the email, definitely no later than 4 March 2020.

## **B. Conclusion**

69. Under the circumstances and in light of the above, that the deadline for filing an Appeal Brief has started to run on 3 March 2020 and not on 10 March 2020, the Panel decides that the appeal of Cristina Iovu is denied for reasons set out above at paras 54 - 59 and paras 61 - 68.
70. The appeal is not admissible, failing the Appellant's respect of the time limit to file her appeal pursuant to Article R49 of the CAS Code.
71. All other prayers for relief are rejected.

## **ON THESE GROUNDS**

### **The Court of Arbitration for Sport rules that:**

1. The Appeal filed by Mrs Cristina Iovu to the Court of Arbitration for Sport on 30 March 2020 against the decision rendered by the International Weightlifting Federation Hearing Panel on 3 March 2020 is not admissible.
2. (...).
3. (...).
4. All other motions or requests for relief are dismissed.