



COMESA Competition Commission

Kang'ombe House, 5th Floor-West Wing

P.O. Box 30742

Lilongwe 3, Malawi

Tel: +265 (0) 1 772 466

Email: compcom@comesa.int



**Common Market for Eastern
and Southern Africa**

SUBJECT: Non-Confidential Report regarding the Sponsorship Agreement for Marketing Rights of CAF Football Events involving the Confédération Africaine de Football, Lagardere Sports SAS, and TOTAL SA

ECONOMIC SECTOR: Sports marketing rights

10th March 2021

Case File No. CCC/RFA/01/01/2017

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Executive Summary

Background

1. On 13th February 2017, the COMESA Competition Commission (the “**Commission**”) commenced an investigation, pursuant to Article 22 of the COMESA Competition Regulations (the “**Regulations**”), into a possible violation of Part 3 of the Regulations by the Confédération Africaine de Football (“**CAF**”). On 16th April 2019, the Commission issued notices of investigation against Lagardère Sports S.A.S (“**Lagardère Sports**”) and TOTAL SA (“**TOTAL**”).
2. This report is concerned with the agreement entered into between CAF, Lagardère Sports and TOTAL for the commercialisation of marketing rights for competitions organised by CAF.
3. The aim of the investigation was to allow the Commission to determine whether or not certain provisions contained in the agreement are in violation of the Regulations.

Relevant Market

4. The relevant market was identified as the market for the acquisition of marketing rights for sporting events in Africa.

Effects on Competition

5. The Commission found that the duration of the agreements with sponsors were longer than those adopted by other football organisers such as UEFA, which conducted tender processes covering events not exceeding a period of four years. However, the Commission established that the CAF marketing rights were not essential rights in the relevant market and that the TOTAL Sponsorship agreement did not preclude CAF from engaging sponsors in other product category. The Commission did not find evidence of anticompetitive harm as a result of the duration of the agreement, the absence of a tender process, or the right of first refusal.

Conclusion

6. The evidence, facts and law analysed in this report has led to the conclusion that the TOTAL Sponsorship Agreement does not contravene Article 16(1) of the Regulations.

Determination

7. Given the foregoing analysis and conclusions, the investigation into the Total Sponsorship Agreement is hereby closed in accordance with Rule 23 of the COMESA Competition Rules.

PREAMBLE

The COMESA Competition Commission (hereinafter referred to as the “**Commission**”),

Having regard to Article 55 of the Treaty establishing the Common Market for Eastern and Southern Africa (hereinafter referred to as the “**COMESA Treaty**”),

Having regard to the COMESA Competition Regulations of 2004 (hereinafter referred to as the “**Regulations**”), and in particular Articles 3, 6, 16, and 22 thereof,

Having regard to the COMESA Competition Rules of 2004, as amended by the COMESA Competition [Amendment] Rules, 2014 (hereinafter referred to as the “**Rules**”),

Hereby issues this determination pursuant to Rule 23 of the Rules.

Introduction

1. On 13th February 2017, the Commission commenced an investigation, pursuant to Article 22 of the Regulations, into possible violations of Article 16 and Article 18 of the Regulations by the Confédération Africaine de Football (“**CAF**”) into agreements entered into relating to the commercialisation of media and marketing rights for CAF competitions.
2. On 16th April 2019, following additional information gathered during the investigation, the Commission identified additional respondents, which led the Commission to issue Notices of Investigation to Lagardère Sports SAS (“**Lagardère Sports**”), and TOTAL SA (“**TOTAL**”).
3. This report is concerned with the agreement entered into between CAF; and Lagardère Sports; and TOTAL for the commercialisation of the marketing rights. Specifically, the concerned agreement is the Sponsorship Agreement for Marketing Rights of CAF Football Events entered with TOTAL on 31st May 2016 (the “**TOTAL Sponsorship Agreement**”).
4. The aim of the investigation was to determine whether the TOTAL Sponsorship Agreement is in contravention of the Regulations. The alleged competition infringements assessed in this report concern:
 - i. the award of marketing rights for CAF competitions in the absence of an open and competitive tender process;
 - ii. the long-term duration of contracts for the award of CAF marketing rights to TOTAL;
 - iii. the inclusion of right of first refusal in the TOTAL Sponsorship Agreement.

5. The Commission's investigation findings are set out in this Report.

Statutory timeline for conclusion of the Investigation

6. Article 22 of the Regulations provides that the Commission shall complete its investigation within 180 days, unless it determines that a longer period is necessary. Rule 18(3) of the COMESA Competition Rules (the “**Rules**”) provides that if the Commission decides that a longer period is necessary, the Commission shall seek approval from the Board of Commissioners (the “**Board**”) and so notify the parties concerned.
- i. The statutory 180 days period in relation to the investigation commenced against CAF was due to expire on 19th August 2017. At the 13th Board meeting on 28th July 2017, the Commission sought the approval of the Board to extend the 180-day statutory period, prompted in part by the slow pace of feedback from CAF and the need for the Commission to meet CAF to discuss any recommended remedies. In that respect, the Board granted an extension of an additional 90 days for the Commission to complete its investigation, which was due to expire on 19th November 2017.
 - ii. On 20th October 2017, the Commission held a meeting with CAF during which they were provided a summary report highlighting the offending clauses identified by the investigation, and the remedies which the Commission intended to recommend to the Committee Responsible for Initial Determination (the “**CID**”). However, the Commission was not afforded an opportunity to present its findings in relation to the competition harms identified. Due to the technical and sensitive nature of the agreements under investigation, and their immediate impact on consumers in the Common Market, the Commission intended to hold another discussion with the respondents to reach a common ground on the recommended remedies. Such a meeting would have taken place after the 19th November 2017 in view of both the Commission's and the respondents' time schedules. Accordingly, on 13th November 2017, the Commission sought and obtained the approval of the CID for a second extension of the statutory investigation period, by an additional 90 days, which was due to expire on 5th March 2018.
 - iii. Having regard to the importance of the rights affected by the investigation and the potential impact of any remedial action by the Commission on the market, at the 15th Board meeting on 28th February 2018, the Board granted to the Commission an indefinite extension of the statutory period within which to conclude the investigation against CAF.
 - iv. With regard to the investigation commenced against Lagardere Sports and TOTAL, on 25th September 2019, the Board granted to the Commission an

indefinite extension of the statutory period within which to conclude the investigation against the two above-mentioned respondents.

The Parties

CAF

7. Article 1 of the CAF Statutes provides that CAF is an international non-governmental organisation with its own legal persona, founded in 1957 in Khartoum, Sudan. The headquarters of CAF is located in Cairo, Egypt. CAF is the governing body of football in Africa and has fifty-four (54) Member Associations, which are the national football associations of the African countries, and two (2) Associate Members (Reunion Island and Zanzibar).
8. The legislative body and supreme authority of CAF is the General Assembly¹. Each of the fifty-four (54) Member Associations have one vote at the General Assembly. The General Assembly elects the President of CAF and the members of the Executive Committee² and is the only body which can make amendments to the CAF Statutes and the Regulations Governing the Application of the Statutes³.
9. The executive body of CAF is the Executive Committee and consists of the President, thirteen (13) members and one (1) female member. The Executive Committee is responsible for implementing the policies and decisions of the General Assembly, and the management and the administration of CAF. It is the supreme authority for all matters concerning CAF competitions⁴.
10. Currently, CAF has exclusive rights to organize eleven (11) competitions⁵, namely:
 - For national teams
 - i. Africa Cup of Nations (“AFCON”);
 - ii. African Nations Championship “(CHAN)”;
 - iii. U-20 AFCON;
 - iv. U-17 AFCON;
 - v. U-23 AFCON;
 - vi. Women’s AFCON;
 - vii. Futsal AFCON;
 - viii. Beach Soccer AFCON;
 - For Clubs
 - ix. CAF Champions League;

¹ Article 17 of the CAF Statutes CAF Statutes dated 29th September 2016 (the “CAF Statutes”).

² *Ibid.*

³ Article 19 of the CAF Statutes.

⁴ Article 23 of the CAF Statutes.

⁵ Article 58 of the CAF Statutes. The Competitions are described further below.

- x. CAF Confederation Cup; and
 - xi. CAF Super Cup
11. Further, CAF has the exclusive right to organize any other continental or intercontinental football competitions.
 12. The Executive Committee is assisted in the fulfilment of its duties by Standing and ad-Hoc Committees. The relevant Standing Committees involved with the TOTAL Sponsorship Agreement are the following:
 - i. TV and Marketing Committee which advises the Executive Committee with regard to marketing and television matters, as well as on the drafting and execution of marketing, sponsorship, broadcasting, television and multimedia contracts with CAF's partners⁶; and
 - ii. Strategic Committee which deals with global strategies as well as political, economic and social aspects of football⁷. The Strategic Committee consists of CAF representatives as well as representatives from Lagardère Sports⁸.
 13. According to Article 59 of the CAF Statutes, CAF and the national football associations of African countries are the legal owners of all rights arising from competitions and other events which fall under their respective areas of responsibility. These rights include, among others, all kinds of pecuniary rights, audio-visual recording rights, reproduction and broadcasting rights, multimedia rights and marketing and promotional rights, copyright as well as intellectual property rights; for example, covering emblems.
 14. The Executive Committee is responsible for determining how and to what extent these rights are exploited. Under the CAF Statutes, it is provided that the Executive Committee is sovereign in relation to the exploitation of these rights and that it can exploit them either directly, or with third parties, or delegate their exploitation totally or partially. The Commission understands that CAF is thus entitled to make decisions pertaining to the exploitation of the media and marketing rights, and in so doing, it may choose to delegate these powers to any third party, for example such as Lagardère Sports.

The main CAF Competitions

The Africa Cup of Nations

15. The AFCON (officially CAN: Coupe d'Afrique des Nations) is the main regional football competition of CAF and is held every two years. The AFCON is open to the national representative male teams of the national associations affiliated to CAF, each

⁶ Article 45 of the CAF Statutes.

⁷ Article 47 of the CAF Statutes.

⁸ Paragraph 15 of the Investigation Records of CAF on 5th March 2017.

association being entitled to enter one team. The AFCON is organised in two phases: a qualifying phase; and a final phase.

16. The AFCON recorded for its 2006 edition a cumulated audience of more than 4.2 billion TV viewers, placing the competition to the 3rd row of the world football events^{9,10}. The global TV audience for the 2013 AFCON tournament was estimated at 6 billion viewers¹¹.

CAF Champions League

17. The CAF Champions League is an inter-club competition organised by CAF, played on an annual basis. The competition is open to:
- i. all First Division national champion male African clubs of CAF Member Associations; and
 - ii. the male teams ranked second in the First Division national championships of the top twelve countries in accordance with the Club classification in CAF competitions of the previous 5 years.

18. The Winner of this competition represents CAF at the Club World Cup organised by FIFA on an annual basis.

CAF Confederation Cup

19. The CAF Confederation Cup is organised on a yearly basis and is an inter-club competition which brings together the winners of the national championships of member associations and teams that ended up in 3rd position in the national championships of the top 12 countries according to CAF's ranking.

CHAN

20. The CHAN is open to the national male teams of the Member Associations; composed exclusively of national players playing in the national championship, each association being entitled to enter one team. The Final Tournament is played every even-numbered year.

⁹ See paragraph 47 of the Investigations Records of meeting with CAF dated 5th March 2017.

¹⁰ Press Release by Lagardere Sports, dated 18 October 2007, '**SPORTFIVE widens its collaboration with Confederation of African Football (CAF) and becomes TV producer of the "MTN Africa Cup of Nations, GHANA 2008"**'. Accessed at <http://www.lagardere.com/press-room/press-releases/press-releases-363.html&idpress=3313>.

¹¹ Press Release by Lagardere Sports, dated 6th February 2013, '**International media coverage for the Orange Africa Cup of Nations, SOUTH AFRICA 2013**'. Accessed at: <http://www.lagardere.com/press-room/press-releases/press-releases-363.html&idpress=5918>

The CAF Super Cup

21. The CAF Super Cup is an inter-club competition organised by CAF on an annual basis which opposes the winner of the CAF Champions League to the winner of the CAF Confederation Cup of the editions in the preceding year.

The U-20 AFCON

22. The U-20 AFCON is a continental football competition which is open to the national junior male teams (consisting of players under twenty years) of the Member Associations. This competition determines the Africa U-20 male selections who participate in the FIFA U-20 World Cup. The Final Tournament is played every odd year.

The U-23 AFCON

23. The U-23 AFCON is a continental football competition which is open to the under twenty-three's national male teams of the Member Associations. The tournament acts as the CAF qualifiers for the Olympic football tournament. The tournament is played every four years.

The Lagardère Group

24. Lagardère Sports is a French simplified company limited by shares (*Société par actions simplifiée*) registered under No. RCS NANTERRE 873 803 456, with its registered offices at 1618 rue du Dome, 92100 Boulogne-Billancourt, France.
25. Lagardère Sports belonged to the Lagardère Group (i.e. Lagardère SCA and any entity directly or indirectly controlled by Lagardère SCA), which describes itself as the global leader in content publishing, production, broadcasting and distribution, whose powerful brands leverage its virtual and physical networks to attract audiences. It is noted that the Lagardère Group sold its sport business (including Lagardère Sports SAS and IFAP Sports) to H.I.G Capital in April 2020 (retaining only a minority, non-controlling interest in the divested entities) at which point Lagardère Sports SAS and IFAP Sports ceased to form part of the Lagardère Group. Subsequent to this transaction, Lagardère Sports has been re-named Sportfive EMEA.
26. The Lagardere sports' division previously traded under Sportfive S.A.S ("**Sportfive**"). The Sportfive Group was active in the trading of sport broadcasting rights, especially football, marketing services for events, including sport events. In the sector of broadcasting rights, its role is to act as an intermediary between the original rights holders and the content users¹². According to the Lagardère Group, Sportfive was the European and African leader in the management of marketing and media rights for

¹² Case No COMP/M.4519 - LAGARDERE / SPORTFIVE, decision of 18.01.2007, paragraph 4. Accessed at http://ec.europa.eu/competition/mergers/cases/decisions/m4519_20070118_20310_en.pdf

sports, whose activities included negotiating TV rights at international level, advertising in stadiums, sponsorship and hospitality programmes¹³.

27. It is noted that the other party to the TOTAL Sponsorship Agreement is IFAP Sports. IFAP Sports obtained the rights to commercialise the media and marketing rights of three CAF competitions (namely Women's AFCON, U17 AFCON, and Futsal AFCON) for a duration of 12 years¹⁴.

TOTAL

28. TOTAL is a French societe anonyme with registered offices located at 2 place Jean Miller – La Defense 6- 92400 Courbevoie, France. TOTAL describes itself as Africa's number one's oil major¹⁵ and the world's fourth-ranked oil and gas company and a global leader in solar energy through its affiliate SunPower. TOTAL has operations in more than 130 countries. Africa accounts for 30% of TOTAL's oil and gas production¹⁶. On 31st May 2016, TOTAL and CAF entered into an agreement whereby TOTAL was appointed as the Title sponsor of certain CAF competitions over the period 2017 to 2024, as discussed further below.

The Agreement under Investigation – the TOTAL Sponsorship Agreement

29. Pursuant to Section 4.1 of the sponsorship agreement between CAF and TOTAL, CAF agreed to licence certain marketing rights and related opportunities to TOTAL as the sole and only Title Sponsor of certain CAF competitions. Lagardère Sports was further appointed without exclusivity by TOTAL to provide with technical services related to the implementation of the sponsorship and with digital activations related to the marketing rights granted.
30. The duration of the agreement spans across [REDACTED] for the period 2017 – 2024 and covers the following events:
- a) The final tournaments of the AFCON: four (4) editions (2017,2019,2021, and 2023)
 - b) The final tournaments of CHAN: four (4) editions (2018, 2020, 2022 and 2024);

¹³ See Press Release from Lagardere Group, dated 19th October 2011: <http://www.lagardere.com/press-room/press-releases/press-releases-363.html&idpress=5273>

¹⁴ See Press Release from CAF dated 27th October 2015, 'CAF AND IFAP SPORTS CONTRACTUALLY BOUND TILL 2028'. Accessed at <https://www.cafonline.com/news-center/news/caf-and-ifap-sports-contractually-bound-till-2028>

¹⁵ <https://www.total.com/en/media/news/press-releases/total-title-sponsor-africa-cup-nations-and-partner-african-football?folder=8163>

¹⁶ <https://www.total.com/media/news/press-releases/total-title-sponsor-africa-cup-nations-and-partner-african-football>

- c) The final tournaments of U-20 AFCON: four (4) editions (2017, 2019, 2021 and 2023);
- d) The Final tournaments of U-23 AFCON: two (2) editions (2019 and 2023);
- e) The Final Tournaments of U-17 AFCON: four (4) editions (2017, 2019, 2021, and 2023);
- f) The Final Tournament of Women AFCON: four (4) editions (2018, 2020, 2022 and 2024);
- g) The Final Tournament of Futsal AFCON: two (2) editions (2020 and 2024);
- h) The Final Phase of the CAF Champions League: eight (8) editions (yearly from 2017 to 2024);
- i) The final Phase of CAF Confederation Cup: eight (8) editions (yearly from 2017 to 2024); and
- j) The CAF Super Cup: eight (8) editions (yearly from 2017 to 2024)

31. [REDACTED]

32. [REDACTED] TOTAL would benefit from an option right to extend the agreement up to [REDACTED] provided TOTAL informs CAF represented by Lagardère Sports of its decision to extend this agreement by written notice within 2 months following the final match of the [REDACTED] at the latest. In such case, the agreement would be automatically renewed to cover the following events:

- a) [REDACTED]
- b) [REDACTED]
- c) [REDACTED]
- d) [REDACTED]
- e) [REDACTED]
- f) [REDACTED];
- g) [REDACTED]
- h) [REDACTED]
- i) [REDACTED]

[REDACTED]

33.



Legal Provisions

34. Article 3(2) of the Regulations provides that the Regulations apply to conduct covered by Parts 3, 4 and 5 which have an appreciable effect on trade between Member States and which restrict competition in the Common Market. Under Part 3 of the Regulations, Article 16(1) further provides that:

“The following shall be prohibited as incompatible with the Common Market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which:

- (a) may affect trade between Member States; and*
- (b) have as their object or effect the prevention, restriction or distortion of competition within the Common Market.”*

35. Article 16(2) provides that Article 16(1) applies *“...only if the agreement, decision or concerted practice is, or is intended to be, implemented within the Common Market.”*

36. Article 16(3) provides that any agreement or decision which is prohibited by Article 16(1) is void. It is noted that in line with established case law¹⁷, this nullity only applies to clauses in an agreement which are caught by the prohibition. It is only the offending clauses which would be required to be amended or terminated, and not the agreements as a whole, to the extent that this does not affect the performance of the agreements. The agreement as a whole will only be void where those clauses are not severable from the remaining terms of the agreement.

37. Under Article 16(4), the provisions of Article 16(1) may be declared inapplicable if the agreement under review *“contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:*

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;*
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial market for the goods or services in question.”*

38. Thus, in assessing whether agreements within the meaning of Article 16 infringe the Regulations, the following cumulative elements must be established:

¹⁷ See *Société Technique Minière v the EC*, Case 56/65 [1966] ECR at page 250.

- (a) Whether there exists an agreement between undertakings;
- (b) Whether the agreement is or is intended to be implemented within the Common Market;
- (c) Whether the agreement has the object or effect to prevent, restrict or distort competition within the Common Market;
- (d) Whether it affects trade between Member States.

Whether there exists an ‘agreement’ between undertakings

39. In assessing whether a business practice can be described as an agreement between undertakings, the first step is to establish whether the parties to the alleged conduct qualify as ‘undertaking’ within the meaning contemplated by the Regulations.

(a) Whether the parties qualify as ‘undertaking’

- 40. An undertaking is defined under Article 1 of the Regulations as any natural or legal person, public or private, involved in the production of, or the trade in goods, or the provision of services. Thus, any entity engaged in the offer of goods and services on a given market, regardless of its legal status and the way it is financed, constitutes an undertaking within the meaning of Article 1 of the Regulations.
- 41. As described previously, Lagardère Sports and TOTAL are both clearly engaged in the offer of goods and services on the market, and thus fall within the statutory definition of ‘undertaking’ for the purposes of the Regulations.
- 42. As regards the activities of CAF, the Commission considered that while CAF is a sporting body, it engages in economic activities by offering rights for exploitation of media and marketing rights for CAF competition on the market and it generates economic revenues through activities such as the conclusion of broadcasting and marketing contracts, and exploitation of CAF emblems. CAF therefore qualify as an ‘undertaking’ for the purposes of the Regulations.
- 43. It is noted that CAF previously submitted that they qualify for an exemption from the provisions of the Regulations under Article 4(1)(c) which provides that *“These Regulations shall not apply to activities of professional associations designed to develop or enforce professional standards reasonably necessary for the protection of the public interest.”*
- 44. CAF submitted that *“it is a non-for-profit professional association constituted of football national federations that aim to develop -inter alia- the professional standards of football in Africa, which constitutes indeed a public interest”*¹⁸.
- 45. *“Professional services, also known as ‘liberal professions’ are generally defined as occupations requiring special training in the arts or sciences, such as lawyers, engineers,*

¹⁸ Paragraph 40 of CAF letter to COMESA dated 28th March 2017.

- architects and accountants.”¹⁹ The OECD further recognised that professional regulation is often necessary to address a perceived ‘market failure’ in the respective markets for the professional service²⁰, noting that “in some cases, consumers are unable to assess the quality of services that have been provided to them and, in some cases are not in a position to determine which services they should purchase. As a result, it is feared that competition in professional services will lead to consumers being offered low quality and inappropriate services.”²¹
46. In view of the foregoing characteristics, professional associations would refer mainly to associations formed for persons whose academic training is specialized for the purpose of providing a specialist function; further that the function of professional associations is to regulate activity of undertakings within a market to ensure greater access to quality services for consumers.
47. Even if the Commission were to consider CAF as a professional association, it is noted that the provision of Article 4(1)(c) does not exempt **all** the activities of a professional association. The provision exempts only those activities which are “*reasonably necessary for the protection of public interest*”, which have not been demonstrated in the case under review²².
48. The Commission further noted that, the fact that an organisation lacks a profit-motive or does not have an economic purpose does not, in itself, mean that an activity is not economic²³. In *Distribution of Package Tours during the 1990 World Cup*²⁴, the European Commission (the “EC”) held that FIFA, which carry out similar activities as CAF, as well as the Italian football association were considered as undertakings which were subject to Article 101 of the Treaty for the Functioning of the European Union (the “TFEU”), which is the equivalent of Article 16 of the Regulations. The EC recognised that FIFA is a federation of sports associations and accordingly carries out sports activities. However, it also considered that FIFA carried out lucrative economic activities such as the conclusion of advertising contracts, exploitation of World Cup emblems and the conclusion of television broadcasting contracts.

¹⁹ Canton E., Ciriaci D., Solera I., *The Economic Impact of Professional Services Liberalisation* taken from http://ec.europa.eu/economy_finance/publications/economic_paper/2014/pdf/ecp533_en.pdf

²⁰ OECD paper (2002) on *Competition in Professional Services*

²¹ OECD paper, supra pg. 7

²² It is further noted that in Case C- 519/04 P Meca- Medina v Commission [2006], it was held that the International Olympics Committee was held as an undertaking and further the Court of Justice confirmed that “rules on sport are subject to community law in so far as it constitutes an economic activity. If those rules do not constitute restrictions on freedom of movement of persons and freedom to provide services because they concern questions of purely sporting interest, that fact does not mean that the sporting activity in question necessarily falls outside the scope of the Community rules on competition”.

²³ Whish R., Bailey D., *Competition Law* 7th & 8th ed.

²⁴ 92/521/EEC: Commission Decision of 27 October 1992 relating to a proceeding under Article 85 of the EEC Treaty (IV/33.384 and IV/33.378 - Distribution of package tours during the 1990 World Cup), paragraph 43 – 47.

49. In view of the foregoing, the Commission considered that CAF's request for exemption under Article 4 was not founded and is satisfied that the activities of CAF qualifies the latter as an undertaking whose conduct is subject to the provisions of the Regulations.

(b) Whether there exists an 'agreement'

50. The Commission has next considered whether there exists an agreement between the above undertakings. The COMESA GUIDELINES ON RESTRICTIVE BUSINESS PRACTICES provides that the defining criterion of an "agreement" within the meaning of Article 16 of the Regulations is the existence of a concurrence of wills between the parties. This is consistent with the decision of the General Court in *Bayer AG v Commission*, wherein it was held that the concept of an agreement between undertakings "*centres around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention*"²⁵. "*It is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way*"²⁶. The way in which an agreement is manifested is not important; whether it be written or oral, formal or informal, and whether or not it can be legally enforceable.

51. It is noted that the application of Article 16 is not restricted to horizontal agreements (i.e. agreements between undertakings operating at same levels of the value chain or economy, where the undertakings in question are usually actual or potential competitors) but is also applicable to vertical agreements (i.e. agreements between undertakings operating at different levels of the value chain or economy). In case of vertical agreements, as in the present case, it becomes important to distinguish conduct agreed upon (whether expressly or tacitly) between the undertakings to the agreement from purely unilateral conduct.

52. There is clear documentary evidence of the conclusion of the TOTAL Sponsorship Agreement, which sets out the parties' joint intention to conduct themselves as per the terms of the agreements for the exploitation of the marketing rights of CAF competitions. The Commission considered that the conclusion of the TOTAL Sponsorship Agreement cannot be construed as unilateral conduct by CAF.

Whether the agreement was implemented or intended to be implemented in the Common Market

53. The Commission has assessed the scope of the agreements to determine whether these were or would be implemented within the Common Market. The concept of 'implementation' require that the business practice must have taken place within the Common Market; must have involved companies established within the Common

²⁵ Judgment of the Court of First Instance of 26 October 2000, *Bayer AG v Commission* of the European Communities, paragraph 69.

²⁶ *Ibid*, paragraph 67.

Market; or must have targeted customers in the Common Market. In *Woodpulp*²⁷ case, the European Court of Justice (the “ECJ”) established that the criterion for determining whether an agreement has been “implemented” is satisfied by direct sales of the relevant products to purchasers established in the Community, irrespective of the location of the sources of supply and the production plant, and where the anticompetitive agreement was formed. The ECJ stated that:

*“It should be noted that the main sources of supply of wood pulp are outside the Community, in Canada, the United States, Sweden and Finland and that the market therefore has global dimensions. Where wood pulp producers established in those countries sell directly to purchasers established in the Community and engage in price competition in order to win orders from those customers, that constitutes competition within the common market.”*²⁸

54. The Commission notes that while some of the parties to the agreements are domiciled outside the Common Market, the TOTAL Sponsorship Agreement cover the exploitation of marketing rights directly to customers and consumers located in the Member States. The Commission thus considers that the Agreements satisfy the territorial scope of Article 16(2) of the Regulations.
55. Lagardère Sports argued that the Commission did not have jurisdiction in the investigation of the agreements, submitting that *“the geographic and financial scope of Commercial Agreements largely exceeds the Common market as COMESA Member States represent a small minority of the overall scope of such agreements”* and that *“the CAF/LS Agreements and the Commercial Agreements have their economic “centre of gravity” outside of the Common market”*.
56. Lagardère Sports further submitted that *“the commercialisation of sport (media and marketing) rights outside of COMESA (e.g. to third parties outside of COMESA) fall outside of the jurisdictional scope of the Regulations. As a result, LS understands that the Commission may not intervene in contractual relationships outside of its jurisdiction. Any intervention beyond COMESA (i.e. regarding any agreement that is either worldwide or regional (beyond COMESA) in scope) would be ultra vires in relation to the COMESA Treaty and the Regulations”*.
57. It is noted that Articles 3(2) and 16(2) of the Regulations empowers the Commission to investigate conduct which has an effect within the Common Market. The argument that the Commission cannot review an agreement because the agreement also covers territories which do not fall within the Common Market cannot be sustained. The underlying principle for the effects doctrine is not whether a country or geographic market constitutes a significant share of the geographic reach of the alleged conduct

²⁷ JUDGMENT OF 27. 9. 1988 — JOINED CASES 89, 104, 114, 116, 117 AND 125 TO 129/85

²⁸ *Ibid*, paragraphs 12-13.

- (this may have other implications for financial penalties), but whether the conduct significantly harms competition within the relevant geographic markets.
58. Despite Lagardère Sports' submission that the Member States account for a minority of the scope of the agreements, it is noted that the value of football rights is linked to the performance/ popularity of the clubs and countries participating in the competitions. According to a Club ranking as at June 2019²⁹, eight out of the top ten clubs competing in CAF competitions represent COMESA Member States (being 2 clubs from Egypt, 2 clubs from the DRC, 2 clubs from Tunisia, and 2 clubs from Sudan), which clearly illustrate the significance of COMESA Member States in the context of the CAF competitions.
59. Further, by virtue of their membership to CAF and participation in the competitions, the Member States are directly affected by the effects of the Agreements. It is a misdirection at law and fact to contend that the Commission lacks jurisdiction on the premise that the commercial value of these agreements in the Common Market relative to the entire value of the agreements is diminutive; rather the jurisdiction test should be concerned with the effect of the agreements on the competitive process and consumers within the Common Market.
60. It should be noted that in relation to the concern raised by Lagardere Sports regarding an intervention by the Commission outside COMESA, any remedy envisaged in this Report relates strictly to the effects of the agreements in question in the COMESA Member States. The commercial agreements would be considered null and void in their entirety only in an event where the parties to the agreement(s) are unable to amend the relevant provisions to ensure their compatibility with the prevailing laws in the Common Market, including the Regulations.
61. The Commission has next sought to determine whether the conduct has the object or effect of restricting competition and trade between Member States. Such an analysis can only be undertaken following the identification of the relevant markets within which the parties concerned compete, and thus within which the competition effects from the conduct under review can be assessed. This is considered in the section further below dealing with competition analysis.

Competition Analysis and Relevant Observations

Consideration of Relevant Markets

62. Paragraphs 1 and 2 of the Commission's Guidelines on Market Definition sets out the Commission's approach in the identification of the relevant markets:

“Market definition is a tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which

²⁹ <https://footballdatabase.com/ranking/africa/1> [Updated after matches played on 9 June 2019].

competition policy is applied by the Commission. The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure"

63. The constituent product market and geographic market are typically defined having regard to demand and supply substitution factors, notably possible consumer and supplier responses to the imposition of a "small but significant and non-transitory" increase in the relative price of the focal product supplied by the undertakings concerned (the "SSNIP test").
64. From a demand perspective, the SSNIP test seeks to assess whether customers would switch to other products in response to a hypothetical small but significant increase in the price of the focal product. From a supply perspective, the test seeks to assess whether suppliers of other products could switch to production in response to a hypothetical small but significant increase in the price of the focal product, without incurring significant additional costs and risks.

Relevant Product Market

65. Paragraph 7 of the Commission's Guidelines on Market Definition states that:

"A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use"
66. The agreements between CAF and Lagardère Sports cover the commercialisation of media and marketing rights for football competitions in Africa. According to the agreements, Lagardère Sports is tasked with concluding sales agreements with marketing sponsors and media broadcasting entities on behalf of CAF. The acquisition of the intermediation rights to commercialise media and marketing rights has an impact on the markets in which these rights are subsequently sold, as such the agreements cannot be viewed in isolation, but must be considered in tandem with the subsequent sale of rights covered under the agreement. The rights under consideration affect different levels of the supply chain. The upstream level is concerned with the interactions between the rights owners and their intermediaries, if any; and the interactions between the rights owners or their intermediaries and the commercial partners; while the downstream levels is concerned with the interactions between the commercial partners and the consumers, in this case the football fans.

67. At upstream level, the Commission has considered that the market for acquisition of marketing rights can be distinguished from the market for acquisition of intermediation right, for reasons discussed below.
68. The players in the intermediation market consist of the right owners of sporting competitions (such as CAF) and intermediaries/sports marketing agencies (such as Lagardère Sports) who are engaged to perform a certain function, *inter alia*, the management of commercial rights. The motive of the rights holder is to ensure maximum revenues are received from the exploitation of its rights. The objective of the sports marketing agency is to secure relevant third parties, who wish to exploit these rights. In their submission³⁰, Lagardère Sports stated that the intermediation sport market is one where demand comes from rights holders such as CAF while commercialisation and management services are provided by sport agencies.
69. The birth and growth of the market for sports marketing has led to the development of the profession of intermediary agencies specialized in this market. The increasing complexity of the implementation of these rights - from a technical, legal, economic and commercial point of view - has led to the rights owners appointing specialized agencies to ensure complete or partial management of the rights. Commercialisation of the media and marketing rights often cannot be managed directly by sports federations and sports clubs which may not have the capabilities to deal with the complexity of these services.
70. There are certain considerations that a rights holder would have to take into account when determining whether to exploit the rights internally through an in-house division, or by appointment of an intermediary. The choice of a marketing option in-house necessitates the acquisition of an internal marketing skill that generates fixed costs, the profitability and performance of which may not be adapted to the portfolio of rights managed by the holder. In addition, the intermediary ensures the legal, financial and operational follow-up of the contracts on all of these services.
71. In this market, intermediary agencies purchase media and marketing rights or, in most cases, obtain a mandate from the right owners to commercialise them to broadcasters or advertisers. The function of the agencies entails the selling, negotiation of contracts and collecting of revenues for the rights holder.
72. In the case of media rights, the activity of the intermediary will include obtaining the best possible audio-visual exploitation of the competition for the rights holder by seeking out the interested broadcasters to obtain the best possible price and coverage; while in the case of marketing rights, the intermediary will seek out marketing agencies to sponsor the matches in exchange for their brand name to be associated with the competitions.

³⁰ Submission by Lagardere Sports dated 21st April 2017.

73. In these circumstances, it is clear that intermediaries perform a distinct role and incur distinct risks and costs from broadcasters and sponsors operating at a downstream level. Thus, the Commission is satisfied that the market for intermediation services is distinct from that of the acquisition of market rights. For purposes of this report, the market for intermediation services will not be further considered in the competitive assessment as it is not relevant to the TOTAL Sponsorship Agreement.
74. Within the marketing rights market, the Commission has considered whether sub-segmentation is required.
75. Sponsors seek to purchase the rights to use the marks of the sports events or otherwise affiliate with the rights owners or the events for purposes of advertising and promoting goods and services. These goods and services broadly entail shirt and equipment sponsoring, selling panel advertising, billboard advertising in the stadium, as well as a variety of activities generally categorised as ‘public relations’ which involve organizing public relations and hospitality events.
76. Marketing communication activities in the field of sports may be construed as a distinct market given that “*from a demand perspective, sports events may be especially suitable to attract certain groups of customers*”³¹. Sponsors seek to secure marketing rights for sport events based on the popularity of the events and as such its expected returns from the publicity i.e. they gauge the level of publicity that an event is expected to achieve in order to weigh whether or not to associate their brands with that particular event. The OECD observed that “*the profits advertisers make from the TV channel increase in parallel with the increase of number of viewers.*”³²

Submissions by TOTAL

77. TOTAL submits that the Preliminary Report unduly chose to rely on EU case law to restrict the relevant product market to sports marketing. The only reason provided to justify such a narrow definition is based on the inconclusive statement of the Canal+/RTL/GJCD/JV decision according to which, “*from a demand perspective, sports events may be especially suitable to attract certain groups of customers*”. However, that decision merely mentions that the EC’s market investigation “*resulted in some indications that a separate market for marketing communications services in the field of sports may be considered*”, without carrying out a detailed analysis that would allow it to reach a definite conclusion in this respect (as the transaction under scrutiny did not involve any affected markets).
78. Setting aside the reference to sports, the description of the contents of the marketing rights provided in the Preliminary Report (“shirt and equipment sponsoring, selling panel advertising, billboard advertising in the stadium, as well as a variety of activities

³¹ EU Case No. COMP/M.2483 Canal+/RTL/GJCD/JV para 27

³² OECD Policy Roundtables supra 2013 pg. 87

generally categorized as ‘public relations’”) could fit other forms of entertainment sponsoring, such as concerts for instance. However, the Preliminary Report fails to investigate this possibility and merely asserts a narrow definition limited to sports marketing without providing any clear reasoning for doing so. The abovementioned quote from Canal+/RTL/GJCD/JV is particularly vague and, as such, insufficient to support the conclusion reached.

79. Sports is one marketing tool amongst various others that may be included in companies’ marketing budgets. [REDACTED] [REDACTED]. In addition, many companies that sponsor sporting events (e.g., AT&T, Evian, Samsung, McDonald’s or Nike) also sponsor non-sporting events such as the Oscars or the various Fashion Weeks.
80. In light of these considerations, TOTAL submits that the relevant market should not be restricted to sports marketing but should instead extend to cover all marketing communication services provided by marketing agencies or rights holders to sponsors.
81. Secondly, should the Commission nevertheless maintain its position (subject to carrying out a fully-fledged analysis establishing that sports marketing rights are not substitutable with other entertainment rights), the market would then necessarily cover the sale of all sports marketing rights by holders, on the supply-side – regardless of whether these sales take place directly or indirectly (through agents appointed to sell the rights on behalf of their principal) – to sponsors, on the demand-side.
82. TOTAL further submitted that the multi-sports portfolio of companies should be viewed as “an indication that sports are viewed as substitutes. Otherwise the fact that a client has several suppliers would always imply that the latter are present on different markets, which is obviously erroneous. This may be illustrated by an example: the fact that a consumer regularly drinks two different types of soft drinks does not imply that they fall within different markets; rather, subject to a fully-fledged substitutability analysis, this would tend to show that they are substitutes.”
83. “The assertion in support of a single-sport market is contradicted by TOTAL’s own sponsoring strategy as it currently sponsors other important sporting competitions in rugby³³, motorsports³⁴, badminton³⁵, cycling³⁶ and ice hockey³⁷. This multi-sport approach is also followed by TOTAL’s competitors. For example, Chevron sponsors

³³ TOTAL sponsors the rugby team Section Paloise (France).

³⁴ TOTAL is the official oil supplier of PSA Motorsports’ activities (*i.e.*, Citroen Racing team in the FIA World Rally Championship, DS Performance team in FIA Formula E Championship) as well as the Automobile Club de l’Ouest which is the organizer of the 24 Hours of Le Mans as well as other championships (*i.e.*, FIA World Endurance Championship, FIA European Le Mans Championship, FIA Asian Le Mans).

³⁵ TOTAL is the title sponsor of the Badminton World Federation (Asia and Europe).

³⁶ TOTAL sponsors the Total Direct Energie pro-cycling team which competes as a UCI Professional Continental team in UCI Continental Circuits races and at the UCI World Tour.

³⁷ Total sponsors the Russian ice hockey federation (by in-stadium visibility and digital activation; see <https://ru.total.com/en/home/media/list-news/total-vostok-becomes-new-partner-russian-ice-hockey-federation>).

baseball³⁸, marathon³⁹, motorsports⁴⁰ and golf⁴¹ whereas BP sponsors the Paralympic competitions⁴², Formula One⁴³ and the Red Bull Air Race⁴⁴. ExxonMobil sponsors tennis⁴⁵, motorsports⁴⁶ and basketball⁴⁷ and Shell sponsors motorsports⁴⁸. It is precisely because of the multi-sport nature of the market that TOTAL is frequently contacted by owners of marketing rights for various sporting competitions, such as rugby, tennis, badminton, or multi-sports events⁴⁹. [REDACTED]

[REDACTED]

[REDACTED]

84. Finally, according to TOTAL, an assessment of the sponsorship choices made by TOTAL's competitors (i.e., TOTAL's competitors downstream, which share similar commercial constraints to TOTAL) confirms the view that a sport-specific approach is not appropriate. The sports sponsored by some of the main market players in the oil and gas industry differ radically from one group to another. For instance, while Shell focuses on motorsports, ExxonMobil sponsors basketball. This clearly shows that companies with the same constraints may choose from a wide range of sports and sporting competitions when they intend to become a sponsor".

The Commission's Assessment

85. Sports sponsorship is an essential component of the marketing strategy of many companies. According to industry reports, *"sports sponsorship is a powerful and impactful marketing technique. It consists of the suggestion between a company (sponsor) and a sports club or event (sponsee)... Visibility and media exposure are guaranteed. Also, it gives the user a chance to stand out and differentiate. Sports sponsorship has witnessed a lucrative growth as more money been put into marketing with athletes, sports team, or sporting events. In times of advertising message overloads, sport offers something extremely valuable: real emotions. In connection with the digital possibilities, enormous opportunities arise for global players as well as small start-ups. Nowadays, sponsorship accounts for an enormous portion of the sports*

³⁸ <https://www.bizjournals.com/sanfrancisco/news/2019/04/05/oracle-park-san-francisco-giants-ballpark-sponsors.html>.

³⁹ <https://www.chevronhoustonmarathon.com>.

⁴⁰ <https://nascar.nbcsports.com/2019/07/26/havoline-returns-as-nascar-sponsor-in-three-race-deal-with-ben-rhodes/>

⁴¹ <https://static.clubs.nfl.com/image/upload/49ers/cl5is93ijhs76t47z92i.pdf>.

⁴² <https://www.bp.com/en/global/corporate/who-we-are/sponsorship/paralympic-partnership.html>.

⁴³ <https://www.bp.com/en/global/corporate/who-we-are/sponsorship/renault-formula-one.html>

⁴⁴ <https://www.bp.com/en/global/corporate/who-we-are/sponsorship/red-bull-air-race.html>.

⁴⁵ <https://www.qatartennis.org/ar/tournaments/qatar-exxonmobil-open-2019/>.

⁴⁶ <https://news.mobil.com/press-release/mobil-1/mobil-1-named-official-motor-oil-all-female-heinricher-racing-team>

⁴⁷ <https://www.nba.com/celtics/partners/partners-logos>.

⁴⁸ <https://www.shell.com/motorist/shell-motorsport.html>.

⁴⁹ [REDACTED]

*business industry.*⁵⁰ The foregoing is clearly illustrative of the demand for sports sponsorship, in a manner which cannot be easily substituted by most non-sporting events. The Commission is therefore satisfied that a distinct market exists for sports marketing.

86. Further, the Commission observed that most sponsors tend to direct their marketing efforts towards more than one sporting discipline e.g. Heineken is an official partner of Formula 1[®], the UEFA Champions League and Rugby World Cup, amongst others. The Commission considered that the rationale for companies to promote their brands through multi-sports sponsorship is illustrative of the fact that the different sports target different category of audiences.
87. Demand for sponsorship is driven by the popularity of a sport. It is important to consider the special characteristics of football and in particular CAF competitions, for the African continent. An internet search for the most popular sport in Africa identifies football as the top sport. TOTAL recognises on its website that “[I]n Africa, football is more than just a sport—it’s a unifying force like no other that brings together the different cultures of the continent.”⁵¹ During the official signing of the agreement, the Chairman and CEO of TOTAL SA expressed that the company was looking for “something emblematic of Africa, an iconic team sport”.⁵² Likewise, CAF has submitted that “With TOTAL, Orange, and the many other CAF-event-sponsors looking to develop their businesses across Africa, the selection of CAF as a partner only seems natural”. In this regard, the Commission observes that sponsors seeking to target the African audience may have fewer effective options outside continental events such as those offered by CAF tournaments.
88. However, it is important to recognise the quickly evolving nature of sport popularity, and the performance of sports teams which impact on the attractiveness of CAF events for sponsors. [REDACTED]
[REDACTED]
[REDACTED]
89. As opposed to the intermediation and media markets where the operators are engaged in their core business, in the context of the TOTAL Sponsorship agreement, sponsorship plays a secondary role to the sponsor’s core business activities. The marketing aims to assist with the promotion of a given sponsor’s business to increase its brand visibility. It is the sponsor who seeks access to the brand of the sporting event. In this regard, the Commission considered that there would be no significant restraint

⁵⁰ Sports Sponsorship Market Statistics, Size, Trends, Growth and top sponsorship companies 2019 companies. Accessed at: <https://www.marketwatch.com/press-release/sports-sponsorship-market-statistics-size-trends-growth-and-top-sponsorship-companies-2019-companies-2019-09-17>

⁵¹ Total – Our Partnership with CAF. Accessed at: <https://www.football-together.total.com/en/our-partnership-caf>

⁵² <https://www.total.com/en/media/video/official-signing-partnership-between-total-and-caf>

preventing a general or Title sponsor to switch across different sporting events as it entails no technical requirements or services to be provided by the sponsor.

90. The Commission has thus considered that the relevant product is **the acquisition of marketing rights for sporting events**.

Relevant Geographic Market

91. The COMESA Competition Commission Guidelines on Market definition define the relevant geographic market as follows:

“The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas”.

92. The Commission considered that advertising is typically adapted to fit the tastes and languages of a certain territory. In the *Sportfive* case, the Autorité de la Concurrence held that for the market for marketing rights of sports, the geographic market can be national because the marketing rights are concerned with viewers in specific territories. This argument is reasonable based on the fact that the local premier league (the rights of which were subject of that particular case) would appeal most to local supporters, and as such sponsors would tailor their advertisements to that particular customer set.
93. On the other hand, since the competitions affected by the agreements under review are continental in nature, the sale of advertising rights would be tailored to fit the tastes of the viewers on the continent. Advertisers would tailor their advertisements to appeal to a continental audience, as opposed to a national audience. They would typically seek to maximise visibility of their brand within Africa, regardless of the location of a particular tournament. As such, the geographic market for marketing rights of CAF competitions is the entire continent. Lagardère Sports submitted⁵³ that *“the sponsorship rights over CAF’s competitions confer visibility and allow communication strategies toward an audience which is much wider than national, if not worldwide”*.
94. Total has disputed the finding of a continental geographic market, stating that EU case law as early as 2001 and 2007 acknowledging that the market was “more likely worldwide”⁵⁴. Total submits that the global reach of the Sponsorship Agreement is confirmed by three additional elements:

i. [REDACTED]

⁵³ Submission from Lagardere Sports dated 21st April 2017.

⁵⁴ Case No COMP/M.2483 - *GROUP CANAL + / RTL / GJCD / JV*, paragraph 27; Case No COMP/M.4519 – *LAGARDERE / SPORTFIVE*, paragraph 15.

- ii. [REDACTED]
[REDACTED]
[REDACTED]
- iii. Third, the African Cup of Nations was broadcasted in North America (Canada and the United States), in more than 20 countries of Central America, in 13 countries of Europe and in a dozen of countries of Asia and the Pacific region.
95. It is noted that Total’s claim that EU case law acknowledged that the market was “more likely worldwide” is a misrepresentation of the cases quoted. In both cases, it was the submission of the merging parties involved that the relevant geographic market was at least European/EEA- wide or more likely worldwide. The European Commission however concluded that the geographic market could be left open as even on the basis of a national market, the merger transactions considered would not have led to affected markets. In fact, in the *GROUP CANAL + / RTL / GJCD / JV* case, the European Commission carried out the assessment of the market for sports marketing on a national basis⁵⁵.
96. The Commission considered that while potential sponsors may indeed be located anywhere in the world, the advertisements need to resonate with the targeted audience. As such, it is unlikely that sponsors without some presence in the African countries or knowledge of the taste of African consumers would be able or willing to quickly switch to offering marketing services without incurring significant costs or risks. Along the same line of reasoning, it is unlikely that an increase in the price of marketing rights for international sports events would provoke a substitution away from CAF competitions unless if it offers a similar vector to reach African consumers. As such, the Commission considered that the identification of a continental market is warranted.
97. On the basis of the foregoing, the Commission identified the relevant market **as the market for the acquisition of marketing rights for sporting events in Africa.**

Consideration of Restriction of Competition by Object or Effect

98. Article 16(1) requires that the agreements in question, or clauses contained therein, have as their object or effect the restriction of competition for there to be an infraction of the law and consequently a prohibition. This section considers whether the agreements contain any restriction of competition by object. Object restrictions are restrictions which by their very nature are injurious to the competitive process and from which benefits, if any, are unlikely to outweigh the competition injury on the market.

⁵⁵ Case No COMP/M.2483 - *GROUP CANAL + / RTL / GJCD / JV*, paragraph 59.

Right of First Refusal

99. The right of first refusal is a contractual right that gives its holder the option to enter a business transaction, according to specified terms, before the other contracting party is entitled to enter into a transaction with a third party⁵⁶. The literature on rights of first refusal in the corporate world context suggest that the device is used to assure compatible management, maintain family control, or otherwise protect the remaining shareholders from an interloper. The existence of such goals suggest that an insider may place a high idiosyncratic value on a property and that absent the insurance provided by a right of first refusal, such value could be lost in a failed negotiation.
100. Where contracts include such preferential renewal clauses that allow parties to renew existing agreements instead of potentially contracting with new parties, leading to long term contractual relationships, this make it more difficult for new players to enter the market, or for existing operators to expand their current commercial activities. The right of first refusal thus needs to be assessed in light of the characteristics of the concerned agreement, including in particular the nature of the rights concerned and the duration of the agreement. As such, the Commission considered that the right of first refusal does not constitute a restriction by object and should be assessed as an ‘effects’ restriction, as discussed in the next Section.

Duration of Exclusivity

101. Exclusive agreements tend to have a restrictive effect on competition as they aim to shield at least one party to an agreement from outside competitive pressures. Exclusive agreements, however, are not by themselves considered *object* violations under the Regulations. It is important to recognise that for certain products or sectors, such provisions may be necessary in order to facilitate the supply of the product to the market, such as promoting the successful establishment of a new player on the market or incentivising an undertaking to invest in new technologies.
102. The granting of exclusive rights in the sports media and marketing industry is a common commercial practice, where exclusive contracts are often awarded covering the duration of a sport event or one season in a given championship. However, exclusivity for a significant long duration can lead to market foreclosure, particularly when the exclusivity is combined with right of first refusal. As such, the Commission considered that the duration of the exclusive agreement does not constitute a restriction by object and it is thus necessary to examine its effects on the markets, as discussed in the next section.

⁵⁶ European Commission Preliminary Report on the E-commerce Sector Inquiry, 2016.

The “Effects” Test

Market Structure

103. Market structure generally refers to the features that may affect the behaviour and performance of firms operating in an industry. The structure of the market indicates the relative number of buyers and sellers in the market and therefore the nature of competition that is expected to take place. Market conditions can vary from perfectly competitive to monopolistic, and the consequences of these can be seen in market conduct and performance outcomes. An analysis of market structure remains critical to ascertain the nature and extent of market power of the players. The competitiveness of the market indicates the extent to which an individual firm has power to influence market price or the terms on which its product is sold..
104. The Commission noted that there exist several players who have been awarded various marketing rights for the CAF competitions, including TOTAL, Orange, Visa, 1XBET.
105. The competitive assessment for the marketing rights market need to be considered in conjunction with the markets where the sponsors have their core activities. The Commission observed that TOTAL is a significant player in the broad market for petroleum products. It is noted that TOTAL described itself as the largest integrated energy player notably thanks to the volume of hydrocarbon production and the number of Group- branded service stations on the African continent⁵⁷. The Commission noted nonetheless that TOTAL still faces competition from other players in the Common Market, including Puma, Vivo Energy, ENGEN, KenolKobil, Petroda, and Mount Meru.
106. Further, it is noted that there exist alternative sporting events on the continent to which sponsors can turn to promote their image, including rugby, cricket, and athletics.
107. In this regard, the Commission considered that neither TOTAL nor CAF (or Lagardere Sports) would have a dominant position on the market for acquisition of marketing rights for sporting events.

Barriers to Entry and Expansion

108. The main element that affects the structure of the market is barriers to entry and expansion. Barriers can take the form of structural barriers or artificial barriers. Barriers to entry are a critical element in determining whether the incumbent has market power or not. Barriers to entry refers to obstacles for potential new entrants to enter the market and compete with the incumbents; while barriers to expansion refers to obstacles for incumbents to grow in the market. Where the barriers to entry or expansion are high,

⁵⁷ Total Form 20-F 2018, pages 13 and 63.

the incumbents have more freedom to abuse their position in the market because they do not face any competitive restraint from potential competition.

109. In the present case, the Commission did not identify significant barriers to entry as regard the market for marketing rights, as evidenced by the availability of alternative sponsors and sporting rights. The barriers to entry are likely to manifest themselves in the form of availability of capital by the sponsors, and brand recognition.

Consideration of Effects on Competition

110. In the relevant market for marketing rights for sporting events, the Commission identified potential concerns relating to the duration of the Total Sponsorship agreement, the incorporation of a right of first refusal clause, and the manner in which the agreement was concluded in the absence of an open tender process.

Duration of the Agreement

111. The Commission noted that the agreement entered with TOTAL run for a duration ■■■■■ 8 years. The sponsorship agreement can be seen as an investment by the corporate sponsor in exchange for the exploitable commercial potential associated with the sports event or property. Sponsors enter into such agreements with sports properties for a multitude of reasons, including brand exposure, brand image association, and the potential to influence consumer purchase behaviour⁵⁸. The Commission is thus mindful that a reasonable amount of time may be required to allow the sponsors to recoup their investments. The Commission has next considered the practice by other rights holders in relation to the duration of marketing arrangements.

Submissions by TOTAL

112. TOTAL submitted that the duration of their agreement with CAF does not give rise to a restriction of competition by effect⁵⁹. Their arguments in this respect are reproduced below:
- i. “An agreement reveals a restriction of competition by effect if it has a sufficiently appreciable adverse impact on one of the parameters of competition such as price, output, product quality, product variety or innovation. In this regard, the assessment of whether an agreement has restrictive effects on competition must be made in comparison to the actual and legal and economic context in which competition would occur in the absence of the concerted practices”.
 - ii. “Whereas certain sports media rights are an essential input for sports TV channels, sports marketing rights do not constitute an essential input for industrial and commercial clients. This is notably why sports marketing

⁵⁸ John A. Fortunato, J.A., and Martin. S.E., *American needle v. NFL: legal and sponsorship implications*.

⁵⁹ Submissions made on 30th January 2018 and 21st May 2019.

rights bear little competitive significance compared to certain sports media rights”.

- iii. “First, the rights granted to TOTAL are limited in time. The exclusivity was only granted for eight years, [REDACTED] [REDACTED] [REDACTED]”. The limited duration of the Sponsorship Agreement appears even more clearly in view of the typical duration of Sponsoring agreements for the world’s most prestigious events, which ranges between seven to seventeen years. Certain naming agreements have even been signed for more than twenty years. The table below summarizes the duration for the sale of marketing agreements and shows that the eight-year duration of the Sponsorship Agreement, [REDACTED] [REDACTED] is fully compliant with market practice. Therefore, the Sponsorship Agreement fits with usual commercial practices of sports marketing rights. This is especially the case for naming sponsorships as it is recognized that a lengthy commitment is key for both the sponsor and the right holder. Sports sponsoring partnerships involve high investments which need to be recouped over a long period of time.

OVERVIEW OF THE DURATION OF SPORTS MARKETING RIGHTS		
Sports event/Stadium	Duration of the marketing rights	Commercial client
Sponsoring agreements		
Football World Cup	8 years	Coca-Cola
Football World Cup	12 years	Hyundai / Kia Motors
Football World Cup	17 years	Adidas
Football World Cup	8 years	Visa
Olympic Games	10 years	Procter & Gamble
Olympic Games	7 years	Toyota
Olympic Games	11 years	Alibaba
Naming agreements		
Manchester Stadium	10 years	Etihad
New York Mets	20 years	Citigroup
London Arena	22 years	O2

- iv. Second, the limited exclusivity involved in the Sponsorship Agreement bears no strong competitive significance compared to sports media rights. In that regard, first, as recalled above, sports media rights are very different from sports marketing rights. Whereas sports media rights may constitute an essential input for sports TV channels, sports marketing rights do not constitute an indispensable input for industrial and commercial clients. For TOTAL, the purchase of marketing rights was certainly an interesting investment, but it was not decisive, since TOTAL can sponsor other events (should they be sports related or not). It is precisely owing to the limited

competitive importance of sports marketing rights that, in the UEFA case regarding the sale by UEFA of football media rights for the Champions League, the European Commission specifically excluded sports marketing rights from its investigation. It is also for this reason that, to TOTAL's knowledge, no competition authority has ever imposed a limited duration for the sale of marketing rights to sponsors.

v. Third, the limited exclusivity does not foreclose any competitors on the market for the purchase of marketing rights since rights granted to TOTAL are limited substantively and numerous alternatives exist on the market. The exclusivity therefore enables competing sponsors to either buy the same marketing rights or to find alternatives.

vi. [REDACTED]

vii. Certain CAF existing marketing rights (such as space on LED panels) were not allocated to any buyer and are therefore available for sale.

viii. [REDACTED]

- ix. The Sponsorship Agreement only relates to certain CAF events. Therefore, other CAF events were awarded to Aiteo and Pepsi [REDACTED].
- x. Finally, a myriad of sponsorship alternatives (other than those related to the CAF events) exist on the sports marketing market. These include (i) non-African football events which have an equal or bigger reach than the CAF events in Africa, including the Champions League, national European championships (such as the English Premier League or French Ligue 1) or the FIFA World Cup or (ii) other sports broadcasted in Africa.
- xi. As a result, the limited exclusivity enjoyed by TOTAL does not foreclose competitors from accessing the market for the purchase of marketing rights. As a result, the duration of Sponsorship Agreement does not restrict competition in the COMESA Common Market.

Overview of the duration of sport title sponsorships

Event/Competition	Duration	Title sponsor
<i>Examples of recent long-term title sponsorship agreements</i>		
Mumbai Marathon	10 years (2017-2027)	Tata
World Golf Championships	10 years (2019-2029)	FedEx
Denver Marathon	10 years (2010-2020)	Colfax
Crossfit games	10 years (2010-2020)	Reebok
New Mexico Bowl	8 years (2010-2018)	Gildan
Shoot Out Golf Tournament	8 years (2010-2018)	Orange
CAF	8 years (2009-2017)	Orange
Premiership Rugby	8 years (2010-2018)	Aviva
<i>Examples of long-running title sponsorships</i>		
Classic PGA Tour golf	39 years (1982-2021)	Honda
Long Beach Grand Prix	39 years (1980-2019)	Toyota
All England Open Championships	38 years (1983-2021)	Yonex
Pebble Beach Pro-AM (Golf)	38 years (1986-2024)	AT&T
Outback Bowl	31 years (1995-2026)	Outback
Stella Artois tennis tournament	29 years (1979-2008)	Stella Artois
Badminton Horse Trials	28 years (1991-2019)	Mitsubishi
Wheelchair Tennis Masters	28 years (1992-2020)	NEC
Qatar Open	27 years (1995-2022)	ExxonMobil

Houston Open	26 years (1991-2017)	Shell
Twelve Hours of Sebring	26 years (1995-2021)	ExxonMobil
Sony Open	23 years (1999-2022)	Sony
Toshiba Classic	24 years (1994-2018)	Toshiba
BNP Paribas Open	21 years (2009-2030)	BNP Paribas
Phoenix Open	20 years (2010-2030)	Waste Management
Davis Cup	21 years (1980-2001)	NEC
Liberty Bowl	16 years (2004-2025)	Autozone
Italian Open	19 years (2006-2025)	BNL (BNP Paribas)
Marathon Düsseldorf	18 years (2003-2021)	Metro
Western & Southern Open	18 years (2002-2020)	Western & Southern
Davis Cup	17 years (2001-2018)	BNP Paribas
Six Hours of The Glen	16 years (2003-2019)	Saleh
Premier League	16 years (2001-2016)	Barclays
Six Nations	14 years (2003-2018)	RBS
Indian Wells	14 years (2009-2023)	BNP Paribas

113. The general tendency for long-term partnerships applies also to marketing rights which do not include a title sponsorship⁶⁰. For example, in July 2019, the International Olympic Committee signed a twelve-year sponsorship agreement with Coca-Cola and Mengniu⁶¹. In addition, examples of sponsorship partnerships that are based on long-term business relations include the sponsoring of Ferrari by Shell (which was initiated in 1929 and is still ongoing today)⁶² or the sponsoring of the Australian Open by Kia (which was initiated in 2002 and will last until at least 2023)⁶³.
114. The duration of these marketing agreements, some of them lasting for more than twenty years overall, clearly shows that a sponsorship partnership is never envisaged by the seller of the rights and by the sponsor for a couple of years. Examples of such partnerships include the PGA Tour golf title sponsorship by Honda for 39 years, the Long Beach Grand Prix title sponsorship by Toyota for 39 years or the partnership between Ferrari and Shell lasting for 90 years.

Submissions by CAF

115. CAF submits that it is the industry practice for marketing agreements to be longer in time and wider in scope. The length of a sponsorship agreement is necessary to enable the sponsor to make its brand as visible as possible and achieve return on its investment.

⁶⁰ This tendency for long-term partnerships also applies for naming of stadiums. As an example, the partnership for the Bridgestone arena in Nashville, which started in 2010, was recently extended through 2030 (see <https://www.benzinga.com/pressreleases/19/09/n14510421/bridgestone-nashville-predators-extend-naming-rights-agreement-for-bridgestone-arena-through-2030>).

⁶¹ Article entitled “*Le CIO rassemble les Etats-Unis et la Chine*”, Lettre du Sponsoring n° 339, page 5.

⁶² <https://formula1.ferrari.com/en-fr/partners-xu/shell-xu/>

⁶³ <https://ausopen.com/articles/news/kia-extends-partnership-ao>.

This is more pronounced in the case of main sponsors (or title sponsors) who pay higher fees so that a tournament could be associated with their name for the duration of the sponsorship agreement. In fact, most sponsorship agreements (in relation to main sponsors) of major sporting events last an average of eight (8) to ten (10) years, and some of which exceed thirty (30) years; yet in none of these cases was a breach of competition legislation found. Examples of sports competitions covered by sponsorship agreements lasting for eight (8) to ten (10) years include the Mumbai Marathon, the English Premiership Rugby, the Olympics and the Australian Open which are sponsored respectively by Tata, Aviva, Coca Cola and Kia. Examples of other sports competitions covered by agreements lasting between fifteen (15) to thirty (30) years include the English Premier League and the Qatar Open, which are sponsored by Barclays and ExxonMobil. Finally, the Classic PGA Gold Tour and the Long Beach Grand Prix have been sponsored for more than thirty (30) years by Honda and Toyota. The foregoing is to be contrasted with contracts over media rights where European and certain national regulators limit contract terms to three (3) to four (4) years.

116. CAF submits that it does not preclude any prospective sponsors from sponsoring CAF events⁶⁴. The only restriction, which is in line with the marketing industry practice, is that sponsors may not be of the same product categories. In other words, CAF cannot be sponsored by both Coca Cola and Pepsi, or Orange and Vodafone, or Stella and Heineken at the same time, since none of the sponsors would have any interest in sponsoring an event co-sponsored by its direct brand competitor.

The Commission's assessment

117. The Commission noted some of the examples cited by TOTAL in relation to existence of long-term partnerships between right holders and sponsors for events such as the Olympic Games and the FIFA World Cup. It is recalled that these events occur within a longer timeframe of 4 years compared to the CAF competitions which occur either annually or every two years, such that the duration of these agreements in terms of number of years may not constitute the most appropriate benchmark.
118. It is noted that in the press release announcing the collaboration between FIFA and The Coca Cola Company in 1998, the conclusion of the “landmark” eight-year agreement was viewed as an “unprecedented partnership” and marked “the first time that a sponsor has extended its partnership with FIFA for more than a four-year term”⁶⁵. Any comparison with such an agreement would thus be questionable as The Coca Cola Company agreement itself departed from standard practice at the time. Similarly, the

⁶⁴ CAF submits that there are large numbers of sponsors of CAF events whose sponsorship terms were for one (1) to two (2) years (e.g., Qnet, Yamaha, Visa, and others). The sponsorship packages did not exclude parties from sponsoring CAF events and tournaments and all parties could have opted for visibility. Furthermore, local advertising banners could also use the CAF logo in relation to CAF championship to promote their products.

⁶⁵ Press Release by FIFA issued on 30 January 1999, titled ‘Coca-Cola extends FIFA partnership through 2006’. Accessed at: <https://www.fifa.com/worldcup/news/coca-cola-signs-fifa-partner-strengthens-commitment-world-football-22157>

subsequent 16-year extension in 2006, cannot be held as standard industry practice when the partners themselves branded the duration as “an unprecedented term”⁶⁶.

119. Likewise, in the Hyundai Motor Company-FIFA collaboration, the 2010 press release refers to “*an unprecedented long-term commitment for sponsoring the FIFA World Cup™ in 2018 and 2022*”⁶⁷. It is not clear how this constitute a ‘common industry practice’ if the parties themselves qualify the extension of the duration of their collaboration as ‘unprecedented’. It is noted that the extension effectively covered two additional World Cup competitions.
120. Similarly, the eight-year VISA agreement covers two World Cup competitions. Applying the same principle to the CAF competitions would imply that sponsorship agreements should be of a duration of four years to cover two AFCON competitions, which is the main CAF competition.
121. The Commission observed that while the UEFA has long standing partnerships with sponsors such as Heineken, adidas, and Carlsberg, from the recent announcements made on its website, these commercial contracts are typically awarded for initial periods covering three or four years⁶⁸ through open calls, at the end of which the partnership with the sponsor can be renewed through another call for tender⁶⁹:
- i. Wednesday 29 November 2017: Banco Santander's partnership with the UEFA Champions League is the third partnership to be agreed as part of the 2018-21 sponsorship sales process for the UEFA Champions League. Heineken and Nissan have both already confirmed that they have extended their sponsorship of the competition for another three years⁷⁰;
 - ii. Monday 23 October 2017: UEFA has announced that the Japanese sports ball manufacturer Molten Corporation has signed a three-year agreement to become the Official Matchball Supplier of the UEFA Europa League⁷¹;

⁶⁶ Press Release by FIFA issued on 22nd November 2015, titled ‘**Coca-Cola signs up as FIFA Partner, strengthens commitment to world football**’. Accessed at: <https://www.fifa.com/about-fifa/who-we-are/news/coca-cola-extends-fifa-partnership-through-2006-70366>

⁶⁷ <https://www.hyundainews.com/en-us/releases/158>

⁶⁸ See for instance: <http://www.campaignlive.co.uk/article/heineken-extends-champions-league-football-sponsorship/1422861>; [PlayStation extends Champions League sponsorship for 2012-2015](#); [UEFA and Carlsberg EURO sponsorship agreement for 2014 to 2017](#); [Heineken extends Champions League sponsorship for another three seasons](#); [Sharp Signs EUROTOP Sponsorship Agreement with UEFA for 2010 to 2013](#)

⁶⁹ See for instance: [https://www.uefa.com/insideuefa/about-uefa/administration/marketing/news/newsid=2453158.html#/#/](https://www.uefa.com/insideuefa/about-uefa/administration/marketing/news/newsid=2453158.html#/); UEFA has announced that it is giving interested parties the opportunity to become commercial partners with the UEFA Champions League in three categories; <http://www.campaignlive.co.uk/article/heineken-extends-champions-league-football-sponsorship/1422861>; [PlayStation extends Champions League sponsorship for 2012-2015](#); [UEFA and Carlsberg EURO sponsorship agreement for 2014 to 2017](#); [Heineken extends Champions League sponsorship for another three seasons](#); [Sharp Signs EUROTOP Sponsorship Agreement with UEFA for 2010 to 2013](#)

⁷⁰ http://www.uefa.com/insideuefa/about-uefa/administration/marketing/?redirectFromOrg=true#post_1875250

⁷¹ http://www.uefa.com/insideuefa/about-uefa/administration/marketing/?redirectFromOrg=true#post_1692604

- iii. Thursday 19 October 2017: UEFA and Booking.com are proud to announce a new four-year global partnership for all UEFA national team football competitions from 2018 to 2022. Booking.com becomes the Official Accommodation and Attractions Booking Partner for all events, including UEFA EURO 2020⁷².
 - iv. Monday 11 September 2017: UEFA today announced the extension of Nissan's partnership of the UEFA Champions League for the 2018-21 cycle. The agreement also includes the UEFA Super Cup in 2018, 2019 and 2020⁷³.
122. On 15th March 2020, UEFA launched bidding process to seek sponsors in the beer category for a single competition, namely the UEFA EURO 2020, as a result of which Heineken was appointed.
123. The market practice adopted by UEFA point towards duration with sponsors for a contract period not exceeding four years.
124. The Commission also noted TOTAL's submissions about the features of naming sponsorships requiring higher investments which need to be recouped over a long period of time. In its 2018 submissions, TOTAL had submitted that the "average yearly costs of naming stadium agreements are of EUR 4 to 5 million in Europe and the USA. In addition, it usually takes a couple of years for viewers to consider a company as the new naming sponsor. For instance, according to TOTAL's market intelligence, best-cases of sponsoring revealed that limited number of webpages or social media would correctly name the company after a year. As a result, naming agreements usually span for long period. For example, the Manchester naming stadium agreement was signed for 10 years and entails yearly costs of EUR 13 million, and the New York Mets naming stadium agreement was signed for 20 years and entails yearly costs of EUR 16.7 million euros".
125. The Commission observed that the examples cited by TOTAL relate to the naming of stadia for individual clubs. The Commission is not aware of TOTAL having incurred similar costs for the naming of stadia for the CAF tournaments. It is the Commission's understanding that as Title sponsor, its name would be associated to the name of the competitions, rather than to the names of stadia in a given country given the competitions are regional in nature and thus the venue for the final phase of a competition typically changes depending on the host country.
126. Further, it is noted that the English Premier League dropped the title sponsorship from the 2016/2017 season: "*The move reflects the organisation's desire to mirror major*

⁷² http://www.uefa.com/insideuefa/about-uefa/administration/marketing/?redirectFromOrg=true#post_1644250

⁷³ http://www.uefa.com/insideuefa/about-uefa/administration/marketing/?redirectFromOrg=true#post_1321686

*American sports leagues like the NBA and NFL in presenting a 'clean' brand"*⁷⁴, and to make use of alternative sponsorship methods. It is further noted that the title sponsorships for the English Premier League were for individual durations of three to four seasons:

- i. A four-year agreement was signed Carling in 1993 for £12m. The League was called FA Carling Premiership,
 - ii. The sponsorship with Carling was renewed for another four years in 1997.
 - iii. Barclaycard paid £48m for a three-year contract beginning in 2001.
 - iv. Barclays paid £57m for a three-year sponsorship deal in 2004.
 - v. A new deal was agreed with Barclays in 2006, worth £65.8 million until the 2009/2010 season⁷⁵.
 - vi. In 2009, Barclays renewed their title sponsorship of the Premier League for a further three years until 2012/13 in a deal worth 82.25 million pounds⁷⁶.
127. TOTAL submitted that the marketing rights are not “mission critical” for its competitors to market their end products in Africa. The Commission however considers that the sponsorship rights, in particular the Title Sponsorship, may provide a competitive edge for the appointed sponsors.
128. The Commission noted that there was no conclusive evidence that competitors to TOTAL were foreclosed as a result of the duration of the sponsorship, nor was TOTAL’s market position enhanced directly as a result of the duration of the agreement. The Commission also noted submissions from CAF during its meeting of 16th December 2019 that CAF is not precluded from entering into agreements with other sponsors, outside the product category of the Total Sponsorship agreement.
129. The Commission also considered the submission by Lagardere Sports that “relocation of the Competitions may lead to wasted activation or other product costs by Sponsors”. It was submitted that “only two months before the start of the event, Morocco withdrew as host of the 2015 AFCON edition due to the Moroccan government's concerns relating to Ebola outbreak. CAF was required to find an alternative host (Equatorial Guinea) within a very short period. This relocation caused significant damage to the sponsors as well as to CAF”. The Commission considered that the prevailing economic circumstances on the African continent, which has led to cancellation or relocation of matches and tournaments, provide reasonable justification for a longer time period for

⁷⁴ <http://www.dailymail.co.uk/sport/football/article-3111413/Premier-League-without-title-sponsor-2016-17-season-bid-mirror-major-American-sports-clean-branding-strategy.html>

⁷⁵ <http://www.worldsoccer.com/news/premier-league-agrees-new-sponsorship-deal-95999>

⁷⁶ <https://uk.reuters.com/article/uk-soccer-england-premier-barclays/barclays-extend-premier-league-sponsorship-idUKTRE59M38C20091023>

marketing rights of CAF competitions compared to other international football competitions.

130. In view of the foregoing, the Commission observed that there is no evidence to establish that the duration of the TOTAL Sponsorship agreement by itself resulted in anti-competitive effects on the sponsorship market or the respective market in which the sponsor carries out its core activities.

Lack of Tender Process

Submissions by TOTAL

131. TOTAL submitted that the sale of marketing rights in the absence of a bidding process is fully compliant with the COMESA competition rules. In particular Total argued that:

i. According to international practice, formal tender procedures are imposed under very rare circumstances and only for premium prestigious broadcasting rights (e.g., premium football competitions in the EU such as Bundesliga or Premier League championships). These types of procedures are imposed by competition authorities in very rare cases whereby the sports broadcasting rights at stake are competitively so important that they cannot be allocated to one purchaser on a bilateral basis. This is because in the related countries (in particular the UK, Germany and France), it is not possible to effectively compete on the market for premium sports channels without holding at least part of these rights.

ii. There is no doubt that this reasoning does not apply to the sport marketing at stake in the present case. No tender process to purchase the marketing rights concerned was legally required. Imposing such constraint would not be in line with recognized practice, because the absence of a bidding process for the sale of sports marketing rights does not give rise to a restriction of competition.

iii. First, the absence of a formal tender procedure does not equate to a lack of effective competition. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

and Visa in 2018, and IXBET and Continental in 2019.

iv. Second, sports marketing rights bear no strong competitive significance, especially in comparison with sports media rights.

- v. Third, owing to the limited competitive importance of marketing rights, bilateral exchanges are the standard sale process followed for the sale of sports marketing rights. It is no coincidence that neither the European Commission, nor to TOTAL's knowledge any competition authority, has ever imposed specific selling conditions (i.e., the obligation to resort to a transparent and non-discriminatory tender procedure) for the sale of sports marketing rights to sponsors. This is consistent with market practice since, in Total's own experience, even the purchasing of highly prestigious sports marketing rights such as those linked to the Olympic Games does not give rise to a formal tendering process.
 - vi. The European Commission has not imposed this unusual constraint even for most football media rights, which are undeniably more competitively sensitive than sports marketing rights. In practice, it has imposed such conditions only in very rare cases, notably for the sale of the most attractive premium media rights (e.g., those related to premium football competitions such as the Bundesliga or Premier League championships), not marketing rights. For these reasons, sports marketing rights cannot be subject to any specific selling conditions. Obliging parties to a sponsorship agreement to sell and purchase marketing rights through a bidding process would not be in line with well-established competition law principles.
 - vii. Fourth, the limited exclusivity does not foreclose any competitors on the market for the purchase of marketing rights since rights granted to TOTAL are limited substantively and numerous alternatives exist on the market. The exclusivity therefore enables competing sponsors to buy and sell other marketing rights.
132. It stems from the above that the conclusion of the Sponsorship Agreement through bilateral exchanges does not give rise to foreclosure considering the limited importance of marketing rights, its limited duration and the existence of alternatives on the market. Imposing such selling conditions would be disproportionate in view of the limited competitive importance of marketing rights and the international decisional practice.

The Commission's Assessment

133. The Commission observed that the UEFA carries out tender procedures for both media and marketing rights, unlike the CAF/TOTAL arrangement. While the Commission considers that tender procedures provide a useful mechanism to prevent potential anti-competitive behaviour or outcomes on the market particularly where agreements are of a long duration, the Commission recognises that the CAF rights may not constitute critical rights for sponsors operating or wishing to operate on the continent, such that a tender process for CAF marketing rights may not be an essential requirement.

134. The Commission considered that there was no evidence to establish that the lack of a competitive tender process for the award of the TOTAL Sponsorship agreement caused anti-competitive harm in the broad energy markets where TOTAL operates or for other potential sponsors, as there exist alternatives to the CAF rights.
135. It is also worth noting that on 11th March 2020, CAF launched a tender for the Marketing Services related to the following competitions for the editions 2020 and 2021⁷⁷:
- i. Women AFCON 2020
 - ii. Beach Soccer AFCON 2020
 - iii. U17 AFCON
 - iv. U20 AFCON
 - v. Africa Cup of Nations 2021
 - vi. Supercup 2020
 - vii. Interclub Competitions 2020/2021
 - viii. Supercup 2021
 - ix. AFCON Qualifiers 2021
136. The Commission is satisfied that the new tenders being launched by CAF would create additional competitive pressures on the relevant market for marketing rights.

Right of First Refusal

137. Right of first refusal covenants may have the effect of enhancing barriers to entry and may contribute to anti-competitive effects of exclusive arrangements. Commercial partners are free to maintain long-standing partnerships where that partnership can be justified by virtue of the parties' market performance and capabilities; or where the rights or products under consideration do not constitute essential goods. Where the focal products constitute a key element for the competitiveness of the market operators, the maintenance of preferential renewal clauses can serve to dampen the demand from actual and potential competitors, which may in turn hamper entry and expansion into the market.
138. [REDACTED]
139. In the context of the marketing rights, as discussed above, it was observed that the rights do not constitute essential rights for sponsors wishing to operate on the continent. The existence of numerous alternatives from a sponsoring perspective would limit the

⁷⁷ <https://www.cafonline.com/news-center/news/tender-for-marketing-services;https://images.cafonline.com/image/upload/caf-prd/x8i9lktez8sfzfxwsi3a.pdf>

potential restrictive effects of the right of first refusal clauses as competing players have other sponsoring options to which they can turn to.

140. [REDACTED]

141. [REDACTED]

142. [REDACTED]

143. It is noted that prior to intervening on a market, the Commission has regard to the necessity, effectiveness, and proportionality of any remedy being imposed. In the current case, the Commission reiterates, as earlier observed in paragraph 135, that the rights in question are subject to competitive pressures from other football competitions and other sports. As discussed above, the Commission has not come across evidence that players in the relevant market were foreclosed as the result of the implementation of the Total Sponsorship Agreement. [REDACTED]

Consideration of Exemption under Article 16(4)

144. The respondents have made submissions for exemption under Article 16(4) of the Regulations with respect to the TOTAL Sponsorship Agreement.

The Total Agreement

145. On 31st October 2019, TOTAL provided substantive justifications that its Sponsorship Agreement satisfies the conditions of Article 16(4) of the Regulations as it promotes economic progress (A), grants consumers a fair share of the benefits (B.), does not

impose restrictions that are not indispensable to attain the objectives of the Treaty (C.), and does not afford the possibility of eliminating competition in respect of a substantial market for the goods or services in question (D). Their arguments are summarised below.

A. Promotion of economic progress

146. [REDACTED]
[REDACTED]
- i. [REDACTED]
[REDACTED];
 - ii. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
 - iii. [REDACTED]
[REDACTED]
[REDACTED]
 - iv. [REDACTED]
[REDACTED]
[REDACTED] and
 - v. [REDACTED]
[REDACTED]

147. TOTAL has ensured that the implementation of the Sponsorship Agreement would involve the development of TOTAL's activities in Africa since the purpose of the Agreement is notably to strengthen its relationship with its clients and stakeholders as well as to reinforce its social proximity to offer better quality energy to people.

B. Fair share of benefits for consumers

148. [REDACTED] the Sponsorship Agreement, and in particular its duration, allow the financing of CAF members' activities and the development of CAF competitions to the direct benefit of COMESA consumers (e.g., through increased quality and visibility of amateur and professional football).

149. In addition, by providing consumers with various forms of innovative entertainment, the Sponsorship Agreement necessarily allowed a fair share of benefit for consumers.
150. Indeed, TOTAL's sponsoring efforts offered to consumers exclusive behind-the-scenes content, including off-pitch scenes during matches, warm-ups, a web series on how to experience football in different African cities, as well as exclusive off-the-field content during major football events across the continent.
151. General opinions in Africa confirm that TOTAL's sponsorship efforts have been passed onto consumers. Approximately [REDACTED] of surveyed people in Angola, Congo, Egypt, Gabon, Kenya, Morocco, Nigeria, Senegal, South Africa and Uganda consider that TOTAL contributes to the development of Africa through the CAF sponsorship and [REDACTED] of people believe that TOTAL is involved in young local talents through the sponsorship. In addition, approximately [REDACTED] of surveyed people consider that TOTAL makes access to energy easier for all, contributes to society by sponsoring CAF competitions and puts people at the center of its priorities.
152. The Sponsorship Agreement therefore brings about substantial benefits to consumers.

C. Indispensability

153. The eight-year duration of the Sponsorship Agreement, [REDACTED] [REDACTED] was indispensable to achieve the benefits described above. This duration is necessary and justified owing to the numerous investments made by TOTAL in the context of the Sponsorship Agreement; the time a title sponsor needs to acquire the sufficient legitimacy to be viewed by consumers as the event's title sponsor; the risks arising from the implementation of the Sponsorship Agreement; as well as the financial stability required for national football federations and clubs.

Duration necessary in view of the significant investments made by TOTAL

154. [REDACTED] TOTAL has invested to advertise and promote the sponsorship association. These investments, also generally referred to as activation programs, are one of the key success factors in a sponsorship partnership as license fees paid for sponsorship rights are often considered "non-working dollars".
155. TOTAL's activation programs include several innovative initiatives, as well as advertising campaigns (e.g., through TV, radio, web and the press).
156. Since the conclusion of the Sponsorship Agreement, TOTAL has made the following investments to promote the CAF partnership:
 - [REDACTED] of investments spent in 2017, notably in relation to the 2017 Africa Cup of Nations (also referred to as AFCON 2017 or CAN 2017), the U-20 AFCON 2017, the CAF Super Cup 2017 and the CAF Champions League 2017;

- ██████████ of investments spent in 2018, notably in relation to 2018 African Nations Championship (also referred to as CHAN 2018), the Women AFCON 2018, the CAF Super Cup 2018 and the CAF Champions League 2018;
- ██████████ of investments spent in 2019, notably in relation to the 2019 AFCON, the Confederation Cup and the 2019 Champions League.

157. The Preliminary Report itself notes the “importance” of these investments, underlining that the CAF rights account for ██████████ of the budget allocated specifically for sponsoring.

158. In addition to these direct investments, ██████████
██████████

159. As may be seen from the above, sports sponsoring partnerships involve high investments which need to be recouped over a long period of time. The duration of the Sponsorship Agreement is therefore justified by the time required to recoup the significant investments and costs borne by TOTAL for this sponsorship partnership.

Duration necessary in view of the time required for consumers to correctly consider TOTAL as title sponsor

160. The aim of a title sponsorship being to generate brand/product awareness and to build image for the sponsor, companies that sponsor an event for the first time need sufficient time to consolidate their visibility and legitimacy to be known as the title sponsor of the event.

161. TOTAL’s market intelligence shows that, overall, consumers may take time to fully assimilate the relevant sponsor as title sponsor of a stadium or competition.

162. ██████████
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163. In order to build legitimacy and awareness of TOTAL as the title sponsor and enable TOTAL to be legitimized as a football sponsor, a duration of eight years with a right of first refusal is therefore required, as it covers four editions of the CAN (2017, 2019, 2021 and 2023).

Duration necessary in view of the risks arising from the implementation of the Sponsorship Agreement

164. Importantly, experience shows that a number of circumstances (e.g., public health issues, lack of security or military operations) may endanger the smooth implementation of sponsorship agreements concerning the CAF competitions. Since the Sponsorship Agreement was concluded, certain events indeed entailed the bearing by TOTAL of significant costs and material risks. For instance, whereas host countries are in general designated four to eight years before the beginning of the relevant competition, the location of the following events changed many times, in certain circumstances only a few months before the commencement of the competition. Overall, since the start of the Sponsorship Agreement, host countries were irrevocably confirmed between 4.5 and 1.5 months before the start of the competition.
165. This significantly impacted their organization and the implementation of the Sponsorship Agreement. In particular:
- the 2018 CHAN's location was changed from Morocco to Kenya three months before the beginning of the competition;
 - the 2019 AFCON's initial host (Cameroon) was replaced six months before the commencement of the event by Egypt; and
 - the initial host of the 2021 AFCON edition (Ivory Coast) was replaced by Cameroon in 2019.

D. No elimination of competition

166. On the upstream market, TOTAL faces significant actual and potential competition on the market for marketing rights.
167. On the downstream market, there is no evidence that TOTAL's competitors are eliminated on the markets where TOTAL is present.
168. In the face of these competitive pressures, it is clear that the Sponsorship Agreement does not afford TOTAL the possibility of eliminating competition.
169. Consequently, should the Commission decide that the Sponsorship Agreement falls within the scope of Article 16(1) of the Regulations, TOTAL respectfully submits that it satisfies the requirements of Article 16(4) of the Regulations.

The Commission's position

170. As discussed above, the Commission has not identified evidence of anti-competitive harm occurring in the relevant markets for marketing rights for sporting events in

relation to the duration of the contract (including the right of first refusal), nor has it established any harm relating to the absence of a tender process for the award of the contract. In this regard, a further assessment of the justifications provided by the sponsor is not warranted.

Consideration of Effect on Trade between Member States

171. The consideration of effect on trade between Member States is central in the investigation of cases under the Regulations. Pursuant to Article 3(2) of the Regulations in order for conduct to be incompatible with the Regulations, it should, *inter alia*, have an appreciable effect on trade between Member States. Conduct that are likely to lead to an appreciable effect on trade between Member States are those that result in the prevention, restriction or distortion of competition in the Common Market.
172. In line with the *EU Guidelines on the effect on trade concept contained in Articles 81[now Article 101 of the Treaty for the Functions of the European Union (the "TFEU")]* and *82 [now Article 102] of the Treaty*, the Commission considers that the concept of trade applies not only to practices that affect actual trade between incumbent firms, but also applies to practices that may affect the structure of the market, such as prohibiting the establishment of undertakings.
173. In view of the above assessment, the Commission considered that the TOTAL Sponsorship Agreement is unlikely to have had an effect on trade between Member States, given that the parties to the agreement were not in a dominant position in the relevant market and that there exists alternative sporting rights that companies can turn to for sponsorship opportunities, as well as other potential sponsors with whom CAF can engage. The Commission further noted that the TOTAL Sponsorship market does not preclude CAF from engaging sponsors in different product categories.

Conclusions

174. The evidence, facts and law analysed in this report has led to the conclusion that:
 - i. the eight-year duration of the agreement has not foreclosed competitors of TOTAL or other potential sponsors from the market for acquisition of marketing rights for sporting events in Africa;
 - ii. CAF marketing rights are not critical rights for general sponsors, who have the option of seeking sponsorship deals with other sporting rights holders; and,
 - iii. CAF is not precluded from entering into agreements with other sponsors, outside the product category of the TOTAL Sponsorship agreement.
175. In this regard, the Commission considered that the conclusion of the agreement in the absence of a tender process and the inclusion of the right of first refusal did not result in foreclosure of competition in the relevant market.

176.

[REDACTED]

Determination

177. Rule 23 of the Rules states that should an investigation result in the relevant department finding that there has been no breach, the matter shall be presented to the Director who shall issue an order to the effect that the matter shall be closed.
178. Given the foregoing analysis and conclusions in this report, the investigation into the Total Sponsorship Agreement is hereby closed in accordance with Rule 23 of the Rules.