COMESA
Competition Commission

Common Market for Eastern and Southern Africa

CASE FILE NO.: CCC/APPEAL/JR/03/01/2022

DECISION OF THE APPEALS BOARD ON THE APPLICATION FOR JUDICIAL REVIEW BY CAF AGAINST THE DECISIONS OF THE COMMITTEE RESPONSIBLE FOR INITIAL DETERMINATIONS DATED 29 JUNE 2021 AND 2 SEPTEMBER 2021

16 December 2022

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Reference:	CCC/APPEAL/JR/03/01/2022
Applicant:	Confédération Africaine de Football (CAF)
Interested Parties:	COMESA Competition Commission (the CCC) Sportfive EMEA (Sportfive)

In the matter: Application for Judicial Review by CAF against the decisions of the Committee Responsible for Initial Determinations (CID) dated 29 June 2021 and 2 September 2021. The decisions concern agreements concluded between CAF and Sportfive relating to the commercialisation of commercial rights of CAF competitions ("the matter").

APPEALS BOARD MEMBERS

Commissioner Lloyds Vincent Nkhoma (Chairperson)
Commissioner Danson Mungatana
Commissioner Beatrice Uwumukiza
Commissioner Francis Lebon
Commissioner Islam Tagelsir Ahmed Alhasan

LEGAL REPRESENTATIVES FOR THE APPLICANT (CAF)

Mr Tarek Badawy (Partner, Shahid Law Firm)
Mr Ismael Lamie (Associate, Shahid Law Firm)

LEGAL REPRESENTATIVES FOR THE INTERESTED PARTIES

Ms Alexia Waweru (Senior Legal Officer)	CCC
Mr Paul Ogunde (Walker Kontos)	Sportfive

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A. INTRODUCTION

1. On 22 November 2021, the Confédération Africaine de Football ("**CAF**") lodged an appeal against the decisions of the Committee Responsible for Initial Determinations (the "**CID**") dated 29 June 2021 and 2 September 2021, relating to the rejection of undertakings[1] negotiated between CAF and the COMESA Competition Commission (the "**CCC**") in the context of an investigation under Article 22 of the COMESA Competition Regulations (the "**Regulations**"). CAF lodged the Appeal citing the CID as the Respondent.

2. On 10 February 2022, the Appeals Board, which is constituted pursuant to Article 4 of the COMESA Competition Commission (Appeals Board Procedure) Rules 2017 (the "**Appeals Rules**"), considered the Notice of Appeal and issued a Practice Direction (**CCC/AB/PD/2/2022**) in accordance with Articles 3(3), 13 and 37 of the Appeals Rules which guided, among others, that:

    a. there is no Respondent in the matter;

    b. the Notice of Appeal filed stands withdrawn;

    c. CAF should file an application for Judicial Review and serve it on the interested parties, *to wit*, the CCC and Sportfive EMEA (**"Sportfive"**, formerly operating as Lagardere Sports SAS); and

    d. CAF and the interested parties should follow the procedure set out under the Appeals Rules *mutatis mutandis*.

3. On 18 March 2022, pursuant to Articles 9 and 10 of the Appeals Rules and the Practice Direction, CAF submitted an application for Judicial Review. On 4 May 2022, the CCC filed the Record of Proceedings in accordance with Article 16 of the Appeals Rules.

[1] The term 'undertaking' in this decision is taken to mean 'firms/companies' as provided under Article 1 of the Regulations or 'commitments offered by companies', as the context may be.

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On 25 May 2022, CAF filed a Statement of Judicial Review in accordance with Article 17 of the Appeals Rules. On 4 July 2022 and 8 August 2022 respectively, the CCC and Sportfive filed their Statements of Response to CAF's Statement of Judicial Review. Consequently, the Appeals Board scheduled a Pre-hearing Conference on 17 August 2022 where it provided directions on the procedure for the Hearing and close of pleadings. The Hearings on the matter were held on 10 October and 7 November 2022.

B. BACKGROUND TO THE MATTER

4. On 13 February 2017, the CCC, pursuant to Article 22 of the Regulations, commenced investigations against CAF for possible violations of Article 16 of the Regulations in relation to two agreements relating to the commercialisation of marketing and media rights of CAF competitions, namely:

    a. The Long Form Contract between CAF and Sportfive relating to the marketing and media rights for CAF competitions, of 3 October 2007 (the "**Long Form Contract**"); and

    b. Full Form Agreement between CAF and Sportfive relating to commercialisation of commercial rights of CAF competitions signed on 28 September 2016 but which is deemed to have taken effect retroactively on 11 June 2015 (the "**FFA**").

5. On 16 April 2019, following additional information gathered during the investigation, the CCC identified Sportfive, the other party to the aforementioned agreements, as a respondent which led the CCC to issue a Notice of investigation against Sportfive.

6. The aim of the investigation was to determine whether the agreements between CAF and Sportfive were in contravention of the Regulations and the following alleged competition infringements were assessed in the investigation report:

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a. The award of intermediation rights for CAF competitions in the absence of an open and competitive tender process;

b. The long-term duration of the exclusive contract for the award of intermediation rights for CAF competitions; and

c. The inclusion of rights of first refusal in the agreements between CAF and Sportfive.

7. On 22 July 2019, the CCC issued a Preliminary Investigations Findings Report in which it found that certain provisions contained in the agreements contravened Article 16 (1) of the Regulations and recommended the termination of the FFA among other conditions.

8. On 8 November 2019, CAF issued a statement announcing the immediate termination of its agreement with Sportfive, citing the preliminary findings of the CCC, among others, as the basis for termination. On 23 August 2020, following discussions between the CCC and CAF, CAF provided the following undertakings to the CCC to address the competition concerns identified by the CCC in relation to their future conduct (the "**CAF Undertakings**"):

a. CAF undertakes to eliminate all right of first refusal clauses, or similar preferential renewal clauses, from its existing and future exclusive agreements relating to the intermediation of commercial rights of CAF competition within the Common Market.

b. CAF undertakes to award all future exclusive agreements relating to the intermediation of commercial rights of CAF competitions within the Common Market on the basis of an open, transparent and non-discriminatory tender

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process, based on a set of objective criteria which shall be shared with the CCC prior to launching the tender. CAF shall continue to publish the results of all tender exercises conducted, on its website, subject to redaction of confidential information.

c. CAF shall not enter into new exclusive agreements for the intermediation of commercial rights of CAF competitions within the Common Market for a duration that exceeds four years. Where CAF has justifiable grounds to enter into a future exclusive agreement for the intermediation of commercial rights of CAF competitions within the Common Market or a duration which exceeds a duration of four years, CAF shall notify the CCC for authorisation of such agreement pursuant to Article 20 of the Regulations.

d. CAF shall, within thirty (30) days of each anniversary of the CID's Decision for a period of three years, submit to the Commission an affidavit from a senior official from CAF confirming compliance by CAF with these Undertakings.

e. CAF may at any time, on good cause shown, apply to the Commission to consent to the waiver, relaxation, modification and/or substitution of these Undertakings.

9. The CCC was of the view that the CAF Undertakings would sufficiently and proportionally address the identified competition concerns, in light of the fact that the agreement between CAF and Sportfive had already been terminated in 2019 following the CCC's preliminary findings. The CAF Undertakings were presented to the CID on 29 June 2021 at its 76th meeting. The CCC recommended the acceptance of the CAF Undertakings and that the investigation be closed.

10. On 28 June 2021, that is a day before the CID was convened, Sportfive submitted a letter to the CCC. The CID accepted the letter to be submitted to it and this letter stated that:

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Lagardère Sports maintains its view that the CAF/LS Agreements do not infringe the Regulations. Notwithstanding this position, given the Commission's recommendation to close the investigation into the CAF/LS Agreements, Lagardère Sports has, on a non-admission of liability basis, elected to not appear before the CID in relation to this report based on the explicit reassurances from the Commission and the CID that there shall be no determination of whether the CAF/LS Agreements infringe the Regulations and that the matter before the CID is whether to accept the commitments voluntarily offered by CAF (without consultation of Lagardère Sports) as set out in this report. Lagardère Sports has reserved its position to the extent that the CID elects to not accept the Commission's recommendations as set out in this report.

11. On 29 June 2021, the CID, having considered the investigation report, Sportfive's letter of 28 June 2021, and the recommendations of the CCC to accept the CAF Undertakings and close the investigation, issued the following decision ("**June Decision**"):

> *The CID rejected the submissions that the matter should be considered on a no-admission of guilt basis. The CID determined that the case should be determined on merits as it was not convinced that the Regulations have not been breached. Therefore, the CID decided that the parties to the agreement should be afforded an opportunity to be heard within thirty (30) days of receipt of this decision.*

12. After availing the June Decision to the parties, Sportfive, in a letter dated 6 July 2021, submitted a request to the CID to reconsider its June Decision.

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13. During its 77th Meeting held on 13 July 2021, the CID considered the request from Sportfive and issued the following determination (the "**July Decision**")[2]:

    a. ***The CID took note of the application and submissions by Sportfive. It however noted that it is not best practice for it to revisit its decision in view of the fact that there should be finality in the decision-making process. Such practice is only done in exceptional circumstances and the CID determined that the grounds advanced by the parties were not exceptional.***

    b. ***The CID further considered that Sportfive did not submit compelling reasons warranting a reconsideration of its decision.***

    c. ***In view of the foregoing, the CID rejected Sportfive's request for the CID to reconsider its decision that the case be heard on merits.***

    d. ***Further, the CID determined that Sportfive's request for an extension of the timelines for the hearing was reasonable under the circumstances. In this regard, the CID determined that the hearing into the CAF/LS Agreements will be held by 30th September 2021.***

14. CAF, through a letter dated 29 July 2021 addressed to the CID, similarly requested the CID to reconsider the June Decision and adopt the CCC's recommendations to accept the CAF Undertakings and close the investigation.

15. The 78th meeting of the CID considered the application by CAF to reconsider the June Decision and issued the following decision on 2 September 2021 ("**September Decision**"):

[2] Paragraph 13-16 of CID decision on 13 July 2021 which is provided under page 10-11 of Exhibit 4 of the Statement of Response of the CCC filed on 7 July 2022 pursuant to Article 18 of the Appeals Rules.

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a. ***The CID took note of the submissions by CAF. The CID determined that the parties did not provide compelling reasons which were not before the CID at the time of their initial Decision.***

b. ***In view of the foregoing, the CID declined CAF's request to reconsider its Decision that the case be heard on merits. The CID concluded that if CAF is dissatisfied with its determination, it may appeal to the full Board of Commissioners in accordance with Article 15 (1) (d) of the Regulations as read together with Rule 24 (e) of the COMESA Competition Rules of 2004 (the "Competition Rules").***

16. In response to the Appeals Board Practice Direction (**CCC/AB/PD/2/2022**) dated 10 February 2022, CAF lodged an application for Judicial Review in relation to the June and September Decisions of the CID. In the Application, CAF sought the following relief:

a. Quash the CID Decisions of 29 June 2021 and 2 September 2021;

b. Accept the Undertakings offered by CAF on 23 August 2020 and approved by the Commission as signed; and

c. Order the closure of the investigation into the Intermediation Agreement concluded between CAF and Sportfive for the commercialization of CAF competitions' commercial rights as recommended by the Commission.

C. SUBMISSIONS BY THE PARTIES

I. The Application for Judicial Review – CAF's Submission

17. The grounds advanced by CAF for the Judicial Review of the June and September Decisions are summarised below:

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a. The CID committed **an error of fact** when it wrongly suggested that the Undertakings were conditioned on CAF's non-admission of guilt, disregarding the clear wording of paragraph 4 of the CAF Undertakings, which provides: "**The investigation established that such conduct [for which the Undertakings are signed] restricts competition in the Common Market and is in violation of the Regulations.**" Pursuant to several discussions with the CCC, CAF provided undertakings in order the alleviate the competitive harm identified during the investigation.

b. The CID committed **an error of law and error of assessment** for requiring that CAF "admit guilt" where no such requirement is needed considering the purpose of the Competition Rules and Regulations would have been achieved (and any competition concern would have been alleviated) following the signing of the CAF Undertakings. Furthermore, CAF did not challenge the CCC's finding that the Regulations and Competition Rules had been breached (hence there is no need for a further finding of a breach considering this was not challenged by CAF). Basing the Decisions on an irrelevant factor (i.e., the requirement to admit guilt) is an error of law.

c. The CID Decisions are **defectively reasoned**, since the CID failed to provide sufficient reasons for the rejection of the Undertakings submitted by CAF and approved by the CCC. The CID June Decision was issued on the basis of the following general wording that is: "The CID rejected the submissions that the matter should be considered on a no-admission of guilt basis. The CID determined that the case should be determined on merits as it was not convinced that the Regulations have not been breached".

d. The combined effect of the errors in (a) to (c), led to a misuse of powers by the CID.

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18. In its Notice of Judicial Review and Statement of Judicial Review, CAF raised the following procedural issues:

    a. the September Decision was issued by a committee that was not fully constituted, which is a serious procedural irregularity that renders the September Decision void *ab initio*. [3]

    b. the CID decisions are defective in nature since CAF's right of defense was not respected as the CID never held a hearing under Rules 29 and 49 of the Competition Rules and the Practice Note on Undertakings.[4]

    c. the CID decisions are devoid of any reasoning.

19. Further, CAF raised the following arguments on substantive matters:

    a. absence of reasoning reveals that the CID did not conduct any market analysis or examined the content of the CAF Undertakings.

    b. requesting CAF to admit guilt defeats the purpose of undertakings and conflates prohibition and commitment decisions.

    c. the CID decisions are tainted with misuse of power and violate the principle of proportionality of commitment decision.

20. To this end, CAF in its presentation during the Hearing held on 10 October 2022, stated that the substantive flaws of the decisions were that:

    a. They violate the essence of the Competition Rules and Regulations;

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[3] Page 4 of the Notice of Judicial Review of CAF dated 18 March 2022.
[4] The CID on 23 April 2021 issued a Practice Note on the "Procedures relating to Cases before the COMESA Competition Commission Where Undertakings Have Been Reached Between the Commission and the Respondents" (CCC – RBP –**Practice Note 1 of 2021**).

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b. They are not competition law motivated nor do they assess the content of the proposed CAF Undertakings;

c. They are disproportionate and lack legal basis; and

d. They set a worrisome precedent of lack of cooperation between the CCC and undertakings[5].

III. Response of the CCC in relation to the Application for Judicial Review filed by CAF

21. The CCC agreed with CAF's application for Judicial Review with respect to the arguments that the CID made an error of fact, an error of law and an error of assessment when making the June Decision, as discussed in detail hereinafter. The CCC stated that the CID committed an error of fact when it wrongly suggested that the undertakings were conditioned on CAF's non-admission of guilt, disregarding the clear wording of paragraph 4 of the CAF Undertakings which provides: "the investigation established that such conduct [for which the undertakings are signed] restricts competition in the Common Market and is in violation of the Regulations."

22. The CCC however disagreed with the following arguments presented by CAF as discussed in detail hereinafter:

a. That there was no substantive analysis on a market test;

b. That there was failure to offer CAF an oral hearing; and

c. That the September Decision was passed by a CID that had not met quorum.

[5] Undertakings here means 'firms/companies' as provided under Article 1 of the Regulations.

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23. Notwithstanding the point of deviations raised above, the CCC in its Statement of Response confirmed that it agrees with the following prayers of CAF as contained in CAF's Notice of Judicial Review[6] together with the Detailed Statement of Judicial Review[7], that is:

    a. Uphold the CCC's recommendations in its investigation Report dated 23 June 2021;

    b. Accept the Undertakings offered by CAF on 23 August 2020; and

    c. Order the closure of the investigation into the intermediation agreement concluded between CAF and Sportfive for the commercialization of CAF competitions' commercial rights as recommended by the CCC.

IV. Response of Sportfive to the Application for Judicial Review filed by CAF

24. Sportfive submitted that the June Decision is incompatible with the commitment proceedings under the Regulations as set out in CCC's Practice Note 1 of 2021. Sportfive contended that failure to follow the commitment proceedings is both irrational and procedurally irregular.

25. Sportfive, in this regard, submitted that the application for Judicial Review be upheld and the CID be directed to reconsider the June Decision with a view to accepting the recommendation of the CCC to close the Investigation in respect of the agreements.

D. APPEALS BOARD ANALYSIS AND DETERMINATION

26. The Appeals Board considered the issues arising from the Judicial Review as follows:

[6] Page 6 of the Notice of Judicial Review.
[7] Page 65 of the Detailed Statement of Judicial Review.

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I. COMMITMENT PROCEDURES AND THE ROLE OF THE CID

27. The Appeals Board considered the detailed submissions of CAF and the interested parties on the role of the CID. CAF submitted that the CID decisions are tainted with misuse of power and violate the principle of proportionality of commitment decisions. CAF pointed out that it is internationally recognised that competition investigative bodies may only reject commitments submitted by the entity under investigation in the event that such commitment "*fall short of addressing the [authority's] concerns*".

28. The Appeals Board observes that besides the CCC's Practice Note 1 of 2021, the CCC does not have elaborate procedures in relation to commitments and the role of the CID with respect to such commitments. There is thus need for the following to be clarified:

    a. **What is a commitment and its essence?**

    b. **What is the expected procedure which the CID should follow with respect to commitments negotiated between the CCC and parties under investigation?**

29. CAF submitted that the CID never examined the CAF Undertakings. Further, that the CID's approach is devoid of any competition law rationale and sets a worrying precedent that will discourage undertakings[8] from cooperating with the CCC in the future. The CCC confirmed that the CAF Undertakings were thoroughly discussed with CAF, and they sufficiently addressed the concerns identified, more so since the agreement was terminated following the issuance of the Preliminary Investigations Findings Report.

[8] CAF's PowerPoint presentation during the Hearing held on 10 October 2022. Undertakings in this context refers to enterprises or firms, as contemplated by Article 1 of the Regulations.

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30. CAF made reference to the European Commission ("**EC**") approach on commitment decisions in particular Article 9 of Council Regulation (EC) No. 1/2003 which provides that:

> "Where the [EC] intends to adopt **a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the [EC] in its preliminary assessment**, the [EC] may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the [EC]."

31. Further, CAF submitted that the EC "will prefer Article 7 decision [prohibition decision] in cases of very serious infringements, such as cartels, **as well as when there is no remedy available to solve the competition problem other than a cease and desist order.**"[9]

32. CAF, therefore, submitted that drawing from the above, it is established that commitment decisions (or undertaking decisions), being a tool that encourages cooperation with competition authorities and ensures continuous compliance and cooperation between stakeholders, are favoured over prohibition decisions. The foregoing is especially true in fast-moving markets such as the sports media market. CAF submitted that consistent with the aim of encouraging cooperation between parties within a given market and the relevant competition authority (be it national or regional), the issuance of a commitment decision necessarily leads to the exclusion of a prohibition decision and a finding of guilt (*ergo* one **must** exclude a determination of the substantive merits of a violation of competition laws and avoid the imposition of fines).

33. Sportfive submitted that the June Decision gives rise to material policy considerations and argued that the whole point of commitment proceedings is to allow competition

[9] EC Competition Policy Brief, Issue 3, March 2014, p/2 under Exhibit 22 of CAF's Statement of Judicial Review.

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authorities to bring investigations to an end and safeguard competition without having to undertake the burdensome task of proving infringements. Sportfive referred to the **CJEU Case C-441/07P, 29 June 2010, *EC v. Alrosa Company Ltd* Judgment (the "Alrosa Judgment")** where the Court of Justice of the European Union ("**CJEU**") emphasized that commitments procedure enables the rapid resolution of cases and is based on considerations of procedural economy. The CJEU stated as follows:

> *"[the commitments procedure] is intended to ensure that the competition rules [...] are applied effectively, by means of the adoption of decisions making commitments, proposed by the parties and considered appropriate by the [EC], binding in order to provide a more rapid solution to the competition problems identified by the [EC], instead of proceeding by making a formal finding of an infringement.*
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> *More particularly, Article 9 of [Regulation No 1/2003] is based on considerations of procedural economy, and enables undertakings to participate fully in the procedure, by putting forward the solutions which appear to them to be the most appropriate and capable of addressing the [EC]'s concerns."*

34. Sportfive added that the purpose of commitment procedures is to *"... free up limited [competition authority] resources, which can be employed in other (more serious) cases in the interest of competition and thus the consumer"*.[10] Sportfive further underlined that for this reason, the EC's practice during the first ten years following the enactment of Council Regulation (EC) No. 1/2003, put aside hard-core cartel cases, and the commitment decisions outstrip infringement decisions.

35. It is in this regard that Sportfive submitted that the June Decision is very likely to discourage all future respondents from cooperating with the CCC knowing that such cooperation could be futile as the CID is not likely to accept commitments agreed with

[10] Sportfive quoted M. Wathelet, "Commitment Decisions and the Paucity of Precedent" (2015) 6(8) Journal of European Competition Law and Practice 553-555, at p. 553.

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the CCC. Sportfive further submitted that predictability is a key component in ensuring the future success of the commitments practice and the use of commitments under the Regulations as a whole.

36. The Appeals Board considered the legal basis and relevant references in relation to the procedures for undertakings and noted that Article 8(4) of the Regulations gives the CCC powers, to the extent required, to remedy or penalize anti-competitive activity. In this regard, the CID on 23 April 2021 issued the Practice Note 1 of 2021 which provides that the CCC may negotiate undertakings with the respondents any time before the CID makes a determination. The Practice Note 1 of 2021 further provides that should the CID disagree with the undertakings presented by the CCC and the respondents, the appointed CID shall convene a full hearing. In the case under review, the Appeals Board notes that the CID disagreed with the CAF Undertakings and decided that the case be heard on merits. One may argue that the CID disagreed with the undertakings and thus held that the matter be heard in accordance with the Practice Note 1 of 2021. However, the Appeals Board observes that the Practice Note 1 of 2021 is silent on the conditions and criteria to be considered in rejecting undertakings.

37. The Appeals Board assessed the powers of available to an adjudicative body such as the CID when considering undertakings submitted to it and the grounds on which it can disagree with such undertakings. The Appeals Board notes that within the European Competition Network ("**ECN**") various jurisdictions provide for the withdrawal, removal or amendment of commitment decisions and/or the reopening of proceedings where:

> *"(i) there has been a material change to the facts or the relevant legal context on which the decision was based; and/or*

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(ii) the decision was based on misleading, incorrect or incomplete information."[11]

38. To this end, within the ECN, it is at the discretion of the competition authorities whether or not to accept commitments and to adopt a commitment decision or to decide at any stage to continue proceedings with a view to adopting a prohibition decision.[12]

39. With respect to the experience of South Africa, the Competition Commission of South Africa ("**CCSA**") submits consent agreements[13] or settlements to the Competition Tribunal of South Africa ("**CTSA**") for confirmation.[14] Pursuant to Section 21(1)(f) of the Competition Act of South Africa, the CCSA is responsible for negotiating and concluding consent orders whereas under Sections 49 D (2) and 58(1)(b), after hearing the motion for a consent Order, the CTSA is empowered to:

    a. *make the order as agreed to and proposed by the CCSA and the respondent;*

    b. *indicate any changes that must be made in the draft order before it will make the order; or*

    c. *refuse to make the order.*

40. The CTSA hears oral submissions from the CCSA and the respondents. The CTSA has in most cases shown deference in approving consent agreements. However, in the proposed consent agreement of the **CCSA and AECI Limited and others**, the CTSA rejected the agreement on the basis that no coherent theory of harm was alleged by the CCSA and thus, it was not possible to assess whether a chosen remedy

[11] This recommended practice is common views of the ECN Competition Authorities which is recommended based on the need for making commitments binding and enforceable on undertakings and for ensuring a minimum level of procedural guarantees for stakeholders. The recommended practice contains the general principles which the Authorities consider relevant to ensure the effective enforcement of the EU competition rules within the ECN. ECN Recommendation on Commitment Procedures (euro a.eu) p.1.
[12] ECN Recommendation on Commitment Procedures (europa.eu) p. 8.
[13] Consent agreements can be equated to commitment decisions based on how they are treated under the Competition Act of South Africa.
[14] See CCSA v Shoprite Checkers (Pty) Ltd Case No: CO26May20. p.12-12

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was an appropriate one without a coherent theory of harm. In its judgment, the CTSA did not approve the agreement on the basis that the consent agreement contained no averment as to the section of the Act the respondents have allegedly contravened and found the agreement not to be rational. [15]

41. In view of the references above, the Appeals Board observes that for the EC, the final authority to decide on commitment decisions lies with Competition authorities; for South Africa it lies with the Competition Tribunal and for the CCC this power lies with the CID. The practices in these jurisdictions reveal the decision maker for commitments and also indicate the need to provide for an opportunity to hear the parties in determining commitments. This is also applicable in the determination of commitments under the CCC's legal framework as the CID is required to provide parties the opportunity to be heard under Rules 29 and 49 of the Competition Rules. It is in this respect that the Appeals Board is of the view that there should be a clear and fair procedure in which the CID should be able to examine commitment decisions. This procedure is needed for legal certainty and for the decision makers to apply the principle of proportionality. The Appeals Board notes that the essence of requiring that Undertakings be examined/considered by the CID is to provide checks and balances on the negotiations carried out by the CCC. To this effect, the conditions in which the CID rejects undertakings should be narrowly interpreted such that once undertakings are recommended to the CID, it is expected to uphold such undertakings unless there are blatant errors in the CCC's assessment or investigation; or where there are blatantly unfair settlement terms imposed on the parties.

42. This means there should be reasonable grounds for the CID to reject undertakings which the CCC has recommended for adoption. Any decision of the CID on accepting or rejecting the undertakings in the form they have been presented, should be undertaken after hearing the CCC and the concerned parties. Further, the CID may return the undertakings to the CCC for changes to be effected.

[15] CCSA and AECI Limited and others p. 5, 7, 8, 9.

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43. The Appeals Board examined the CID decisions and the Record of Proceedings filed by the CCC and noted that CID did not seem to consider the sufficiency or proportionality of the CAF Undertakings to address the concerns alleged by the CCC. Further, there is no evidence that the CID carefully considered the CAF Undertakings, availed the parties an opportunity to be heard on the CAF Undertakings, or provided guidance to the CCC on any possible variations to be made to the CAF Undertakings. The Appeals Board is of the reasoned view that the CID's decision to reject the CAF Undertakings without hearing the parties or examining the sufficiency or proportionality of the Undertakings, may set an undesirable precedent and compromises the CCC's ability to engage with parties in finding rapid resolution in future cases.

II. ADMISSION OF GUILT

44. The Appeals Board considered the detailed submissions of CAF and the interested parties on whether the CID decision was tainted with error of law, fact and assessment when conditioning the undertakings on CAF's non-admission of guilt.

45. CAF argued that the CID committed an error of fact when it disregarded the clear wording of paragraph 4 of the CAF Undertakings which provides that: "*the investigation established that such conduct [for which the Undertakings are signed] restricts competition in the Common Market and is in violation of the Regulations. Pursuant to several discussions with the CCC, CAF provided Undertakings as reflected below in order to alleviate the competitive harm identified during the investigation*".

46. CAF argued that the CID made an error of assessment in requiring it to admit guilt since this conflates prohibition decisions with commitment decisions, despite the latter being the most appropriate solution to alleviate the CCC's concerns.

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47. CAF argued that it is not necessary to require it to "admit guilt" when no such requirement is needed and considering that the purpose of the Competition Rules and Regulations would have been achieved (and any competition concern would have been alleviated) following the signing of the CAF Undertakings. Furthermore, CAF did not challenge the CCC's finding that the Competition Rules and the Regulations had been breached (hence there is need for a further finding of a breach considering this was not challenged by CAF). Basing the decisions on an irrelevant factor (i.e., the requirement to admit guilt) is an error of law.

48. CAF submitted that Article 8(4) of the Regulations dictates that the CCC is to opt between seeking a remedy **or** a penalty, as may be appropriate in each case being investigated, *in concreto*.

49. CAF referred to the European Union approach to commitment proceedings as laid down under the Council Regulation (EC) No. 1/2003, Recitals, para. 13 which reads as follows:

> *Where, in the course of proceedings which might lead to an agreement or practice being prohibited,* ***undertakings offer the [EC] commitments such as to meet its concerns****, the [EC] should be able to adopt decisions which make those commitments binding on the undertakings concerned. Commitment decisions should find that* ***there are no longer grounds for action by the [EC] without concluding whether or not there has been or still is an infringement****.*

50. CAF also referred to the precedent by **Case Comp/39.847 EC v Hachette Livre SA and Others**[16] which stated that commitments are offered without admission of guilt.

51. The Appeals Board further notes that the CCC agreed with the submission of CAF that the CID made an error of fact, an error of law and an error of assessment in requiring CAF to "admit guilt" where no such requirement is needed considering that

[16] Case COMP/39.847, eBooks, Commitments of Hachette.

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the purpose of the Competition Rules and Regulations would have been achieved (and any competition concern would have been alleviated) following the signing of the CAF Undertakings. Furthermore, the CCC stated that CAF did not challenge the CCC's finding that the Competition Rules and the Regulations had been breached. This was evidenced as CAF terminated the FFA. Hence, the CCC asserted that basing the decisions on an irrelevant factor, that is on the requirement to admit guilt, was an error of law.

52. The CCC delved into the arguments advanced by CAF in support of the application for Judicial Review. The CCC clarified that the reason the CID made reference to the admission of guilt in the June Decision, disregarding the clear wording of paragraph 4 of the CAF Undertakings, was because the CID received a letter from Sportfive on 28 June 2021 (a day before the CID meeting) which letter stated that:

> *"...given the recommendation of the Secretariat of the CCC recorded in the Staff paper to close the investigation into the Agreements, Sportfive elected on a non-admission of liability basis, to not appear before the CID during the meeting on the explicit assurances from the Secretariat and the CID that:*
>
> *i. neither the Secretariat will seek nor the CID will make any determination as to whether the agreements infringe the Regulations during the meeting.*
>
> *ii. The only matter before the CID during the meeting is whether to close the investigation in respect of the agreements based on the commitments offered by CAF on a voluntary and unilateral basis."*

53. The CCC explained that based on the above letter from Sportfive, the CID rejected the CAF Undertakings on the basis of non-admission of guilt. The CCC confirmed that CAF never conditioned its commitments on the non-admission of guilt basis.

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54. The Appeals Board notes that Sportfive supported the argument of CAF and the CCC that it was not necessary for the CID to be convinced on whether the Regulations had been infringed, rather it was only necessary for the CID to ascertain whether the commitments offered by CAF unambiguously addressed the potential competition concerns (concerns which, for the avoidance of doubt, Sportfive continues to deny) identified by the CCC. Thus, Sportfive submitted that it was not necessary for the CID to determine whether the potential concerns of the CCC were well-founded on the Regulations.

55. It was noted that Sportfive referred to the EC practice that commitment decisions are adopted on the basis of Article 9 of Council Regulation (EC) No. 1/2003 and that they do not establish an infringement or impose a fine but bring a suspect behaviour to an end by imposing on companies the commitments offered to meet the EC's concerns. Sportfive highlighted that the CJEU has held that the EC decisions adopted on the basis of Article 9 of the Council Regulation (EC) No. 1/2003 "*are based on a preliminary evaluation of the anti-competitive nature of the conduct in question*" and therefore "*... do not entail an in-depth and detailed analysis*". Sportfive highlighted that as acknowledged by the CJEU in the **Alrosa Judgment** (paragraph 46), commitment decisions do not put an end to the infringement that the EC has found to exist but "*aim to address the [EC]s concerns following its preliminary assessment*". Hence, Sportfive pointed out that commitment decisions render the commitments legally binding and conclude that there are no longer grounds for action by the EC.

56. Sportfive further referred to the same **Alrosa Judgment** which stated that:

> *"[the EC] resolves the competition problems identified by it without first establishing an infringement in cooperation with the undertakings concerned on the basis of their voluntary commitments."*[17]

[17] See CJEU, Opinion of Advocate General Kokott in EC v Alrosa (C441/07 P, EU:C:2009:555, para. 51).

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57. The Appeals Board has further considered whether the approval of undertakings requires admission of guilt and observes that the Regulations and Competition Rules do not provide any condition(s) for negotiation of undertakings or commitments. In this regard, the Appeals Board considered the practices adopted in other jurisdictions in the review of commitment decisions and whether there is a requirement for an admission of guilt. The Appeals Board made reference to the major principles under the Council Regulation (EC) No. 1/2003 with respect to commitment procedures which provides as follows:

a. *The Commitment decisions should find that there are no longer grounds for action by the competition authority without concluding whether or not there has been or still is an infringement.*

b. *Commitment decisions are without prejudice to the powers of competition authorities and courts of the Member States to make such a finding and decide upon the case.*

c. *Commitment decisions are not appropriate in cases where the [EC] intends to impose a fine.*

58. The Appeals Board notes that the term 'commitment' as used in the EU is similar to the CCC's approach to 'undertakings'. The Appeals Board notes that undertakings allow parties to an investigation to offer commitments to address the competition concerns identified by a competition authority. Under the Council Regulation (EC) No. 1/2003, if the EC accepts these commitments, it adopts a commitment decision making them binding on the parties without, however, establishing an infringement. The spirit of undertakings or commitments decisions is to allow the competition authority to conclude an investigation swiftly, which may be quicker than under a prohibition decision for instance. This is beneficial to both the competition authority and the parties under investigation. The competition authority can thus divert its resources to other matters. The Appeals Board notes that undertakings may not be

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appropriate in all cases and would depend on the nature and seriousness of the infringements being investigated by the competition authority, and whether the undertakings are sufficient and proportional to the identified concerns. As a result of the faster procedures under commitments decisions, a commitment procedure, which is equivalent to the procedure followed by the CCC for undertakings, involves neither an admission of guilt by the undertaking[18] involved, nor a formal finding of a competition violation.

59. The Appeals Board observes that the investigation at hand was initiated in 2017 and was brought before the CID in 2021, i.e., four years later. The Appeals Board notes that commitment decisions offer an avenue for closure of investigations where time is of the essence to effectively remedy the concerns identified. In **EC v Hachette Livre SA and Others**[19], the EC accepted commitments by the parties under investigation, on the basis that (i) the final commitments offered adequately address the EC's concerns; (ii) none of the parties offered less onerous commitments which also adequately address the EC's concerns; and (iii) the EC took into consideration the interests of third parties, including those of the interested third parties that have responded to the notice published by the EC on the initial commitments. The decision does not state or conclude whether an infringement occurred, and accordingly no admission of guilt or liability is expressed as part of the commitments offered. In **EC v International Business Machines Corporation (IBM)**[20], it was reiterated that a commitment decision should not consider whether or not there has been, or still exists, an infringement. Further, the formal commitments offered by the parties state that "*[n]othing in these Commitments may be construed as implying that IBM agrees with the concerns expressed in the [EC's preliminary assessment]. Consistent with Article 9 of Regulation 1/2003, the Commitments are given in the understanding that the [EC] will confirm that there are no grounds for further action and will close all open investigations in relation to maintenance services for System z servers. For the avoidance of all doubt, IBM strongly contests that it is dominant or that it has engaged*

[18] Undertakings here means 'firms/companies' as provided under Article 1 of the Regulations.
[19] AT.39847 – Ebooks; https://ec.europa.eu/competition/antitrust/cases/dec_docs/39847/39847_26804_4.pdf
[20] https://ec.europa.eu/competition/antitrust/cases/dec_docs/39692/39692_1304_3.pdf

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in abusive conduct contrary to Article 102 [Treaty on the Functioning of the European Union], and these Commitments are without prejudice to IBM's position should the [EC] or any other party conduct proceedings or commence other legal action against IBM."[21] **In EC v E.ON AG**[22], the decision records that "*these Commitments may not be interpreted as an acknowledgement by E.ON AG that it has infringed Competition Law.*"

60. Commitments, or undertakings in the case of the CCC jurisdiction, fulfil an important function; often, firms will be willing to offer commitments that may go beyond what the competition authority could have achieved under a formal infringement decision, where there is no admission of guilt requirement. This was accurately described by the CJEU in the **Alrosa Judgment**, noting that firms which offer commitments consciously accept that the concessions they make may go beyond what the competition authority could itself impose on them in a prohibition decision after a thorough examination, in exchange for avoiding a finding of an infringement of competition law and a possible fine[23]. A similar approach is noted with respect to the competition regime in Italy which as recent as 22 March 2022, the Italian Competition Authority announced that it had accepted commitments leading to the closure of proceedings initiated by the competition authority in relation to concerns that competition in the wholesale fixed telecommunications markets was "*allegedly reduced*"[24].

61. The Appeals Board also considered the practice of the CTSA and noted that parties to agreements may admit to wrongdoing but it is not a requirement in all instances. For instance, the consent agreement signed between the **CCSA and Vodacom (Pty) Ltd** stated that it "*makes no admission of liability of any kind whatsoever for any prohibited conduct under the Act on its part*".[25] In its rejection of the proposed consent

[21] https://ec.europa.eu/competition/antitrust/cases/dec_docs/39692/39692_1305_3.pdf
[22] https://ec.europa.eu/competition/antitrust/cases/dec_docs/39388/39388_2796_3.pdf
[23] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62007CJ0441&from=EN
[24] https://www.concurrences.com/IMG/pdf/agcm_-_autorita_garante_della_concorrenza_e_del_mercato-75.pdf?76601/6b7b5c9ac59cc1513286ba06086c9168f55d94b0b848c8e5795dc00b3b2f5371
[25] https://www.saflii.org/za/cases/ZACT/2020/8.pdf

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agreement between the **CCSA and AECI Limited and others**, the CTSA reiterated that admission of infringement is not a requirement for approval of all consent orders and stated as follows:

> *"Note that we distinguish here between those cases where respondents do not make an admission of a contravention and those such as in the present agreement where there is no allegation by the CCSA of what section of the Act has been contravened. It is true that in the former we have approved such agreements as consent orders in the past, in the latter we have not decided case that such a lacuna still renders an agreement susceptible to approval as an order of the Tribunal."*

62. Reverting to the matter at hand, the Appeals Board observes that the undertakings were negotiated between CAF and CCC, and the same did not contain a reference to 'admission of guilt'. Whereas Sportfive was not a party to the CAF Undertakings, it was given the opportunity by the CCC to comment on the Investigation Report as a party to the FFA. On 28 June 2021, Sportfive submitted to the CCC that it "has on a non-admission of liability basis, elected to not appear before the CID" in relation to the recommendations of the Investigation Report. Thus, the June Decision which rejects the undertakings, on the basis that the matter should be considered on a no admission of guilt basis, appears to have been influenced by Sportfive's letter.

63. The Appeals Board is of the view that if the CID wished to incorporate the submissions of Sportfive in its decision, it was expected to give CAF an opportunity to respond to Sportfive's letter. However, it is observed from the submissions, which were presented the Appeals Board, that CAF did not have sight of this letter which had a bearing on the decision on the CAF Undertakings.

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64. The Appeals Board observes that:

a. On the basis of the foregoing facts, the issue of non-admission of guilt was not referred to in the CAF Undertakings.

b. On the basis of matters of law, the Regulations and international best practices do not require admission of guilt for the approval of undertakings.

65. Hence, the Appeals Board concludes that the CID committed an error of fact and law in rejecting the CAF Undertakings on the basis that they were made in the absence of an admission of guilt.

III. ASSESSMENT OF MARKET TEST AND PROPORTIONALITY

66. CAF in its submission asserted that the CID appeared intent on hastily reaching a finding of guilt without engaging in a substantive analysis of a market test notwithstanding the doctrine and international jurisprudence in this matter. CAF argued that an adjudicative body ought to undertake the relevant market study and made reference to the **Alrosa Judgment**, para. 62 which provides that:

> *"[T]he [EC] concluded, **after taking note of the results of the market test it had conducted**, that the joint commitments were not appropriate for resolving the competition problems it had identified."*

67. CAF supported its argument that the CID made substantive flaws by not having conducted market analysis or examined the content of the CAF Undertakings by making reference to Article 27(4) of the Council Regulation (EC) No. 1/2003 which states as follows:

> *"Where the [EC] intends to adopt a decision pursuant to Article 9 or Article 10, it shall publish a concise summary of the case and the main content of the*

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commitments or of the proposed course of action. Interested third parties may submit their observations within a time limit which is fixed by the [EC] in its publication and which may not be less than one month. Publication shall have regard to the legitimate interest of undertakings in the protection of their business secrets."

68. The CCC disagreed with the position expressed by CAF with respect to whether the CID should have conducted a market analysis. In its Statement of Response, the CCC stated as follows:

> *". while undertakings are negotiated and agreed upon with parties, the final decision lies with the CID and is particularized in the Practice Note. [...] it is not common procedure for the CID to conduct its own market analysis at the stage of decision making, but rather it acts upon the recommendations of the CCC based on information and evidence presented to it and hears matters in accordance with Rule 24 of the [Competition] Rules. Where the CID is dissatisfied with the information and/or evidence gathered, it can instruct the CCC to carry out further investigations before making a decision. The CCC is the one vested with the role of investigation and based on the investigation it conducts, if it finds that there has been a breach of Regulations, it then makes recommendations for consideration by the CID. The Respondent is then granted an opportunity to be heard."*[26]

69. The Appeals Board is cognisant that the CCC is mandated to investigate and conduct the necessary market analysis required and make recommendations to the CID. Whereas the CID considers the recommendations submitted to it, it is essential that its decisions are well reasoned, and this is achieved when the CID has mechanisms to verify the market assessment and analysis submitted to it. This may be carried out by the CID conducting its own research or interrogating the CCC on the investigations

[26] Paragraph 38, page 16 of the Statement of Response filed by the CCC.

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it had undertaken to establish the infringement and in assessing the effectiveness and feasibility of the implementation of any proposed undertaking.

70. The Appeals Board notes that the approach of the EC in conducting market tests is decided on a case-by-case basis. Based on the ECN Recommendation on Commitment Procedures, the ECN Authorities are empowered to decide whether the commitments identify competition concerns on the basis of the market test identified and/or any other information available.[27] The ECN Recommendation on Commitment Procedures and the **Alrosa Judgment** states as follows:

> *"When applying the principle of proportionality, the Authorities should not be obliged to go further than verifying that the commitments do not manifestly go beyond what is necessary to address these concerns and that the undertakings subject to the proceedings have not offered less onerous commitments that also address the competition concerns adequately. When carrying out that assessment, the Authorities take into consideration the interests of third parties. In any case, the Authorities are not obliged to compare voluntary commitments submitted by the undertakings subject to the proceedings with measures which they could impose under a prohibition decision and to disregard as disproportionate any commitments which go beyond such measures."*

71. In the context of the EC, the principle of proportionality requires that the measures of the competition authorities which considers commitment decisions "*must be suitable and not exceed what is appropriate and necessary for attaining the objective pursued.*"[28] Under Article 9 of Council Regulation (EC) No. 1/2003, the application of the principle of proportionality requires that:

> a. *the commitments in question address the concerns expressed by the EC in its Preliminary Assessment.*

[27] ECN Recommendation on Commitment Procedures (europa.eu) p.4.
[28] See Case T-260/94 Air Inter v. Commission [1997] ECR II-997, paragraph 144 and Case T-65/98 Van den Bergh Foods v. Commission [2003] ECR II-4653, paragraph 201.

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b. *the undertakings concerned have not offered less onerous commitments that also address those concerns adequately.*

c. *the EC when carrying out the assessment must take into consideration the interests of third parties.*[29]

72. Having regard to this practice and references as well as the submissions from the parties, the Appeals Board considered whether there is clear procedure in the CCC legal framework for commitment proceedings to be tested. A perusal of the Regulations and Competition Rules reveals that they do not expressly provide for the procedure to be followed in relation to commitments. However, the CCC under Rules 29 and 49 of the Competition Rules is bound by the principle of providing an opportunity to concerned parties, third parties and competent authorities of Member States to be heard. Rules 29(3) and 49(3) of the Competition Rules provides that the process of the right to be heard should take cognizant of the legitimate interest of the undertakings[30] and confidential information. The Appeals Board observes that the CID before making any such decisions must ensure that the CCC has collected the views of interested parties during its assessment and that the competition concerns are adequately addressed in the proposed undertakings.

73. In relation to the CAF Undertakings, the Appeals Board observes that the competition concerns and proposed recommendations were guided by interviews and research carried out by the CCC with various market players. Further that the CAF Undertakings were the product of extensive negotiations between the CCC and CAF, and specifically addressed each alleged competition infringement identified in the report. Notably:

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[29] See Case C-441/07 P Commission v Alrosa [2010] ECR I-5949, paragraph 41 and 39847_27536_4.pdf (europa.eu)

[30] Undertakings here means 'firms/companies' as provided under Article 1 of the Regulations.

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a. To the alleged infringement that the intermediation rights for CAF competitions were awarded in the absence of an open and competitive tender process, CAF undertook to award all future exclusive agreements relating to the intermediation of commercial rights of CAF competitions within the Common Market on the basis of an open, transparent and non-discriminatory tender process, based on a set of objective criteria which shall be shared with the CCC prior to launching the tender. CAF shall continue to publish the results of all tender exercises conducted on its website, subject to redaction of confidential information.

b. To the alleged infringement that the long-term duration of the exclusive contract for the award of intermediation rights for CAF competitions led to a significant lessening of competition, CAF undertook not enter into new exclusive agreements for the intermediation of commercial rights of CAF competitions within the Common Market for a duration that exceeds four (4) years. Where CAF has justifiable grounds to enter into a future exclusive agreement for the intermediation of commercial rights of CAF competitions within the Common Market or a duration which exceeds a duration of four (4) years, CAF shall notify the CCC for authorisation of such agreement pursuant to Article 20 of the Regulations.

c. To the alleged infringement that the inclusion of rights of first refusal in the agreements between CAF and Sportfive led to a significant lessening of competition, CAF undertook to eliminate all right of first refusal clauses, or similar preferential renewal clauses, from its existing and future exclusive agreements relating to the intermediation of commercial rights of CAF competition within the Common Market.

d. With respect to monitoring compliance with the undertakings, CAF undertook to submit an annual compliance report to the Commission for a period of three years.

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74. Further, the FFA was terminated by CAF upon, amongst others, the CCC's recommendations.

75. The Appeals Board is of the view that the CID should be guided by a thorough due diligence and well-informed research in its decision making process. This may include interrogating the investigating body on the findings and recommendations of the investigation. Such an approach will ensure that the decisions made are not only rational but they also adhere to the principle of proportionality as guided by international best practices.

IV. ABSENCE OF REASONING

76. CAF submitted that the absence of reasoning in the June and September decisions indicates procedural violation. CAF referred the Appeals Board to the CJEU decision in **Case T-45012 *Anagnostakis v EC,*** dated 30 September 2015 when it pronounced the reasons for providing decisions as follows:

> *"According to consistent case-law, the purpose of the obligation, under Article 296 TFEU, to state the reason for the an individual decision is to provide the person concerned with sufficient information to make it possible to determine whether the decision is well founded or whether it is vitiated by an error which may make it possible for its validity to be contested, and to enable the Courts of the European Union to review its lawfulness."*

77. CAF also made reference to Article 26 of the Appeals Rules which states that decisions issued by the Appeals Board shall contain the reasons for the decision. Further, CAF made reference to the COMESA Court of Justice Rules of Procedures, 2016 (CCJ Rules), Articles 67(5) and 68 which states that a judgment shall contain the reasons for the decision.

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78. CAF further made reference to the Terms of Reference (TORs) of the CID which states that:

> *"A decision of the CID shall be in writing and shall contain the following:*
> - *The finding of the CID on issues of fact or law*
> - *The reasons for the CID's findings*
> - *The decision of the CID"*

79. CAF stated during the hearings held on 10 October 2022 and 7 November 2022 that the minutes in the Record of Proceedings reveal the CID's intentions that it had formulated an opinion on the merits before even hearing the parties on the validity of the CAF Undertakings. CAF noted that the CID decision should have sought clarifications such as:

a. The conduct being purportedly sanctioned;

b. How this conduct is relevant to the assessment of the validity of the CAF Undertakings;

c. Whether a market test was conducted to determine if the CAF Undertakings failed to address the Commission's concerns;

d. Why the CID deviated from the Practice Note 1 of 2021 on Undertakings;

e. Why the CID did not invite CAF to comment on its "alleged" conduct or the Undertakings that were the subject of the review; and

f. Why the CID did not invite CAF to an oral hearing as provided for in Rule 29 of the Competition Rules and [Practice Note 1 of 2021' on Undertakings as, in its view, it did with Sportfive

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80. The Appeals Board examined whether the two CID decisions provided any reasoning for the determinations issued:

a. Whereas the June Decision provides as follows:

> *"The CID rejected the submissions that the matter should be considered on a no-admission of guilt basis. The CID determined that the case should be determined on merits as it was not convinced that the Regulations have not been breached. Therefore, the CID decided that the parties to the agreement should be afforded an opportunity to be heard within thirty (30) days of receipt of this decision."*

b. Whereas the September Decision provides as follows:

> *"The CID took note of the submissions by CAF. The CID determined that the parties did not provide compelling reasons which were not before the CID at the time of their initial Decision.*
>
> *In view of the foregoing, the CID declined CAF's request to reconsider its Decision that the case be heard on merits. The CID concluded that if CAF is dissatisfied with its determination, it may appeal to the full Board of Commissioners in accordance with Article 15 (1) (d) of the Regulations as read together with Rule 24 (e) of the [Competition Rules]."*

81. The Appeals Board examined the Record of Proceedings filed by the CCC and the minutes for the June and September decisions. The minutes of the June decision indicates that the CID was minded to "*deter the parties from engaging in such conduct in the future*". However, the Appeals Board takes note that the CID did not provide any reasons in its June or September decisions for rejecting the matter submitted to it

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other than stating that the matter could not be considered on a non-admission of guilt basis. The Appeals Board notes that the TORs of the CID sufficiently guide the latter in ensuring its decisions are well reasoned.

82. In view of this, the Appeals Board concludes that the June and September Decisions were not well reasoned and hence directs that going forward all CID decisions must contain the reasons for the decision and must substantially:

    a. Set out the facts of the matter and the issue for determination including the historical background;

    b. Set out the issues for determination;

    c. Make reference to legal authorities and case references where necessary;

    d. Provide the reasons/rationale on the findings or determination on each of the issues.

V. THE QUORUM FOR THE SEPTEMBER DECISION

83. CAF in its submission argued that whereas Article 13 (4) of the Regulations provides that the CID shall comprise three (3) Commissioners, the CID September decision is in contravention of Article 13 of the Regulations as it was signed by two Commissioners and hence the quorum was not met. CAF elaborated that this statutory requirement is to ensure CID decisions are sufficiently deliberated and reasoned by and between a college of three (3) Commissioners. CAF argued that it is against international, regional and domestic law practice for an adjudicative body to be constituted of an odd number of decision makers and the reason for it is that an odd number of decision makers ensures balanced deliberations which ultimately allows the Chairperson to cast the decisive vote in the event of disagreement between the CID members.

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84. CAF highlighted that Commissioner Justice Charlotte Wezi Malonda was a CID member in the CID June and July Decisions and the Record of Proceedings reveal that she was not a member of the CID that issued the September Decision due to the end of her tenure of office. CAF argued that the absence of any evidence of Commissioner Justice Charlotte Wezi Malonda's participation in the deliberations, issuance and signature of the September Decision, nullifies the decision.

85. CAF stated in its Statement of Judicial Review that the TORs of the CID[31] provides that its quorum constitutes two Commissioners. CAF asserted that the TORs allow the CID to be constituted by two Commissioners instead of the statutory requirement of the three Commissioners, which would be in direct contradiction to the mandatory provisions of Article 13 (4) of the Regulations, the very statute that created the CID and determined its constitution and all known standards applicable to judicial, quasi-judicial and adjudicative bodies (that require an odd number of adjudicators to assess a given case). CAF further stated that if the Regulations allowed for the variation of the number of the CID members, this would have been explicitly provided for (as is the case for the full board of Commissioners under the Regulations and the Appeals Board under the Appeals Rules). CAF further pointed out that the undated TORs were never published in the COMESA Official Gazette, nor were they communicated to CAF during the investigation prior to its submission of its Statement of Judicial Review. CAF further made reference to Rule 9 of the COMESA Court of Justice Rules of Procedure which provides quorum of uneven number as follows:

> *"1. The Appellate Division shall sit in plenary session or with* ***a quorum of three Judges****, as the President may determine.*
>
> *2. The First Instance Division shall sit in plenary session or with* ***a quorum of five (5) or three (3) Judges*** *as the Principal Judge may determine.*
>
> *3. Where, by reason of a Judge being absent or prevented from taking part in the proceedings the Court cannot sit in plenary session –*

[31] Submitted as part of the Record of Proceedings filed by the CCC

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(a) *For the Appellate Division, the President, may direct the case to be heard with* ***a quorum of three judges****.*

(b) *For the First Instance Division the Principal Judge may direct the case to be heard with a quorum of five (5) or three (3) Judges.*

4. ***If after a Division has been convened it is found that the quorum of Judges has not been attained, the presiding Judge shall adjourn the sitting until there is a quorum."***

86. In this regard, CAF argued that the CID's lack of statutory authority to amend the Regulations by issuing 'terms of reference' that directly contradict the Competition Rules and Regulations, coupled with CAF's deprivation of the opportunity to consult such TORs renders the 78th meeting and the September Decision void *ab initio*.

87. In response to the submission of CAF, the CCC in its Statement of Response contended that the June Decision which considered the CAF Undertakings and the letter from Sportfive dated 28 June 2021, as well as the July Decision which considered the application of Sportfive to reconsider its June Decision, was delivered by a CID consisting of three members. While the September Decision was delivered by two members, the CCC submitted that the minutes of the September CID indicated that the CID and the CCC were cognizant that there were two members of the CID present and after considered discussions, it was held that the quorum for the meeting was met. The CCC submitted that it is not convinced that a determination by two Commissioners would be in clear breach of the Regulations and that it undoubtedly renders the September Decision null and void *ab initio*.

88. The CCC further argued that the TORs do not provide that the CID shall be composed of two Commissioners, rather it states that the quorum shall be two Commissioners. Further, the TORs do not alter the composition of the CID but simply provides a quorum to ensure that the proceedings of the CID are not interrupted by absence of any one Commissioner occasioned by a number of factors. The CCC further noted

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that most of the CID proceedings are time bound by statute and therefore disruptions of its operations due to absence of any one Commissioner would be perilous to its operations and that it could not have been the intention of the founders of the Regulations that such a situation should occur.

89. The CCC further contended in its Statement of Response that it is not unusual though maybe infrequent that a judicial body would have an even number of decision makers. The CCC noted that the United States Supreme Court, the highest Court in the United States of America, has on several occasions found itself with an even number of Justices. For instance, when Associate Justice Antonin Scalia died in February 2016, the Republicans blocked President Obama from filling the seat and the court operated with 8 justices for fourteen (14) months. Further, that this was later seen when the nomination of Justice Kavanaugh was delayed. The CCC was therefore satisfied that the September Decision is not *ultra vires* as the CID was legally constituted.

90. In response to the CCC's argument, during hearing held on 7 November 2022, CAF contended that having an odd number of such an adjudicative organ is in line with jurisprudence in various COMESA Member States, as well as the constitution of the Board itself and the COMESA Court of Justice.

91. CAF challenged the analogy of the CCC with respect to the highlighted US Supreme Court case and stated that it is unwarranted since the composition of the Court is structured along party lines which is not the case with the COMESA adjudicative system. Further, CAF averred that when the US Supreme Court operates with even number of judges and is equally divided, it cannot issue a judgment or decision settling an issue of law.

92. Sportive did not make submissions with respect to the quorum.

93. Having considered the two views advanced by CAF and the CCC, the Appeals Board considered the cases submitted by the parties in support of their arguments and the

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practice of other jurisdictions. The Appeals Board observes that the Regulations in Article 13 (4) empowers the Chairperson to assign three of the Commissioners to be full time members of the Board and they will form the CID. The Appeal Rules which have been highlighted by the parties, in Article 4, provides that the Appeals Board when hearing shall be constituted by a minimum of five members of the Board but in no case shall be an even number. It is also observed from the CCJ Rules, in Rule 9, which were referred to by CAF in its submission, that there are elaborate provisions on quorum.

94. The Appeals Board takes note of the view of Cushing[32] who refers to the requirement of a quorum that it is "*to prevent matters from being concluded in a hasty manner or agreed to by so small a number of the members, as not to command a due and proper respect.*"[33]

95. In the matter at hand, the Appeals Board notes that Article 13 (4) of the Regulations requires three members to sit on the CID. The requirement for the CID to be constituted by an odd number of Commissioners suggests that the drafters of the provision intended that decisions to be made by the CID be in line with international best practice for decision making by adjudicative bodies. However, unlike the provision for three members to constitute the CID under the Regulations, the TORs which were approved by the Board provides under paragraph 33 that *"[two] members of the CID shall constitute a quorum."* In conformity with the TORs of the CID, the September Decision was made by two Commissioners who constituted a quorum. The Appeals Board also notes that Article 13 (4) of the Regulations is silent on the quorum of the CID as it does not provide for the maximum or minimum constitution of the CID.

[32] Luther S. Cushing, Rules of Proceeding and Debate In Deliberative Assemblies 17 (Boston, Thompson, Brown & Co. 1874), as quoted in "Civil Procedure — Quorum Requirements — Fifth Circuit Leaves Panel Decision Vacated upon Loss of En Banc Quorum — Comer v. Murphy Oil USA, 607 F.3d 1049 (5th Cir. 2010) (en banc)". Accessed at https://harvardlawreview.org/wp-content/uploads/pdfs/vol_12402_comer_v_murphyoil.pdf

[33] Ibid p.624.

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96. The Appeals Board also observes that as per Article 13 (4) of the Regulations, the Chairperson of the Board is empowered to assign three Commissioners to form the CID. In this regard, it could have followed that, when convening the 78th meeting of the CID the Chairperson may have assigned another Commissioner to replace the Commissioner whose tenure had ended. However, the replacement of a Commissioner may ordinarily lead to reopening of the matter which may result in delays in the delivery of justice. This raises the need for the Regulations to be reviewed to cover for such eventualities so that continuity of cases is guaranteed where a sitting Commissioner(s) is no longer available.

97. CAF in its submissions stated that the CID has no authority to issue the TORs. The Appeals Board notes that Article 8(7) of the Regulations provides that *"The Commission, pursuant to the provisions of Article 55 of the Treaty, may establish its own rules of procedure to effectively implement the Regulations."* In this regard, the Appeals Board is of the view that TORs were not *ultra vires* the Regulations on grounds that they were duly approved by the Board. It is also worth noting that in line with corporate governance practice, authorities usually issue terms of reference to guide conduct and proceedings of the Board and its respective Committees. While the Appeals Board notes CAF's submission that the TORs were not published on the Commission's website, a perusal of the Regulations and Rules does not point to any requirement for the TORs to be published.

98. In view of the foregoing, the Appeals Board concludes that the September Decision is not invalid as it was issued in accordance with the TORs approved by the Board. However, the Appeals Board notes that this may be the first time the TORs are being put to test and thus may be an opportunity for the CCC to revisit the Regulations and the TORs to address the challenges that have been observed with respect to the quorum.

VI. WHETHER CAF WAS DENIED AN OPPORTUNITY TO BE HEARD

99. CAF submitted in its Statement of Judicial Review that it was not offered a chance to a full hearing despite the following:

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Whereas the Practice Note 1 of 2021 provides that "Should the CID disagree with the Undertakings presented by the CCC and the respondents, the appointed CID shall convene a full hearing. The respondent party shall be notified of the date and time of the hearing. The hearing shall be undertaken in compliance with Rules 29 and 49 of the Rules." [34]

Whereas the decision of 28 June 2021 provides that the CID determined "that the case should be determined on merits and that the parties to the agreement should be afforded an opportunity to be heard within thirty (30) days of receipt of this decision."

100. CAF noted that the July Decision in relation to the reconsideration of the June Decision which was filed by Sportfive and not communicated to CAF provided that "the CID determined that the hearing into the CAF/LS/Agreement will be held by 30 September 2021."

101. Further, CAF alluded that its filing for reconsideration of the June Decision did not preclude the CID from holding a hearing which it should have offered to conduct before CAF filed its request for reconsideration, as it did with Sportfive.

102. In response, the CCC argued that CAF was never denied a Hearing since the hearing was unequivocally contemplated in the decisions. The Practice Note 1 of 2021 highlights that where the CID disagrees with the undertakings presented by the CCC and the Respondents, a full hearing would then be convened. Further, for this to be possible, the respondent party would then have to be notified of the date and the time of the hearing and that the hearing would then be undertaken in compliance with Rules 29 and 49 of the Competition Rules. Therefore, the rejection of the CAF Undertakings triggered the investigation process to revert to a full hearing where CAF as a

[34] The Practice Note was submitted as part of the List of Exhibits (Annex 2) to the Statement of Response filed by the CCC.

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respondent would then have to defend itself against the findings of the investigation, hence a hearing on merits.

103. The CCC submitted that the June Decision afforded an opportunity for a hearing to the parties involved. The September Decision reiterates this position by the CID stating that the case must be heard on merits and if CAF was not satisfied with having a hearing on merits, then they have the right to lodge an appeal before the full Board. The CCC stated that it is its solid position and comprehension that the matter could only have been heard on merit by following procedures under Rules 29 and 49 of the Competition Rules. However, no full hearing was convened since CAF filed an Appeal on the June Decision. If no Appeal had been filed, the next step would have been for a hearing to be convened as per the June Decision.

104. The Appeals Board observed that there was a misunderstanding with respect to the interpretation of the June Decision on its pronouncement for the matter to be heard on merit. Whereas the CID in its June decision provided that the parties to the agreement would be afforded an opportunity to be heard within 30 days from receipt of the decision and CAF was expecting the CID to have a hearing on the undertakings. CAF was of the understanding that the CID would have a hearing to consider the response of the parties to the rejection of the CAF Undertakings. The CCC appeared to be of the understanding that no full hearing was convened since Sportfive and CAF both filed reconsideration of the June Decisions, and CAF filed an Appeal. Further, that the hearing would not be with respect to the CAF Undertakings, but to the merits of the findings of the investigation.

105. The Appeals Board observes that it is evident that CAF was not given an opportunity to respond to the position of the CID in relation to the requirement of an admission of guilt in the context of submission of undertakings. As evident in the experience of CTSA, the CID may have taken the approach of conducting a hearing regarding the CAF Undertakings where both the CCC and CAF would be given an opportunity to be heard on the rejection of the CAF Undertakings. However, the CID

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opted for the matter to be heard on merits as per the procedure stipulated in the Practice Note 1 of 2021.

106. The Appeals Board considered who was expected to move the Hearing Procedure. Pursuant to Rule 24 (b) of the Competition Rules, the Chairperson shall convene the CID and notify the respondent party the date and time of the hearing and in terms of procedure under the Competition Rules, the Registrar is expected to notify the parties. In the oral submission, CAF purported it had waited for a long period of time for the Hearing to be convened. The Appeals Board notes that the parties were at liberty to seek clarifications from the Office of the Registrar as regards the dates for the Hearing.

107. Pursuant to the foregoing, the Appeals Board concludes that CAF was not denied the opportunity to be heard rather the hearing was delayed due to the filings lodged for reconsideration of the CID Decisions and the misunderstanding between CAF and the CCC as regards to the nature of the hearing.

VII. SUMMARY OF FINDINGS

108. Having considered the matters presented to it by CAF and the interested parties, and having regard to the facts of the case and matters of law, the Appeals Board, in accordance with Article 28 (1) of the Appeals Rules, concludes as follows:

a. The CID made an error of fact and law by requiring the admission of guilt in the consideration of CAF Undertakings, which is not a requirement in the commitment procedures before the CCC and not an issue lodged by the parties to the undertakings, being CAF and the CCC.

b. The June Decision and September Decision are not well reasoned, and there is no evidence that the CID conducted its due diligence in testing the adequacy and proportionality of the CAF Undertakings in order to reject them.

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c. To the contrary, the Appeals Board observes that the CAF Undertakings were aligned with the stakeholders' views gathered by the CCC during its investigation and were the result of extensive consultations between the CCC and CAF to ensure the effectiveness and feasibility of the implementation of the Undertakings. The Appeals Board thus finds that the CAF Undertakings have sufficiently and proportionately addressed the identified competition concerns.

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ORDERS OF THE APPEALS BOARD

109. In view of the above findings, the Appeals Board ORDERS as follows:

a. The June and September CID decisions are hereby quashed;

b. The Undertakings offered by CAF on 23 August 2020 and agreed to by the CCC are hereby upheld; and

c. The investigation into the two agreements relating to the commercialisation of marketing and media rights of CAF competitions, namely the Long Form Contract and the FFA, is hereby closed.

ISSUED THIS 16TH DAY OF DECEMBER 2022 IN NAIROBI, KENYA

.....
Commissioner Lloyds Vincent Nkhoma
(Chairperson of the Appeals Board)

.....
Commissioner Danson Mungatana
(Appeals Board member)

.....
Commissioner Beatrice Uwumukiza
(Appeals Board member)

.....
Commissioner Francis Lebon
(Appeals Board member)

.....
Commissioner Islam Tagelsir Ahmed Alhasan
(Appeals Board member)