



COMESA Competition Commission

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**Common Market for Eastern
and Southern Africa**

CASE FILE NO: CCC/RFA/01/01/2017/R3

**DECISION OF THE 100TH MEETING OF THE COMMITTEE RESPONSIBLE FOR
INITIAL DETERMINATIONS REGARDING THE MEMORANDUM OF
UNDERSTANDING BETWEEN LAGARDÈRE SPORTS SAS AND beIN MEDIA
GROUP LLC LIMITED IN RELATION TO MEDIA RIGHTS OF COMPETITIONS
ORGANISED BY THE CONFÉDÉRATION AFRICAINE DE FOOTBALL**

ECONOMIC SECTOR: SPORTS MEDIA RIGHTS

22 DECEMBER 2023



Reference: CCC/RFA/01/01/2017/R3

Parties: COMESA Competition Commission Secretariat
Confédération Africaine De Football
beIN Media Group LLC

In the matter Memorandum of Understanding between Lagardère Sports SAS and
beIN Media Group LLC in relation to Media Rights of Competitions
organised by the Confederation of African Football

A. INTRODUCTION

1. On 13 February 2017, the COMESA Competition Commission (the “**Commission**”) commenced an investigation into a possible violation of Part 3 of the Regulations by the Confédération Africaine de Football (“**CAF**”), pursuant to Article 22 of the COMESA Competition Regulations (the “**Regulations**”). On 16 April 2019, the Commission issued notices of investigation against Lagardère Sports S.A.S (“**Lagardère Sports**”) and beIN Media Group LLC (“**beIN**”). CAF and beIN are together referred to as the “**Respondents**”.
2. The investigation was concerned with the two Memoranda of Understanding (“**MOUs**”) entered into between Lagardère Sports and beIN Group for the commercialisation of media rights of football competitions organised by CAF. Specifically, the concerned MOUs (together referred to as the “**Agreements**”) are:
 - a) MOU dated 22 October 2014 between Sportfive and beIN Group (the “**2014 Agreement**”); and
 - b) MOU dated 16 February 2016 between Lagardère Sports and beIN Group (the “**2016 Agreement**”).
3. The aim of the investigation was to allow the Commission to determine whether or not certain provisions contained in the Agreements are in violation of the Regulations. The alleged competition infringements assessed concern:
 - a) the award of media rights of CAF competitions in the absence of an open and competitive tender process;
 - b) the long-term duration of contract for the award of media rights of CAF competitions to beIN; and
 - c) the bundling of media rights across platforms, transmission mode and competitions.



4. The Commission's investigation established that the duration of the 2016 Agreement, coupled with the lack of competitive tender processes and the extensive scope of exclusivity granted to beIN was likely to lead to a significant restriction of competition in the relevant markets in the Common Market. Hence, the Commission concluded that certain provisions contained in the Agreements contravened Article 16(1) of the Regulations as they affected trade between Member States and had as their object and effect the restriction of competition in the Common Market. In view of the addressing the competition concerns identified, the Commission recommended undertakings pertaining to the award of future media rights and the termination of the 2016 Agreement by 31 December 2024.
5. Pursuant to Article 13(4) of the Regulations, there is a Committee Responsible for Initial Determinations referred to as the CID which is convened to hear the matter in accordance with Rules 23, 24, 29(1) and 49 of the COMESA Competition Rules (the "**Rules**"). To this effect, CAF and beIN were afforded an opportunity to be heard where they made written and oral submissions in response to the finding of the Commission. The decision of the CID is set out below.

B. THE PARTIES

CAF

6. 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 Associate Members (Reunion Island and Zanzibar). CAF is an international non-governmental organisation with its own legal persona, founded in 1957 in Khartoum, Sudan. The headquarters of CAF are located in Cairo, Egypt.
7. At the time of the investigation, CAF had exclusive rights to organise eleven (11) competitions¹, namely:
For national teams
 - a) Africa Cup of Nations ("AFCON");
 - b) African Nations Championship ("CHAN");
 - c) U-20 AFCON;
 - d) U-17 AFCON;
 - e) U-23 AFCON;
 - f) Women's AFCON;
 - g) Futsal AFCON;
 - h) Beach Soccer AFCON;

¹ Article 58 of the CAF Statutes. The Competitions are described further below.

For Clubs

- i) CAF Champions League;
 - j) CAF Confederation Cup; and
 - k) CAF Super Cup
8. Further, CAF had the exclusive right to organise any other continental or intercontinental football competitions.
9. The executive body of CAF is the Executive Committee and consists of the President, thirteen (13) members and one 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 competitions.²
10. 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. 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 submitted 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, such as Lagardère Sports.³

² Article 23 of the CAF Statutes.

³ The Lagardère sports' division previously traded under Sportfive S.A.S ("**Sportfive**"). According to the Lagardère Group, Sportfive was the European and African leader in the management of marketing and media rights for sports, whose activities included negotiating TV rights at international level, advertising in stadiums, sponsorship and hospitality programmes. In the sector of broadcasting rights, its role is to act as an intermediary between the original rights holders and the content users. Lagardère Sports obtained the exclusive rights to commercialise the marketing and media rights of CAF's main competitions. Lagardère Sports' sister company, IFAP Sports, also 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 years. Lagardère Sports and IFAP Sports belonged to the Lagardère Group. The Lagardère Group sold its sport business to H.I.G Capital in April 2020 (retaining only a minority, non-controlling interest in the divested entities) at which point Lagardère Sports and IFAP Sports ceased to form part of the Lagardère Group. Subsequent to this transaction, Lagardère Sports has been re-named Sportfive EMEA.

beIN

11. beIN is a global entertainment group headquartered in Qatar, which broadcasts sixty (60) channels across five continents within forty-three (43) countries and in seven different languages. beIN has submitted that it has major operations in the Middle East and Northern Africa region, as well as in France, Asia, Australia, and the USA. beIN has been active in acquiring broadcasting rights for various sports events held globally including premium content across football, tennis, motorsports, cycling, athletics and various other sports.⁴
12. beIN submitted that the broadcasting rights in respect of sports content in the Middle East and North Africa (**MENA**) region are dealt with by beIN Sports MENA, which was established in 2003 as Al Jazeera Sports, and was subsequently rebranded in January 2014. On 1 November 2015, beIN Sports MENA expanded its portfolio to include movies, general entertainment, factual and kid's content on its platform and beIN Media now offers blockbuster movies, entertainment and sports all through a technologically advanced platform across the MENA region in full HD. beIN Sports MENA broadcasts continuously in the MENA region in four languages (Arabic, English, French, and Spanish). On the African continent in particular, beIN Sports MENA offers a direct-to-home satellite service and its channels (including sport and entertainment) are available in Algeria, Egypt, Libya, Morocco, Tunisia, Somalia, South Sudan, and Sudan as well as Mauritius and Madagascar. According to its website, beIN brings unrivalled sport action and major international events, to dozens of millions of viewers around the world.⁵

C. AGREEMENTS SUBJECT TO THE INVESTIGATION

13. The 2014 Agreement was concluded between Lagardère Sports (then operating as Sportfive) and beIN Group on 22 October 2014. Recital B of the 2014 Agreement states that on 10 October 2008 and 5 February 2009 Sportfive granted to Arab Radio and Television and International Sports Events a license to exploit certain media rights for editions of CAF competitions [AFCON, CAF Champions League, CAF Super Cup, CAF Confederation Cup, and CHAN and AFCON U-20] held from 2009 to 2016. These rights were subsequently transferred to Al Jazeera Media Network, a company owned by beIN, on 17 November 2009. The 2014 Agreement also makes reference to a priority right granted by CAF to Sportfive for the renewal of the agreements regarding the editions of the CAF competitions to be held from 2017

⁴⁴ Letter dated 14th June 2019 from Bowmans (legal representatives for beIN).

⁵ <https://www.beinmediagroup.com/>

and 2024, and the preliminary tournaments of the AFCON 2017, 2019, 2021, and 2023; and which Sportfive intended to exercise.

14. The 2016 Agreement was concluded between Lagardère Sports and beIN on 16 November 2016. Section C of the Recital of the 2016 beIN Agreement provides that pursuant to new agreements concluded with CAF and pursuant to other agreements concluded with the company IFAP Sports, Lagardère Sports is entitled, with complete exclusivity, to commercialise, throughout the world, the media rights regarding the following CAF's competitions:
 - i. The Competitions [AFCON, CAF Champions League, CAF Super Cup, CAF Confederation Cup, and CHAN and AFCON U-20] to be held from 2025 to 2028;
 - ii. The Preliminary Tournaments of the AFCON 2025 and 2027;
 - iii. The editions 2019, 2023, and 2027 of the U-23 AFCON;
 - iv. The editions 2017, 2019, 2021, 2023, 2025 and 2027 of the U-17 AFCON;
 - v. The editions 2016, 2018, 2020, 2022, 2024, 2026, and 2028 of the Women AFCON; and
 - vi. The editions 2016, 2018, 2020, 2022, 2024, 2026, and 2028 of the Futsal AFCON.
15. Under Clause 2, Lagardère Sports granted beIN a license related to the media rights for the above competitions on an exclusive basis to the following territories in the Common Market: Djibouti, Egypt, Libya, and Sudan. Mauritius and Madagascar are part of the licensed territories on a non-exclusive basis in any languages but on an exclusive basis in French. The licensed media rights included the right to *“broadcast, exhibit, or transmit on a live, near-live, delayed basis, the Additional Competitions on an unlimited number of times in any languages on a platform neutral basis... for reception on any devices, whether live or delayed coverage, in full or by way of highlights or clips, for any purposes... ”* Under Clause 3 of the 2016 Agreement, in consideration for such an exclusive license, beIN agreed to pay Lagardère Sports a net aggregate license fee.

D. SUMMARY OF PARTIES' SUBMISSIONS

Commission's Submissions

16. The Commission submitted that in accordance with the cumulative elements required under Articles 16(1) and 16(2) of the Regulations, it had established that:



- a) there existed an agreement between Undertakings⁶ that is CAF, Lagardère and beIN;
 - b) the agreement was or was intended to be implemented within the Common Market;
 - c) the agreement had the effect to prevent, restrict or distort competition within the Common Market;
 - d) the agreement affected trade between Member States.
17. For purposes of the competitive assessment, the Commission identified the relevant markets as the national markets for the acquisition of TV broadcasting rights for CAF competitions in Egypt, Libya, Djibouti, Tunisia, Sudan, Mauritius, and Madagascar. The Commission submitted that the duration of the 2016 Agreement, coupled with the lack of competitive tender processes, and the extensive scope of exclusivity granted to beIN led to a significant restriction of competition in the relevant markets in the Common Market.
18. The Commission engaged CAF on remedies to address the identified competition concerns and on 16 January 2020 and 30 September 2020, CAF confirmed its agreement to the proposals by the Commission on the manner in which future media rights would be awarded to the market. The Commission, thus, recommended that the following remedies which were initially negotiated with CAF in relation to future exclusive agreements for the award of media rights be accepted :
- a) CAF undertakes to award all future exclusive broadcasting agreements relating to 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 Commission 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) CAF shall not enter into new exclusive agreements for the exploitation of media rights of CAF competitions within the Common Market for a duration that exceed four years. Where CAF has justifiable grounds to enter into a future agreement for the exploitation of media rights of CAF competitions within the Common Market for a duration which exceeds four years, CAF shall notify the Commission for authorisation of such agreement pursuant to Article 20 of the Regulations.

⁶ 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. In this section of the decision, 'Undertakings' here means 'firms/companies' as provided under Article 1 of the Regulations.

- c) CAF shall offer the various media rights as separate, commercially viable packages, having regard to the media platform and transmission mode. No single undertaking shall be allowed to purchase all the media packages. Where CAF has justifiable grounds to grant all the media packages to a single purchaser, it shall duly inform the Commission.
19. In relation to the 2016 Agreement, no agreement was reached between the Commission and the Respondents, thus the Commission recommended that:
- a) All media rights awarded to beIN pursuant to the 2016 Agreement, with regard to its operationalisation within the Common Market, shall cease on 31 December 2024; and
 - b) Any formal agreement concluded between CAF and beIN should not go beyond the year 2024.
20. The Commission further recommended that the investigation be closed subject to the foregoing.

CAF's Submissions

21. In its Statement of Objections dated 30 June 2023, CAF submitted, *inter alia*, as follows:
- a) With respect to the recommendation of the Commission on tendering media rights, while CAF agrees to tender future exclusive broadcasting agreements, there is no legal obligation to do so.
 - b) With respect to the duration of the Agreement, although CAF agrees in principle to limit the award of future exclusive broadcasting rights to four (4) years, this was conditional upon a longer term not being justified. As such CAF argued that the proposed duration of the Agreements naturally presupposes that upon the conclusion of the term of the Agreements, the broadcasting market in the COMESA region would have matured to allow longer licensing terms. CAF further argued that when the Commission proposed the duration of the agreements it relied upon European courts and decisions of European competition authorities in matters of sports broadcasting that were rendered in a different context which is not applicable in Africa.
 - c) With respect to the recommendation on prohibiting the bundling of the media, CAF was agreeable in principle, provided broadcasters that meet the 'as-efficient-competitor test' can be found. However, CAF argued that no such broadcaster exists in the area covered by the beIN Agreements.

22. CAF submitted its justification of the alleged conducts in terms of Article 16(4) of the Regulations that the beIN Agreements benefits consumers, sponsors, as well as the broadcasting market in the Common Market. CAF, in this regard, requested that the beIN Agreements be allowed to run until their term ends in 2028.
23. The relief sought by CAF in its Statement of Objections were as follows:
- a) Should the CID determine that the relevant broadcasting market is national in scope, the CID should order the closure of the investigation into the beIN Agreements for lack of jurisdiction.
 - b) Should the CID determine that the relevant broadcasting market is regional in scope, the CID should:
 - i. Find that CAF is not dominant in the relevant markets;
 - ii. Dismiss the Commission's recommendations contained in the Investigation Report;
 - iii. Confirm the compliance of the beIN Agreements with the Regulations; and
 - iv. Order the closure of the investigation into the beIN Agreements.
 - c) Should the CID determine that CAF is potentially dominant in the markets in question, the CID should confirm that the beIN Agreements benefit from the provisions of Article 16(4) of the Regulations and order the closure of the investigations into the beIN Agreements.
 - d) In the alternative, and where the CID finds that Article 16(4) of the Regulations is potentially inapplicable to the case at hand, CAF requests the CID to:
 - i. Refer the matter back to the Commission;
 - ii. Direct the Commission to conduct a detailed market test analysis in which relevant stakeholders including CAF and beIN Sports are interviewed; and
 - iii. Abstain from ruling on the matter until the conclusion of the investigation.

beIN Submissions

24. beIN submitted there were no grounds to suggest that a contravention of the Regulations has occurred, and the Commission had not presented evidence or facts to demonstrate such contravention. beIN denied any contravention of the Regulations and submitted that the order sought by the Commission was unjustified.

25. Particularly, beIN raised its objection to the recommendation of the Commission that the 2016 Agreement should cease by 31 December 2024. beIN submitted that an order of this nature was likely to have material detrimental consequences for CAF and for the promotion of football in Africa. beIN's position was that the prevailing provisions of the 2016 Agreement should be permitted to endure in line with the terms and conditions thereof until 2028 and thereafter, it should be within the auspices of CAF to decide how media rights will be granted in future including in terms of any undertaking it may elect to provide to the Commission.
26. beIN argued that the Commission had not discharged the onus to show that the conduct has an appreciable effect on trade between Member States and restricts competition, and that the manner in which the agreements were entered into absent a tender process, or the terms and duration of any agreements to which beIN is a party with CAF, had the effect of preventing, restricting or distorting competition within the Common Market.
27. beIN further submitted that the beIN agreements were procompetitive and contribute to economic progress.
28. beIN requested that:
 - a) The Commission's investigation report and the recommendations thereunder be dismissed by the CID and the 2016 Agreement should be lawfully permitted to run for the duration thereof (until 2028).
 - b) In the alternative, the matter should, at a minimum, be referred back to the Secretariat of the Commission to conduct the assessment contemplated by the Regulations and the Guidelines (and to provide factual and economic evidence to sustain the findings, such that the matter may be considered by the CID).

E. CID'S ASSESSMENT

29. The CID observed that pursuant to Article 16 of the Regulations, the following are required to be established:
 - a) Whether there exists Undertakings;⁷
 - b) The existence of an agreement between Undertakings;

⁷ 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. In this section of the decision, 'Undertakings' here means 'firms/companies' as provided under Article 1 of the Regulations.

- c) Whether the agreement was implemented in the Common Market or was intended to be implemented within the Common Market;
 - d) Whether the agreement had the object or effect to prevent, restrict or distort competition within the Common Market; and,
 - e) Whether the agreement affected trade between Member States.
30. 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. The CID observed that the foregoing is consistent with the decision in the *Klaus Höfner and Fritz Elser v Macrotron GmbH* case wherein it was held that “*in the context of competition law, first that the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed...*”⁸ The CID observed that the Respondents were each engaged in the offer of goods or services on the market, and thus fall within the statutory definition of ‘Undertaking’ for the purposes of the Regulations.
31. Having established the existence of the Undertakings, the CID next considered whether there existed an agreement between the above Undertakings. The COMESA Guidelines on Restrictive Business Practices (the “**RBP Guidelines**”) provide 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 *Bayer AG* case, wherein it was held that “*it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way... it follows that the concept of an agreement... 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.*”⁹ Therefore, the CID considered that 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.
32. Given that there is documentary evidence of the conclusion of agreements between the Undertakings, i.e., the 2014 Agreement and 2016 Agreement, which set out the parties’ joint intention to conduct themselves as per the terms of the agreements for

⁸ Judgment of the European Court (Sixth Chamber) of 23 April 1991 in Case C-41/90, paragraph 21.

⁹ Judgment of the Court of First Instance of 26 October 2000, *Bayer AG v Commission of the European Communities*, paragraphs 67 and 69.

the exploitation of the media rights of CAF competitions, the CID established that there existed an agreement between Undertakings is met. With regard to whether the agreement was implemented in the Common Market or was intended to be implemented within the Common Market, the CID observed that the concept of 'implementation' requires that the business practice must have taken place within the Common Market; must have involved companies established within the Common Market; or must have targeted customers in the Common Market. In the **Wood Pulp** 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:¹⁰

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.

33. The CID observed that while some of the parties to the Agreements are domiciled outside the Common Market, the Agreements cover the exploitation of media rights directly to customers and consumers located in the Member States. The CID thus considered that the Agreements satisfy Article 16 of the Regulations on the implementation of the Agreements within the Common Market.
34. The CID further observed that with respect to paragraph 29 (a), (b), and (c) above were not contentious as all the parties were in agreement.
35. In determining whether conditions (d) and (e) were met, the CID considered whether the Commission established that it had jurisdiction over the matter, whether Commission identified the applicable relevant product and geographic markets, and the effects test conducted by the Commission in its investigation. The CID considered that the definition of the relevant market is essential to identify and define the boundaries of competition between Undertakings and serves to establish the framework within which the Regulations are applied by the Commission.

¹⁰ JUDGMENT OF THE COURT OF 27 SEPTEMBER 1988 — JOINED CASES 'wood pulp' 89, 104, 114, 116, 117 AND 125 TO 129/85, paragraphs 12-13.

36. The CID further noted that following an assessment of the effects of an agreement, the Respondents may submit justifications in accordance with Article 16(4) of the Regulations.
37. As a result, the CID focused its assessment on the following four areas of contention amongst the parties:
- I. Jurisdiction of the Commission;
 - II. Definition of the relevant market(s);
 - III. The effect of the agreement on competition; and
 - IV. Whether the agreement can be justified under Article 16(4) of the Regulations.

I. Jurisdiction of the Commission

38. The CID observed that CAF challenged the jurisdiction of the Commission on the grounds that the agreement could not have an effect on trade between Member States in view of the relevant geographic market being defined as national by the Commission.

CAF's Submission

39. According to CAF, if the geographic scope of the relevant market is national, the Commission would have no jurisdiction over the present investigations, and the matter would fall within the exclusive jurisdiction of the relevant national competition regulators.
40. CAF emphasised that the Commission's jurisdiction is only triggered where practices "*have an appreciable effect on trade between member States*", which naturally entails activities encompassing various States across the Common Market. According to CAF, limiting the scope of the market to the boundaries of one State (i.e., the market being national in scope) would by necessary implication deprive the Commission of its power to investigate the beIN Agreements' compliance with the Regulations.
41. According to CAF, assuming that the market is of a regional nature, only broadcasters with a regional reach can be deemed potential parties of interest to the investigation. CAF submitted that this leads to the natural conclusion that the testimony of national broadcasters was irrelevant, and so was their willingness and reported ability, *quad non*, to broadcast football matches with the same quality and program packaging as beIN Sports.

42. CAF argued that the European cases relied on by the Commission in its investigations demonstrate that the Commission would have no jurisdiction over the matter, should the scope be limited to boundaries of one State. In this vein, the Commission cited the *PZPN/Canal+* case, where the territory of Poland was adopted as a relevant geographic market. In reference to the *Canal+/RTL* case the Commission emphasised the part of the decision which was relative to the regular football competitions market without providing a reason, whereas the same decision specifically states that for the intermittent competitions the relevant geographic market is wider in scope than national, stating:

The geographical scope of the wholesale market (the buying-side) is also national for market (a) since the rights for regular sports events are acquired on a national basis. Only for market (b) the geographic scope of the buying side may be wider than national.

Commission's Submission

43. The Commission asserted its jurisdiction based on Article 3(2) of the Regulations, having regard to the significance of the CAF competitions. Specifically, the Commission argued that since the CAF competitions, in particular AFCON, were among the most prestigious African Football tournaments, agreements pertaining to their broadcast would have an appreciable effect on trade between Member States. Further, the award of the media rights on an exclusive basis and for a long duration may have a direct or indirect, actual or potential, appreciable influence on the flow and pattern of trade between Member States.¹¹ The Commission noted that the concept of trade between Member States goes further than the actual trade and is also linked to the ability of Undertakings to establish themselves within the Common Market.¹² The Commission submitted that the conduct by CAF affected the ability of potential rivals to establish themselves in the relevant markets.
44. Furthermore, the Commission contended that the issue of jurisdiction is distinct from the assessment of geographic market since jurisdiction is an element to be established at the onset of an investigation while the definition of the geographic market is carried out for the purposes of establishing the boundaries within which the effects of the alleged conduct are to be assessed. To this effect, the Commission submitted that the identification of a national market had no bearing on the jurisdiction of the Commission.

¹¹ RBP Guidelines.

¹² *Ambulanz Glöckner*, [2001] ECR I-8089, paragraph 49.

CID's Analysis

45. The CID agreed with the Commission that in competition law practice, the consideration of the relevant geographic market is distinct from the consideration of jurisdiction.
46. The CID observed that the Commission's jurisdiction is triggered by consideration of effect on trade between Member States. In other words, the application of the effect on trade criterion, as a jurisdictional element, is independent of the definition of relevant geographic market as trade between Member States may be affected also in cases where the relevant market is national or sub-national. The CID observed that in the ***Ambulanz Glöckner*** case, it was held that:¹³

Community law covers any agreement or any practice which is capable of constituting a threat to freedom of trade between Member States in a manner which might harm the attainment on the objectives of a single market between the Member States, in particular by sealing off national markets or by affecting the structure of competition within the common market.

Similarly, trade between Member States may be affected by a measure which prevents an undertaking from establishing itself in another Member State with a view to providing services there on the market in question.

47. Based on the above, it is therefore not peculiar for regional competition authorities to investigate conduct which may have an appreciable effect within one Member State, or even within part of a Member State. The foregoing is consistent with the EC's approach as the EC Guidelines on the effect on trade concept contained in Articles 81 and 82 (now Articles 101 and 102 of the Treaty of the Functioning of the European Union) of the Treaty stipulates that:¹⁴

The concept of "trade" is not limited to traditional exchanges of goods and services across borders. It is a wider concept, covering all cross-border economic activity including establishment. This interpretation is consistent with the fundamental objective of the Treaty to promote free movement of goods, services, persons and capital.

¹³ *Ambulanz Glöckner*, [2001] ECR I-8089, paragraphs 47 and 49.

¹⁴ Paragraph 19-22, EC Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty.

According to settled case law the concept of "trade" also encompasses cases where agreements or practices affect the competitive structure of the market. Agreements and practices that affect the competitive structure inside the Community by eliminating or threatening to eliminate a competitor operating within the Community may be subject to the Community competition rules. When an undertaking is or risks being eliminated the competitive structure within the Community is affected and so are the economic activities in which the undertaking is engaged.

The requirement that there must be an effect on trade "between Member States" implies that there must be an impact on cross-border economic activity involving at least two Member States. It is not required that the agreement or practice affect trade between the whole of one Member State and the whole of another Member State. Articles 81 and 82 may be applicable also in cases involving part of a Member State, provided that the effect on trade is appreciable.

The application of the effect on trade criterion is independent of the definition of relevant geographic markets. Trade between Member States may be affected also in cases where the relevant market is national or sub-national.

48. The CID further observed that in the **J.C.J. Wouters/ J.W. Savelbergh, Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten** case, it was held that:¹⁵

As regards the question whether intra-Community trade is affected, it is sufficient to observe that an agreement, decision or concerted practice extending over the whole of the territory of a Member State has, by its very nature, the effect of reinforcing the partitioning of markets on a national basis, thereby holding up the economic interpénétration which the Treaty is designed to bring about.

49. The CID also referred to the **Pronuptia de Paris GmbH** case, where it was found that:¹⁶

Finally, it must be added that franchise agreements for the distribution of goods which contain provisions sharing markets between the franchisor and

¹⁵ Judgement of the Court in Case C-309/99, Wouters, [19 February 2002] ECR I-1577, paragraph 95.

¹⁶ Judgment of the Court of 28 January 1986 in Case 161/84 Pronuptia de Paris GmbH, paragraph 26.

the franchisees or between the franchisees themselves are in any event liable to affect trade between Member States, even if they are entered into by undertakings established in the same Member State, in so far as they prevent franchisees from establishing themselves in another Member State.

50. In addition, the CID noted that:

Vertical agreements covering the whole of a Member State may, in particular, be capable of affecting patterns of trade between Member States when they make it more difficult for undertakings from other Member States to penetrate the national market in question, either by means of exports or by means of establishment (foreclosure effect). When vertical agreements give rise to such foreclosure effects, they contribute to the partitioning of markets on a national basis, thereby hindering the economic interpenetration which the Treaty is designed to bring about.¹⁷

51. Having regard to the foregoing, the CID determined that the definition of the relevant market would not have deprived the Commission of its jurisdiction. The CID thus dismissed CAF's prayer for the investigation to be closed for lack of jurisdiction based on Article 3 of the Regulations.

II. Definition of the Relevant Market

Consideration of the Relevant Product Market

52. In this section, the CID considered the definition of the relevant market since it is one of the matters on which the parties did not agree.

Commission's Submissions

53. The Commission submitted that competition between broadcasters is primarily determined on the basis of programme differentiation. Viewer preferences are decisive for broadcasters when they seek to purchase content because the principal objective of broadcasters is to attract large audiences for a sustained period. Sports content on a pay television service is an important driver of a consumer's choice of a pay television provider and the exclusive broadcast of popular league or cup matches/ tournaments on premium bouquets illustrates the willingness of customers to pay extra to access sports content.

¹⁷ Paragraph 86, EC Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty.

54. The Commission submitted that sports broadcasting rights have certain aspects which make them unique, notably the two-sided nature of the market combining subscribers and advertisers, the 'live' value and regular occurrence of most sports events. *"If a specific type of content can regularly attract high audience numbers, specific audiences or provide a certain brand image, which cannot be achieved by means of other content, it may be considered that such content constitutes a separate relevant product market. Consequently, there are no other programmes which place a competitive restraint on the rights holders' ability to determine the price of these TV broadcasting rights."*¹⁸
55. The Commission considered that the importance of sports, and in particular football, on a pay television service is aptly illustrated in the following statement: *"...along with first-run major box-office films, sport forms the major premium content that channels use as a means of standing out from their competitors and to increase both audience size and subscriber numbers. Sports has a clear advantage over films for the advertisers as it attracts a more homogeneous audience... In Europe, football rights have been the driving force in the development of pay-TV, and in Britain the acquisition of exclusive rights for live Premier League matches was a key element in Sky's strategy to dominate the satellite television industry."*¹⁹
56. The Commission referred to the decisional practice of the EC held that *"sports broadcasting rights (...) ought to be further sub-divided into other separate product markets."*²⁰ Football helps build a positive image of the channel for viewers, consolidating brand loyalty. The development of a brand image is increasingly important in a TV industry where the number of channels among which the viewers can choose increases rapidly and where products are generally homogenised. Football further generally provides high audience figures that are unmatched by other types of sports.²¹
57. The Commission submitted that football is considered as one of the most, if not the most, popular sport in the world *"with over 4 billion followers."*²² Unlike many other sporting events, football is characterised by competitions which are played regularly throughout most of the year. Football, unlike other sports, therefore, allows

¹⁸ European Commission Decision of 23 July 2003, (COMP/C.2-37.398 - Joint selling of the commercial rights of the UEFA Champions League), paragraph 58.

¹⁹ Cesar Mattos (2012) 'Broadcasting Football Rights in Brazil: The Case of Globo and 'Club of 13' in the Antitrust Perspective' quoting Jeanrenaud, C. and Késenne, S.: 'Sport and the Media: An Overview', stating that football helps build a positive image of the channel for viewers, consolidating brand loyalty.

²⁰ European Commission Decision of 23 July 2003, (COMP/C.2-37.398 - Joint selling of the commercial rights of the UEFA Champions League), paragraph 62.

²¹ See *UEFA ibid.*

²² See <http://www.totalsportek.com/most-popular-sports/> accessed 7th April 2017

broadcasters to achieve high viewing figures, and sponsors to benefit from brand association, on a regular, sustained and continuous basis. Because of these features, broadcasters and sponsors are willing to pay higher prices for rights for football events than for any other events, including sporting events such as the Olympic Games and Formula One. Particularly across African countries, football is one of the most popular sports, and it is unlikely that other sports broadcasting rights can effectively constitute a constraint on the pricing behaviour of the owners of football broadcasting rights. In view of the foregoing, the Commission was satisfied that there exists a distinct market for football broadcasting rights.

58. The Commission considered further segmentation by type of football event having regard to the specific characteristics of the CAF competitions. CAF competitions can be distinguished from other international football competitions given the participation of national players and teams of the African countries which attract a different audience. While other football competitions, in particular the English Football Premier League, may enjoy more popularity than the CAF competitions in the Common Market, the CAF competitions have a special cultural value for African viewers, which cannot be effectively replicated by the European football competitions.
59. The Commission noted that the identification of relevant markets limited to specific football competitions is not peculiar and has been adopted by other competition authorities. For example, in *Mediapro*,²³ the Spanish Competition Authority determined the relevant market as that for the resale of the audio-visual rights of the Spanish regular league (Liga) and King's Cup (Copa del Rey) football competitions. This was consistent with the approach of the Spanish Competition Authority in the merger involving *Sogecable and Audiovisual Sport, S.L. (AVS)*, where the relevant markets were considered as "*the markets for the reselling of broadcasting rights for live football matches in competitions in the Spanish Liga and Copa del Rey, and the vertically related downstream markets of pay-TV (pay and pay-per-view platforms) and free-TV, in addition to the market for the exploitation of images of those matches on the Internet and UMTS in Spain.*"²⁴ In *Sogecable / Canal Satelite Digital / Via Digital*, while the EC identified a relevant product market consisting of the acquisition and resale of media rights for football matches in which Spanish teams participate which are held regularly during the year, it noted that evidence could point to a narrower market for the Spanish League and Cup. In this

²³ 'Spain: The Competition Authority sanctions Mediapro for Abuse of Dominant Position', accessed at: http://ec.europa.eu/competition/ecn/brief/02_2011/es_mediapro.pdf

²⁴ OECD, Annual ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN SPAIN, 2007, page 15. Accessed at: [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP\(2008\)18/06&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2008)18/06&docLanguage=En)

case, it was held that a more accurate market definition would not change the outcome of the market investigation.²⁵ In its investigation of an agreement involving the Polish Football Association and TV Broadcast of Canal+, the Office of Competition and Consumer Protection in Poland established that the national market for rights to broadcast football matches of the Polish league was the relevant market.²⁶

60. In view of the foregoing, the Commission was satisfied that a sub product market for the broadcast rights of CAF competitions was warranted.
61. According to the Commission, there are various types of media through which broadcasting rights may be exploited including, various forms of TV transmission, Video on Demand, TV over Internet Protocol, as well as various forms of mobile transmission. In the present case, the different platforms for broadcasting were 'bundled' and sold as a single package. Technical convergence in the media has meant that traditional TV faces more competition from other platforms than previously, which in turn could affect the pricing of TV rights. This notwithstanding, the Commission considered that TV remained the most accessible transmission platform for football games in the region, particularly the CAF competitions, followed by radio. Though new technologies have increased the possibilities of convergence between television broadcasting and mobile, digital, and radio broadcasting offerings, the Commission considered that these other forms of media platform did not, nor were they expected in the near future to constitute a significant threat to traditional TV in African markets for sports broadcasting. While the number of internet users on the continent continued to grow, the internet penetration was still relatively low at an estimated 35.9%, compared to a world average of 50%,²⁷ as at end of March 2019. The southern African region had the highest internet penetration on the continent at around 51%, while in Eastern Africa, the penetration rate was estimated at 27%.²⁸ The growth of internet TV was further said to be hampered by the high costs of data in Africa, which are among the world's highest.²⁹ It was reported that internet costs were quite prohibitive for unlocking meaningful use of the web in Africa, with 1GB costing an average of 18% of monthly income, while mobile— encompassing both the cost of the phone and of data, voice and messaging services — as a share of monthly income was at 11% in Africa, far higher

²⁵ COMP/M.2845 - SOGECABLE /CANALSATELITE DIGITAL / VIA DIGITAL, paragraph 37. Accessed at https://ec.europa.eu/competition/mergers/cases/decisions/m2845_20020814_330_es.pdf [Original text in Spanish].

²⁶ OECD (2018) Competition and Sports, page 163. Accessed at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP\(2010\)38&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2010)38&docLanguage=En)

²⁷ <https://www.internetworldstats.com/stats1.htm>

²⁸ <https://www.africanews.com/2018/02/06/digital-in-2018-africa-s-internet-users-increase-by-20-percent/>

²⁹ <https://www.reuters.com/article/us-naspers-internet/in-africa-costly-data-slows-internet-tvs-growth-naspers-showmax-idUSKBN1HG1V3>

than other regions, according to a 2016 GMSA report.³⁰ In view of the foregoing, the Commission considered that the TV broadcasting rights constituted a distinct market from other types of broadcasting rights.

62. The Commission further considered that the market for pay-TV broadcast rights, being the market in which beIN was active for purposes of the Agreements, constituted a separate market from free-to-air TV services having regard to the limited nature of competition between those two modes of broadcasting.³¹ Free-to-air-TV relates to the broadcasting on a channel, either public or commercial, or programmes that are accessible to the public without payment.³² Pay-TV is primarily financed by subscription fees whereas free-access television is financed by public authorities and/or advertising revenue.³³ These different trading relationships result in different conditions of competition for the two types of television. The differences in the characteristics of pay-TV and free-to-air TV in terms of pricing and contents (e.g., premium content such as live coverage of major sport events or first television screenings of recent films are often only available on pay-TV) further supports the finding of separate markets.
63. A review of case precedent confirmed that pay-TV and free-to-air television are in separate product markets. In the *NewsCorp/Telepiu* case, it was recognised that while free-to-air television may exercise a certain constraint on pay television (in particular where free-to-air television offers a wide choice of channels, some of which would include attractive content), free-to-air television and pay-TV fall in separate markets.³⁴ In *SFR/Télé2*, the EC argued that the different types of financing and the fact that the offerings are not substitutable from a consumer's perspective since the free to air one is provided free of charge and the pay-TV one requires a subscription fee, justifies defining separate relevant markets.³⁵ In the *NewsCorp/Premiere* decision, the EC defined pay-TV and free-to-air TV as distinct markets based on the type of content and programme schedules, limited demand-side substitutability due to the subscription fee, and limited supply-side substitutability due to the different types of business models.³⁶ The motivations for distinct pay-TV and free-to-air TV markets that are highlighted in the case precedent are also relevant to the Common Market, or markets in Africa more broadly. Pay-TV

³⁰ *Ibid.*

³¹ EC Case CCOMP/M.2483, part B.

³² See *Market Definition in the media sector: a comparative analysis* taken from http://ec.europa.eu/competition/sectors/media/documents/legal_analysis.pdf accessed 31 March 2017

³³ EC Case No. IV/M.410 *Kirch/Richemont/Telepiu* Para 15

³⁴ COMP/M.2876 (paragraph 47), decision of 2 April 2003.

³⁵ COMP/M.4505 (paragraph 45), decision of 8 July 2007.

³⁶ COMP/M.5121 (para. 17-20). 25 June 2008.

and free-to-air TV have fundamentally different business models, which are further enforced by regulations.

64. The Commission thus defined the relevant product market as the market for acquisition of pay-TV broadcast rights for CAF competitions.

CAF's Submissions

65. CAF disagreed with the market defined by the Commission, submitting that the Commission's analysis and recommendations were based on errors of fact and law. CAF argued that the conclusion of the Commission that there existed a distinct market for football broadcasting rights, as well as a sub product market for the broadcast rights of CAF competitions, was contrary to applicable principles, case law, and analyses on broadcasting rights. CAF maintained that it was part of the global market for broadcasting of football events, where there exists fierce competition with other football associations, be they national, regional, or international.
66. In this respect, CAF submitted that regional competition regulators such as the EC previously held that with respect to football competitions broadcasting rights, there exists two separate product markets, namely:
- a) The intermittent football competitions broadcasting market (such as the AFCON, the Euro, Copa America and the FIFA World Cup), where intermittent football competitions are deemed substitutes for one another from a competition law perspective; and
 - b) The regular football competitions broadcasting market (such as the national leagues, the UEFA Champions League, the CAF Champions League and the FIFA Club World Cup), which are equally deemed to be substitutes for one another.
67. CAF submitted that applying the SSNIP Test to the upstream market, it is apparent that should CAF significantly raise the prices for the rights to broadcast its competitions (assuming that CAF holds that kind of control over pricing), broadcasters, such as beIN Sports, would be likely to substitute CAF competitions with regular and intermittent competitions organised by other football federations and associations.
68. From a downstream perspective, CAF submitted that football viewers in the Common Market consider football competitions organised by non-African

federations and competitions such as the English Premier League, the UEFA Champions League or the Euro to be equally, if not more, popular than African championships. The number of African football players competing in European competitions is consistently increasing, which leads to a surge in the popularity of non-African (mostly European) competitions, as the African fans of these football stars enjoy watching them play and compete at the highest level outside the continent. The success of African players in European competitions contributes to the growing pride of their African compatriots to the extent of creating a sense of rivalry between African countries based on the performance of their nationals in European leagues and tournaments. For instance, one can see the consistent rivalry between players such as Mohamed Salah (Egyptian), Sadio Mane (Senegalese) and Riyad Mahrez (Algerian), who are consistently in competition over the African player of the year award. Accordingly, should the price of viewing CAF competitions increase beyond reasonable limits, African viewers are likely to substitute them for other non-African competitions, which typically benefit from a high production and broadcasting quality.

69. Drawing from the above, instead of grouping all of CAF's competitions into one product market, had the Commission followed international standards, it would have included the various CAF competitions into two separate product markets, namely the intermittent football competitions, in which the AFCON will be paired with the Euro, Copa America and the FIFA World Cup; and the regular football competition where national leagues, the UEFA Champions League, the CAF Champions League and the FIFA Club World Cup are deemed adequate substitutes for one another. CAF's tournaments are generally substitutable by others and risk losing traction should CAF fail to market and deliver them properly, hence the need for competent sponsors and the best broadcasters available.
70. Against this backdrop, with respect to the fundamental distinction between intermittent and regular football competitions, CAF noted that the EC previously held that:

The results of the [EC]'s market investigation show that pan-European and/or national football events that deliver regular matches over a broadcasting season are not substitutable to events that take place more intermittently. Indeed, and based on the above, the [EC] considers that there exist markets for:

(a) the acquisition and re-sale of football broadcasting rights to events that are played regularly throughout every year. In practice, this involves matches to the

national leagues (primarily the 1st Division) and cups, the UEFA Champions League and the UEFA Cup;

(b) the acquisition and re-sale of football broadcasting rights to events that are played more intermittently, every four years. In practice, this involves matches such as the FIFA World Cup and European Championship of Nations, each of this competition being very likely to be a separate market.

71. According to CAF, since there is a consistent overlap between football competitions and tournaments worldwide, it is inevitable to conclude that the events organised by a single football association or confederation cannot be regarded as a product market on its own. CAF competitions are no different in this respect.
72. While CAF did not contend that football broadcasting rights may constitute a distinct product market compared to other sports, it submitted that the additional layer through which the Commission concluded that CAF competitions constituted a distinct sub product market was not only novel and inaccurate, but it also failed to consider several particularities of the football broadcasting industry.
73. CAF submitted that it was not aware of any precedent where a regional competition authority deemed the tournaments organised by a single football federation or association a distinct product market. Instead, the Commission shaped a new principle of cultural significance for the determination of the relevant product market in the absence of any legal basis or precedent from international jurisprudence. It was the contention of CAF that the Commission's position in this regard was equally surprising when factoring in that the Commission itself conceded that certain European competitions enjoy more popularity than African competitions within the Common Market. The Commission's position was both inconsistent and factually inaccurate. On one hand, the Commission recognised that European competitions such as the English Premier League were more popular than CAF competitions within the Common Market, while concluding that these products were not substitutable and constituted distinct product markets. This contradictory statement is at odds with the findings of regional competition regulators, and the recognised classifications in the football media markets over the past decades.
74. CAF submitted that the Commission failed to consider several factual elements that render its reliance on the 'cultural value' criterion baseless at best. Indeed, the growing number of African football players in European football competitions such as the English Premier League and the Bundesliga increased the popularity of these European competitions among African viewers to the detriment of CAF

competitions. As a matter of fact, over the past five years, all the winners and runners-ups of the African player of the year award (which is a yearly CAF event) played in European clubs and championships. Not only do African players competing in Europe constitute a source of pride for their compatriots, but the popularity of the clubs that they play for equally rises in the African market, which further confirms that the cultural value criterion is baseless. It therefore followed that were the 'cultural value' criterion to be retained for the determination of the relevant product market, a position which is firmly denied by CAF, the Commission should have taken into consideration the effect of the growing number of African players in European competitions, and how this affect the increase in African viewers of such competitions to the detriment of the African viewership of CAF competitions as part of its market test analysis.

75. CAF submitted that it also followed that the Commission's conclusion that CAF competitions constituted a sub product of their own, resulting in CAF being viewed as holding a monopoly position, was erroneous and merited some precision from several aspects. According to CAF, the Commission failed to factor in the substitutability between CAF competition and other competitions and relied solely on the 'cultural value' criterion, which is baseless and therefore ought to be dismissed.
76. CAF defined two separate product markets in question in the present investigation: (i) the market for the broadcasting of intermittent football competitions; and (ii) the market for the broadcasting of regular football competitions.

beIN's Submissions

77. beIN submitted that the Commission adopted foreign precedent in arriving at a construction of the relevant market without evidence of local market testing to confirm that such foreign construction is appropriate in the jurisdiction to which the investigation relates. In this regard, beIN noted that the regulatory, technology, social, competitive and economic landscape in COMESA in respect of sports events and broadcasting is markedly distinct from that in the European context at the time of previous EC assessments such that any historic market assessments carried out by the EC – a number of which date back to the 1990s - cannot simply be imported and applied in the COMESA context or to wider developments in the media sector both within COMESA countries and worldwide. As such, beIN argued that the EU cases cited in the Investigation Report are not factually comparable to the present circumstances.

78. Further, beIN submitted that in reaching its conclusions regarding the relevant market the Commission appeared to conflate content popularity, cultural importance, and premiumisation with the question of substitutability. Such an approach is flawed, as it is incumbent upon the Commission to consider content which broadcasters may consider to be substitutable in a particular market. beIN challenged the assertion of the Commission on the popularity of football that it is “*unlikely that other sports broadcasting rights can effectively constitute a constraint on pricing behaviour of the owners of football broadcasting rights.*” beIN argued that the statement is untested in the local context; such a conclusion fails to consider that broadcasters have finite funds with which to procure content and that any content must reflect adequate value or investment return to the broadcaster for the licensing costs. Content such as the CAF competitions, therefore, compete with other content in respect of such value or return on investment assessment. There may be alternate content that offers broadcasters similar or better returns on investment (and hence may compete with the CAF content). As such, the Commission’s conclusion that the various CAF competitions are not substitutable is incorrect and without basis.

CID’s Analysis

79. The CID noted the contention of the respondents that the Commission erred in the finding of a narrower market consisting only of (i) football events; and (ii) CAF competitions. The CID recognised that the definition of the relevant market is key to the determination of the matter, as an overly narrow market may provide a false indication of the market power of the parties to the Agreements, and in turn, overstate the effects of the Agreements. The converse is equally true. A widely construed market may give an impression that the parties lack market power when in fact they do.
80. The CID observed that it is common practice for competition authorities and adjudicators to refer to case precedents, particularly in identifying the relevant markets, as case precedents are persuasive. This does not, however, remove the responsibility for the Commission to assess the relevance and appropriateness of these precedents in the context of markets within the Common Market.
81. The CID observed that the identification of the relevant market is principally concerned with the assessment of credible substitutes. Paragraph 7 of the COMESA Guidelines on Market Definition state 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.

82. It is evident that viewership for a particular sport cannot be reasonably considered as an effective substitute for other sports. The CID observed that the popularity of football on the African continent as a whole is undisputed. The co-existence of other emerging sports favourites, such as rugby and cricket mainly in South Africa, do not diminish the importance of football as a competitive product for broadcasters in the region. The relevance of football for the continent has been publicly acknowledged by CAF partners:
- a. *"In 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."*³⁷
 - b. *"The beauty of football is its accessibility to everyone... Through this partnership with CAF, we have been able to strengthen not just our brand presence in the region, which is a key market for our business, but also reinforce our commitment to our customers and distributors and share in their passion for their favourite sport."*³⁸
83. Contrary to the submissions by belN, the CID was satisfied that the identification of media rights for football events as a distinct market is applicable to the Common Market.
84. With regards to the further narrowing of the product market, the CID noted the arguments submitted by CAF that if the Commission had followed international standards, it would have identified a market for intermittent football competitions (in which according to CAF, the AFCON would be paired with the Euro, Copa America and the FIFA World Cup); and regular football competition (where according to CAF, the national leagues, the UEFA Champions League, the CAF Champions League and the FIFA Club World Cup are deemed adequate substitutes). The CID, however, observed that the cases relied upon by the Commission in fact recognised the possibility of a further narrowing of the relevant market even to specific competitions where the evidence so suggests. In particular, the CID observed the following:
- a) **SOGECABLE / CANAL SATELITE DIGITAL / VIA DIGITAL:** Spanish pay-TV operators consider football by Spanish teams as essential to operate in

³⁷ TOTAL press statement on its partnership with CAF. Available at <https://football-together.totalenergies.com/en/total-and-african-football/notre-partenariat-avec-la-caf>

³⁸ 'QNET Celebrates 3rd Anniversary of its Partnership with CAF and Underscores its Commitment to African football' (2021). Available at <https://citisportsonline.com/2021/02/12/qnet-celebrates-3rd-anniversary-of-its-partnership-with-caf-and-underscores-its-commitment-to-african-football/>

the Spanish pay-TV market. The availability of alternative content does not alter their interest in or demand for soccer broadcasting rights. Demand for regular football events, particularly the Spanish first division league, is so strong that operators are willing to invest very large sums in the acquisition of soccer television rights, even though it is difficult to recoup such costs from potential subscription or pay-per-view revenues. Prices that operators are willing to pay for these rights exceed the prices paid for any other sporting event, including more exceptional ones such as the Olympic Games and Formula One. In addition, football events involving Spanish teams are not substitutable with other football matches. Although there is evidence that there may be a narrower market for the Spanish League and the Spanish Cup, a broader definition as defined does not change the outcome of the market investigation.

- b) **Joint selling of the commercial rights of the UEFA Champions League.**³⁹ Some have suggested that narrower market definitions may exist, such as for matches involving only national clubs. Assuming that such market definitions were correct, they would nevertheless not substantially alter the market share of UEFA. As such it is not necessary to consider such alternative market definitions for the purposes of this case.
- c) In *Mediapro v Spanish Competition Authority*, the relevant market was limited to the resale of the audio-visual rights of the Spanish regular league (Liga) and King's Cup (Copa del Rey) football competitions.
- d) In *Polish Football Association v. Canal+*, the relevant market was limited to rights to broadcast football matches of the Polish league.

85. The CID noted that demand for content by broadcasters is directly related to the demand for content by viewers. For this reason, if a particular event has a strong and inelastic demand for a particular audience as a result of its cultural significance, broadcasters wishing to increase their subscription base in that region would be willing to invest heavily to acquire the rights to this event.

86. The CID observed that the Commission recognised the unique characteristics of the CAF competitions, which involve national players and national teams. The CID observed that CAF's argument in relation to participation of African players in international football competitions did not suffice to establish a substitution effect between CAF competitions and international competitions. The fact that more African viewers chose to watch international competitions as a result of the participation of African players would serve to enhance the profile of CAF matches involving these players. Further, the football calendars are typically set to reduce

³⁹ 2003/778/EC: Commission Decision of 23 July 2003 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/C.2-37.398 — Joint selling of the commercial rights of the UEFA Champions League)

clashes in national and international events, so as not to disrupt the participation of players for their national teams versus their league clubs.

87. The CID considered that the cultural importance raised by the Commission in distinguishing CAF competitions from other football competitions cannot be ignored for purposes of assessing the substitutability of football competitions for broadcasters.
88. The CID also considered the CAF submissions regarding the interchangeability or substitutability of its competitions by the consumer, by reason of the products' characteristics, their prices and their intended use. In this regard, the CID noted CAF's submission that: *"should the price of viewing CAF competitions increase beyond reasonable limits, African viewers are likely to substitute them for other non-African competitions, which typically benefit from a high production and broadcasting quality."*
89. Contrary to CAF's submissions, the CID observed that when faced with constraints in viewing CAF's main tournament, the AFCON, as a result of "prohibitive and inconsiderate fees," the frustration by consumers led to the adoption of a motion at the level of the African Union⁴⁰ calling for the adoption of laws on the terms and conditions of broadcasting sporting events of great significance. If there was indeed effective substitutability for viewers between CAF competitions and other football competitions, it is unlikely that the difficulties for broadcasters to broadcast the AFCON would have been met with such a reaction as viewers could have opted to watch other football competitions being broadcast. The Commission's engagements with a number of stakeholders revealed the same. The stakeholders did not give indications of substituting CAF broadcasting rights for international tournaments but desired that the seemingly high prices for CAF broadcasting rights be considered as it was having a huge impact in that most fans were unable to watch the CAF tournaments.
90. The CID considered that the facts of the characteristics of the product support a narrower market for CAF competitions. The CID also considered that the approach adopted by the Commission did not materially depart from international precedent and was applicable to the Common Market.

⁴⁰ ASSEMBLY OF THE AFRICAN UNION, Twenty-Eighth Ordinary Session 30 - 31 January 2017, Addis Ababa, ETHIOPIA: Decisions, Declarations, Resolution and Motion, page 49 of Assembly/AU/Motion (XXVIII).

91. The CID was therefore satisfied that the relevant product market for purposes of assessing the Agreements was the market for the acquisition of pay-TV broadcast rights for CAF competitions.

Consideration of the Relevant Geographical Market

Commission's Submissions

92. The Commission submitted that the geographic scope of the markets for the acquisition of pay-TV broadcast rights tends to be national or at least segmented according to linguistic regions because broadcasters would normally sell subscriptions to viewers in a certain territory. Indeed, CAF contracted with three main pay-TV broadcasters on the basis of separation of regions (e.g., Sub-Saharan Africa, and MENA), and separation of linguistic regions (e.g., francophone countries and anglophone countries).
93. There typically exist different regulatory regimes, language barriers, cultural factors, and other conditions of competition that prevail at national level. Pay-TV broadcasters are granted exploitation rights for each territory and pay-TV subscriptions are generally not available to customers located outside national borders. Thus, a broadcaster cannot broadcast in a territory for which no rights have been obtained or obtain transmission signals from an overseas signal without prior authorisation.
94. Jurisprudence in other countries dealing with football broadcast rights has identified national geographic markets. For instance, in *PZPN/Canal+*, the “*territory of Poland was adopted as a relevant geographic market.*”⁴¹ In *Canal+/RTL*, the selling side of the market for the retail sale of rights was viewed as invariably national in scope since the rights are “*licensed to broadcasters for each national territory in which they operate, and where due to cultural factors demand for different matches featuring different clubs can vary from country to country.*”⁴²
95. In view of the foregoing discussions, the Commission concluded that the geographic scope for the market for broadcasting rights was national. The Member States territories affected by the beIN Agreements were Djibouti, Egypt, Libya, Madagascar, Mauritius, Sudan and Tunisia.

⁴¹ OECD (2018) Competition and Sports, page 164, Accessed at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP\(2010\)38&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2010)38&docLanguage=En)

⁴² Case No COMP/M.2483 - GROUP CANAL + / RTL/ GJCD / JV, paragraph 22.

CAF's Submissions

96. CAF submitted that the relevant product markets were of a global scale. However, given the jurisdictional scope of the Commission, the examination of the effects of the beIN Agreements should be limited to eight States, namely Egypt, Libya, Tunisia, Sudan, Djibouti, Somalia, Mauritius, and Madagascar. CAF therefore addressed the question whether the scope of the relevant geographic market was national or regional.
97. CAF submitted that the Commission concluded that the relevant geographic market is national in nature without providing any factual or legal base for its exclusion of the regional scope based on '*linguistic regions*', especially where the scope of exclusivity is limited to the Arabic speaking States of the Common Market. The basis for the Commission's approach remains unreasoned.
98. CAF referred to the Commission's argument that:

Pay-TV broadcasters are granted exploitation rights for each territory and pay-TV subscriptions are generally not available to customers located outside national borders. Thus, a broadcaster cannot broadcast in a territory for which no rights have been obtained or obtain transmission signals from an overseas signal without prior authorisation.

99. CAF submitted that while the foregoing could be accurate with respect to national broadcasters, it was simply inapplicable to the facts of this case, where international broadcasters, such as beIN Sports, provide their services globally to over forty (40) countries. CAF argued that, as a matter of principle, national broadcasters cannot be deemed to be '*competitors*' of beIN Sports.
100. CAF submitted that absent any reason to the contrary and given the reach of beIN Sports, the substitutability of competitions on a global scale and the linguistic homogeneity of the States covered by the beIN Agreements within the COMESA region, one must conclude that the scope of the relevant geographic market can only be regional. The region can be segmented depending on the predominant language used for broadcasting. Accordingly, there are two main geographic markets, namely:
- a) Arabic speaking region: Egypt; Libya; Djibouti; Tunisia; Somalia (Arabic and Somali) and Sudan.
 - b) Non-Arabic speaking region: Mauritius and Madagascar.

101. CAF, therefore, requested the CID to find the relevant geographic market as regional and assess the validity of the Commission's market test analysis in light of this finding.
102. Further that, should the Commission maintain that the relevant geographic market is national, then the investigations should be dismissed as beIN was not a national broadcaster, nor did any national broadcaster in the investigated territories provide broadcasting services that are objectively comparable to those of beIN Sports.

CID's Analysis

103. Regarding the definition of the relevant geographic market for the acquisition of pay-TV broadcast rights, the CID observed that the COMESA Guidelines on Market Definition describe 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.

104. The purpose of defining the relevant geographic market is to identify the suppliers of a given product or service that are capable of constraining the market behaviour of a given company and to whom customers of that product or service can turn. Similar to the assessment of relevant product market, the test of substitution takes central place in considering the candidate geographic markets. The goal is to assess the possibility of customers in a given area switching to suppliers outside that area in a manner which is relatively swift.
105. The CID observed that the rights were distributed to separate broadcasters primarily according to linguistic regions on an exclusive basis. However, it was also observed that beIN was awarded non-exclusive rights to broadcast the competitions in two French-speaking countries. The CID considered that even if the 2016 Agreement covered a number of territories, the broadcasting rights are normally awarded for exploitation within each national territory. Even if the broadcaster may have a regional presence, such as beIN, and where cross-border transmissions may be allowed, there are generally restrictions on certain channels, which normally include live transmissions of key football events.

106. Television and radio broadcasting content incorporates a variety of copyright protected content (including audiovisual, musical, literary or graphic works). Member States have their own national regime on copyright and neighbouring (related) rights. It has been reported that “*copyright clearance requires engaging in a complex process to obtain the online rights (given the national disparities in provisions on copyright), and generates high transaction costs, which in turn reduce the broadcasters' incentives to provide cross-border services. As a result, TV broadcasters often make their online services available in a single Member State and put measures in place that prevent cross-border access to these services, such as geo-blocking of IP addresses from other territories.*”⁴³ In Europe, it was found that 80% of public service TV broadcasters and 67% of commercial TV broadcasters who participated in the EC’s e-commerce sector inquiry applied at least one type of geo-blocking to their online services.⁴⁴
107. It is unlikely that a significant number of viewers in one Member State e.g., Egypt, would be able to effectively shift to a broadcaster located in another Member State, e.g., Tunisia or Sudan, in the event of a price increase of subscription packages in Egypt. It was observed that even in Europe, where the growth of the online services market was likely to be considerably higher than in Africa, the online broadcast market was expected to represent a comparatively smaller market share by 2020 when compared to the number of households subscribed to satellite, cable and telecom operator services.⁴⁵
108. With regard to CAF’s submissions that national broadcasters cannot be deemed to be ‘competitors’ of beIN Sports, the CID observed that such an argument is not sound as national broadcasters tend to operate in the free-to-air segment which, as discussed above, constituted a different product market. Therefore, any comparison of substitutability and level of competitive pressure exercised by national broadcasters on regional pay-TV broadcasters such as beIN would not be appropriate.
109. The CID observed that in the **UEFA** case,⁴⁶ the EC’s assessment confirmed the finding of national markets as follows:

⁴³ Tambiama Madiaga (2019), ‘Regulating online TV and radio broadcasting’, European Parliament European Parliamentary Research Service, page 2. Available at: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/620217/EPRS_BRI\(2018\)620217_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/620217/EPRS_BRI(2018)620217_EN.pdf)

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ 2003/778/EC: Commission Decision of 23 July 2003 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/C.2-37.398 — Joint selling of the commercial rights of the UEFA Champions League), paragraphs 88 and 90. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32003D0778>

Media rights to football events like the UEFA Champions League are normally sold on a national basis. This is due to the character of distribution, which is national due to national regulatory regimes, language barriers, and cultural factors. The [EC] therefore considers the geographic scope of the upstream markets for the media rights to be national.

The reasons for defining the geographic scope of the upstream markets as national, such as varying regulatory regimes, language barriers, and cultural factors, are also decisive in the downstream market. A pay-TV broadcaster normally only sells subscriptions to viewers in a certain territory. TV advertising is normally adapted to fit the tastes and languages of a certain territory. The same would seem to apply to new media services. The [EC] therefore considers the geographic scope of the downstream markets to be national or at least confined to linguistic regions.

110. **In view of the foregoing, the CID determined that the geographic scope of the market for the acquisition of pay-TV broadcast rights for CAF competitions is national**, and involved Djibouti, Egypt, Libya, Madagascar, Mauritius, Sudan and Tunisia.

III. Effects Test

111. The CID observed that in accordance with the provisions of Article 16 of the Regulations, the Commission was required to establish the following cumulative elements:
- a) Whether there exists Undertakings;
 - b) Whether there exists an agreement between Undertakings;
 - c) Whether the agreement is or is intended to be implemented within the Common Market;
 - d) Whether the agreement affects trade between Member States; and
 - e) Whether the agreement has the object or effect to prevent, restrict or distort competition within the Common Market.
112. Having established that:
- a. the Commission had jurisdiction in this matter in view of the potential for the Agreements to affect trade between Member States, and;
 - b. the relevant markets as the markets for acquisition of pay-TV broadcast rights for CAF competitions at national level,
- what remained was for the CID to consider whether the Agreements had the object or effect to prevent, restrict or distort competition within the Common Market.

113. The Commission alleged that the agreements had the effect of preventing, restricting or distorting competition within the Common Market due to the market power the Undertakings possess in the market; the scope and duration of the exclusive agreements between belN and CAF; and the lack of tender process in awarding the rights. These are assessed below.

(i) **Market Power**

114. Regarding the competition effects of the agreements within the Common Market, the CID noted that the first issue which was contentious was whether CAF was dominant.

Commission's Submissions

115. The Commission argued that the establishment of a dominant position in the case under consideration was not an essential requirement to prove the likely infringement of Article 16 of the Regulations, and that the establishment of a dominant position in such cases was only relevant in assessing the appreciability of any restrictive effects of the agreement in question. Nonetheless, the Commission argued that CAF enjoyed a dominant position on the identified relevant market as it was the sole owner of the commercial rights for the competitions it organises, without facing any competition from other football organisations.

116. The Commission further argued that CAF, by virtue of its dominance, should be held to the 'special responsibility' doctrine as established by the ECJ in *Michelin*⁴⁷ and *Deutsche Post AG*.⁴⁸ In *Michelin*, the ECJ stressed that "a finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition."⁴⁹ In *Deutsche Post AG*, it was noted that the scope of the 'special responsibility' must be considered in relation to the "degree of dominance held by that firm and to the special characteristics of the market which may affect the competitive situation."⁵⁰

⁴⁷ Case 322/81, NV Nederlandsche Banden-Industrie Michelin v. European Commission.

⁴⁸ Case 331/40, Deutsche Post AG – Interception of cross- border mail.

⁴⁹ Case 322/81, NV Nederlandsche Banden-Industrie Michelin v. European Commission, paragraph 57.

⁵⁰ Case 331/40, Deutsche Post AG – Interception of cross- border mail, paragraph 103.

117. In this regard, the Commission observed that the press statements issued by CAF's commercial partners affirmed the importance of CAF's competition for the African continent, and thus its dominant position, as set out below:

- a) Orange, one of the official sponsors of the AFCON tournament, stated that "This is the most important competition in Africa and probably the third most popular in the world."⁵¹ Orange referred to the tournament as "the biggest football tournament in Africa and the Middle East."⁵²
- b) An online advertisement by SuperSport captured the CAF competitions among the 'best leagues' for the 2018/2019 football season, among the likes of the English Premier League, Italy Serie A, Spain's LaLiga, and the UEFA Champions League.
- c) Canal+ characterised the CAF tournaments as "the best of African football" and "unmissable African football rendezvous", stating that the acquisition of the broadcasting rights enables Groupe CANAL+ to confirm its positioning as a leading sports broadcaster in French-speaking Africa"⁵³
- d) beIN listed the AFCON among the "prime sporting competitions" alongside other competitions such as the FIFA World Cup, and UEFA Champions League.⁵⁴

118. In respect of the market position of beIN, the Commission considered beIN as a dominant player on the national markets in view of its exclusive access to premium competitions. The Commission submitted that beIN Sports was reported to have had a subscription base of 2.43 million in the MENA region as at 2013,⁵⁵ with Saudi Arabia and UAE accounting for more than 50% of the subscribers. beIN described itself as a leading global network broadcasting in the Middle East and North Africa (in 24 countries).⁵⁶ It was noted that in Egypt and Tunisia, competitors to beIN in the broad pay-TV market include Orbit Showtime Network (**OSN**). However, OSN dropped all sport channels in February 2019.⁵⁷ In MENA, as reported on its website, beIN Sports had exclusive rights to the most important sports events, including FIFA World Cup, UEFA Champions League, Europa League, Premier League, La Liga, Serie A, Ligue 1, Bundesliga, Asian Football Confederation (**AFC**) Champions League, AFC Asian Cup, CAF Champions League, Major League Soccer, FA Cup,

⁵¹ Interview with CAF representatives on 5th March 2017, Cairo Egypt; see also <https://www.iol.co.za/sport/soccer/world-leagues/new-caf-boss-says-tv-deal-to-be-reviewed-8553292>

⁵² [Press releases | Corporate \(orange.com\)](#)

⁵³ <https://www.vivendi.com/en/press/press-releases/canal-will-be-broadcasting-the-total-africa-cup-of-nations-gabon-2017-and-the-biggest-african-football-competitions-for-the-next-seven-years/>

⁵⁴ [@beINSPORTS-ranks-1st-in-terms-of-followers-within-the-regional-sports-media-industry-EN.pdf \(beinmediagroup.com\)](#)

⁵⁵ [beIN Sports Arabia attracted 2.43m subscribers across 23 countries | Al Bawaba](#)

⁵⁶ [@beINSPORTS-ranks-1st-in-terms-of-followers-within-the-regional-sports-media-industry-EN.pdf \(beinmediagroup.com\)](#)

⁵⁷ <https://www.arabianbusiness.com/sport/413192-osn-to-drop-all-sports-channels-except-for-cricket>

and beach soccer. Thus, even if one were to consider a relevant market for broadcasting of sports events broader than just the CAF competitions, Thus, even if the relevant market was construed as the broadcasting of sports events in general, beIN would remain the dominant player on the national markets. The Commission, however, observed that in Mauritius and Madagascar, the presence of competitors such as Canal+ may limit the competitive pressures exercised by beIN Group.

beIN's Submissions

119. beIN questioned the Commission's assessment of dominance stating that the Commission had neither undertaken an economic assessment nor referred to any factors or evidence in the relevant Member States of the Common Market to ground its conclusion on market position. beIN further challenged the evidence used by the Commission in showing the importance of CAF's competitions stating that press releases are insufficient.
120. beIN disagreed with the Commission's assessment of market power on the grounds that the Commission had not calculated market shares and that mere descriptions of the importance of events and viewership numbers were insufficient to infer dominance or market power.

CAF' Submissions

121. CAF challenged its dominant position stating that all football associations (international, regional or national) are competitors within the global market of football competitions as the broadcasting of CAF competitions cannot be regarded as constituting a product market on its own but is rather within the same intermittent or regular markets, for the broadcasting of football competitions.
122. CAF further submitted that a review of the pricing of CAF broadcasting rights revealed that not only did CAF not meet the definition of an undertaking in a dominant position, but that it had limited control over prices which were driven by market forces, a major component of the determination of dominance. In support of this view, CAF relied on Article 17 of the Regulations which requires an undertaking to act without constraints from its competitors, for it to be deemed to have a dominant position, which is mostly reflected by the ability to unilaterally control prices of the product or service in question. CAF, thus, argued that it did not meet the criteria set out under Article 17.

CID's Analysis

123. The CID observed that paragraph 39 of the RBP Guidelines state that:

anti-competitive effects are likely to occur when the parties individually or jointly have or obtain some degree of market power and the practice creates, maintains or strengthens that market power or allows the parties to exploit that market power e.g. through market foreclosure. It is necessary to define the relevant market and assess competition in that market (i.e. the nature of the products; the market position of the parties; the market positions of their suppliers, customers, competitors and potential competitors; the barriers to entry; the level of prices). However, it is sometimes possible to demonstrate anti-competitive effects directly by assessing the behaviour of parties in the market.

124. The CID observed that the assessment of the appreciable effects of an agreement require the determination of whether the parties to the agreement possess some degree of market power, which does not necessarily amount to a position of substantial market power or dominance. The consideration of the market position of the Undertakings under investigation serve to determine whether the conduct would be *de minimis* or would likely be appreciable. The CID observed that the requirement of proving a dominant position is not provided for under Article 16 of the Regulations. What should be established under Article 16 is whether the agreement may affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the Common Market. Substantial market power or dominance is only among the factors that may be considered to establish the effects of the anti-competitive agreement.

125. *Stricto sensu*, establishing substantial market power or dominance is not a necessary condition to prove an Article 16 violation. This can be contrasted with the requirements for establishing a violation under Article 18 of the Regulations, where the CID recognises that there is a requirement to establish dominance. The RBP Guidelines recognise that the degree of market power required to establish a restriction of competition within the meaning of Article 16 of the Regulations is less than the degree of market power required for a finding of dominance under Article 18 of the Regulations. This approach is consistent with the practice in other jurisdictions, in particular the Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union,⁵⁸ which is the equivalent of Article 16(1).

⁵⁸ Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, footnote 40.

126. Notwithstanding the foregoing observations with regard to market power, the CID observed that the Commission's conclusion on the market power held by CAF emerged from its finding of a distinct market for CAF competitions. The CID observed that as a result of the joint arrangement between CAF and the national football associations, CAF was the sole holder of the media rights for the CAF competitions, and thus found itself in a position of market power with respect to these rights, since these could only be procured from CAF.
127. The CID observed that contrary to the respondents' submissions that the Commission relied on certain press statements as alternative to market shares, the reference to the press statements was in support of CAF competitions being seen as the prime, best, most popular, and biggest football tournaments in Africa, and thus justifying their identification as a distinct market. Further, this is consistent and supported by the approach taken by the EC in the *Michelin* case where the indisputable quality and reputation of a brand was also taken.⁵⁹
128. The CID further observed that the RBP Guidelines acknowledge that there are situations where a quantitative analysis of market power may not be required to demonstrate anti-competitive effects directly, as this can be assessed through the behaviour of parties in the market. The CID observed that certain behaviour, such as the ability to enter into long term exclusive agreements which are likely to have foreclosure effects, has been found to be indicative of market power as recognised in the decisions of the ECJ in particular, in the *United Brands* case.⁶⁰
129. Having regard to the relevant markets identified, and the arrangement between CAF and the national associations, the CID determined that CAF does indeed hold a certain degree of market power in the relevant market.
130. With regard to beIN, the CID observed that beIN itself confirmed its leading position as a broadcaster in the MENA region, which would be enhanced at national level where it enjoyed exclusive rights:

*beIN has been the home of football for many years for millions of fans across MENA. Bringing hours of extensive multi-lingual coverage, expert analysis, and world-renowned punditry, beIN is irrefutably the leading broadcaster in the region.*⁶¹

⁵⁹ EC Decision of 20 June 2001, COMP/E-2/36.041/PO-Michelin, paragraphs 181-185.

⁶⁰ *United Brands v Commission*, Case 27/76 EU:C:1978:22, paragraphs 67 to 68.

⁶¹ Press release by beIN issued on 13 June 2023, 'beIN Sports secures UEFA National team deal exclusively for 24 countries across MENA region'. Accessed at: <https://www.beinmediagroup.com/article/bein-sports-secures-uefa-national-team-deal-exclusively-for-24-countries-across-mena-region-with-more-significant-announcement-to-follow/>

(ii) Lack of Tender

Commission's Submissions

131. As discussed above, the Commission considered that the CAF competitions are prime competitions on the African continent and thus are critical assets for broadcasters on the continent. CAF's largest competition, the AFCON, has drawn worldwide audiences, and is the third most watched football competition. Some of the CAF competitions further serve as qualification to the FIFA World Cup. The CAF competitions are unique African products and their importance has been reflected even at the level of discussions at the African Union Summit.
132. The Commission noted that tender processes are standard practices for important football tournaments, i.e., UEFA⁶² and FIFA⁶³. In the EC's decisions in seminal cases such as the *UEFA* and the *Football Association of the Premier League (FAPL)* cases, it was held that the potential restrictive effects of a joint selling arrangement could be offset by introducing new rules for the sale of the rights, notably the award of exclusive rights through tenders in multiple packages and for a limited duration. In the *UEFA* case, UEFA committed to evaluate the bids in accordance with a number of objective criteria including, in particular, the following:
- a) price offered for the rights package or packages;
 - b) acceptance by the bidder of all relevant broadcast obligations;
 - c) level of audience penetration of the bidder in the contract territory;
 - d) proposed method of delivery or transmission;
 - e) proposed promotional support offered for the UEFA Champions League;
 - f) production capability and host broadcast expertise;
 - g) combination of rights packages offered in the contract territory; and
 - h) balance between free and pay television.
133. In its Commitments to the EC, the FAPL submitted that all packages shall be offered by means of a transparent and non-discriminatory procedure. Accordingly, the FAPL would communicate simultaneously and clearly to all interested parties the process and rules which are to apply in respect of each and every stage of the sales process for that Package (together with any amendments to, or clarifications of, the process, rules and/or terms of the offer of that Package). Further, the rules which would apply

⁶²

<https://www.uefa.com/insideuefa/about-uefa/administration/marketing/index.html>;
<https://www.uefa.com/insideuefa/about-uefa/administration/marketing/news/newsid=2593794.html>

⁶³

<https://www.fifa.com/about-fifa/who-we-are/news/fifa-launches-invitation-tender-for-sports-equipment-supplier-94107>

at each stage of the sales process for each Package would be applied in a fair and non-discriminatory way as between all Bidders for that Package.

134. The standard practice of awarding sports broadcasting rights through tender process is implicitly recognised in the EC's decision in *Liberty Global/Ziggo*, stating that "*Licenses for sports broadcasting rights are typically granted through tenders on an exclusive basis for a specific geography and for a limited period.*"⁶⁴
135. The relevance of tender procedures in awarding broadcasting rights have been recognised for other sport events outside football. For instance, in 2011 the Austrian Federal Competition Authority found that an agreement between Austrian broadcaster Osterreichischer Rundfunk ("**ORF**") and the Austrian Ski Association Osterreichischer Schiverband ("**ÖSV**") in relation to the broadcasting rights of the Austrian Ski World Cup races for TV and radio were anticompetitive. The contract had been concluded without a public tender. In particular, it was held that the long duration and exclusivity of the treaty between ÖSV and ORF had the effect of foreclosing the new competitors completely from the valuable media rights of top ski events held in Austria. Ski events were considered by far the most popular sports events in Austria. ÖSV agreed by a legal binding settlement to call for tenders as regards pay-TV, highlights and radio broadcasting rights for a period of five years, to offer several smaller packages of media rights and to abide to a no single buyer rule.⁶⁵
136. The Commission challenged beIN's argument that it did not provide evidence that there are other broadcasters that are capable of providing comparable levels of investment as beIN. It is noted that the examples quoted by beIN regarding the reluctance of certain broadcasters to purchase rights for CAF competitions because they are viewed as expensive is a consequence of the absence of a competitive and transparent process for the award of the media rights. The prices for the media rights are not subject to competitive forces but are determined through bilateral negotiations with preferred buyers, who have significant purchasing capabilities. The Commission's investigation is not concerned with the levels of investment which beIN is able to make. Of concern to the Commission is the fact that other competitors are not afforded the opportunity to compete for these rights or a subset of the rights. The effect is to entrench the market position of the broadcaster, as is evident by the prevailing market structure.

⁶⁴ Paragraph 35 of the Investigation report and see COMP/M.700 *Liberty Global/Ziggo*.

⁶⁵ OECD Report on 'COMPETITION AND SPORTS', dated 11-Jun-2018, pages 89-91. Accessed at: [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP\(2010\)38&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2010)38&docLanguage=En)

137. The Commission therefore maintained its view that where the rights being granted are for a long-term duration and have no effective substitutes such as the TV rights for CAF competitions, the competitive process can only be effective where the rights owner contracts with commercial partners appointed on the basis of transparent and competitive bidding process. The Commission also questioned the respondents' arguments that beIN was the only one best placed to provide the services desired by CAF. The Commission submitted that if this was the case, it begs the question why beIN would be averse to competition if it was obvious that given their purported capabilities, they would win the tender through a competitive and transparent process.

beIN's Submissions

138. beIN submitted that the MOUs between beIN and Lagardère Sports were not the outcome of a formalised tender process, and rather, took place (as far as beIN is able to establish) as part of a multi-lateral negotiations and engagements by reference to which the scope of the MOU were finalised. beIN further submitted that it 'stepped into the shoes' of a company with respect to which rights had been conferred, in terms of which those rights were transferred to beIN.
139. The conclusion of the MOUs was conducted in a manner that is consistent with what beIN regards to be market standard practices. Firstly, the attribution of media rights (including sports competitions) through tender processes is but one of the many ways in which these rights may be legitimately secured. Considering the means by which sports broadcasting rights in particular may be acquired globally, it is noted that rights owners openly invite broadcasters to tender but proceed with bilateral negotiations and without disclosing information in respect of these engagements to the market. There are also several instances in which competitive bid processes did not take place through open tenders, but by way of an "invitation to bid" issued by right owners to potential candidates who were considered to fit the right owner's selection criteria. Rights may also be extended by way of exclusive negotiation – this may be particularly relevant where the rights owner has identified the appropriate party by reference to specific selection criteria. It is also not uncommon for existing contracts for broadcast rights to be extended through competitive processes (including by way of provision of matching bids). Finally, contract renewals may also occur through bilateral negotiations towards the end of the contract period even where the contract does not expressly provide for a right of renewal or similar arrangements.

140. beIN submitted that the position that tenders necessarily lead to more competitive outcomes as compared to multilateral or negotiated outcomes is not economically sustainable, and that such a position does not obviate the requirement on the part of the Commission to demonstrate that the agreements in this matter have anticompetitive outcomes as a question of effect.
141. beIN submitted in this regard that the use of regulated tender processes (such as that required by the EC in respect of the FAPL's sale of its media rights within the United Kingdom for six seasons from 2007/8 onwards) is far from being "market practice". There is no "standard" approach to the way in which a rights holder may choose to sell its media rights, and its approach will depend upon its assessment of how best to maximise the value of the rights in the particular territory/ies and to achieve its other requirements (which may include, for example, a mix of pay/free-to-air distribution and promotional activities) at the relevant time. Certain major rights holders (e.g. UEFA) generally elect to run formal tender processes on a market by market basis which require bids to be submitted by set deadlines and for bidders to comply with certain criteria in order to participate in the process; others may run less formal processes and only require a financial proposal; and others may elect to hold direct negotiations with a single broadcaster without running any form of tender process. On this basis, beIN submitted that it is wrong for the Commission to conclude that CAF's previous approach in selling its rights without a formal tender process is inconsistent with "market practice" and automatically gives rise to competition law issues. It is also incorrect to assume that an open tender process is necessarily the correct way for CAF to approach the sale of future rights.
142. beIN argued that firms are not ordinarily required (under the Regulations, competition laws or other competition principles) to undertake a tender process – even in the context of exclusive arrangements and/or where dominant firms are party to the agreements. Furthermore, beIN noted that the imposition of a requirement to undertake tender processes in the European cases were reached in the context of requests for exemptions for the joint selling of media rights and after an interrogation of the market and likely effect in those cases at that relevant point in time.
143. beIN advanced its argument that the Regulations and Guidelines acknowledge that a supplier may elect to deal exclusively with parties downstream, provided that the impact of such an arrangement is not adverse to competition. The conclusion of an exclusive agreement by closed, multilateral, bi-lateral or other negotiation cannot be regarded as evidence of an anti-competitive outcome. Effects must be assessed by reference to the features of the market, and/or the relevant counterfactual (which

must be plausible in the circumstances). beIN contended that the Commission's Preliminary Report does not identify any credible competitor broadcasters that would satisfy CAF's requirements and be capable of bidding for the rights – especially in the COMESA Member States where beIN has rights conferred by CAF. The third-party broadcasters consulted as part of the Commission's investigation have no operations in the same COMESA Member States where beIN has been granted CAF rights.

144. beIN submitted that the Commission did not establish foreclosure (or any other anticompetitive effects) as a result of the MOUs. beIN argued that firstly, there is no evidentiary basis upon which to conclude that the CAF media rights constitute content needed by competing broadcasters to enter effectively or compete within the relevant markets. Secondly, there is no evidence that any firm has, or will be, foreclosed from any relevant market, and there is no evidence or basis to suggest that actual or potential competing broadcasters (capable of competing to secure the media rights to the CAF competitions) have been excluded within the Common Market, or indeed across the MENA region.
145. According to beIN, credible alternate broadcasters remain a hypothetical assertion in circumstances where the broadcasters noted in the Preliminary Report are national operators, and/or do not operate in the same territories as beIN and have not demonstrated that they are capable of providing comparable levels of investment to develop the scope and quality of broadcasting coverage in the areas in which beIN operates. In this regard, the case file reflects that other broadcasters (outside of the territory in which beIN operates) have been offered the opportunity to buy certain CAF media rights, but have declined to do so.
146. According to beIN, Wananchi was offered the CAF Women's football package, but ultimately did not purchase it as it was concerned that the tournament was too expensive and would not attract sufficient viewership. In addition, the Kenya Broadcasting Corporation ("**KBC**") similarly submitted that it was offered the rights to the 2017 AFCON tournament but declined the offer as it was too expensive and KBC was unsure whether it would recoup its investment in the tournament. beIN noted that Egyptian Radio and Television Union ("**ERTU**") submitted that they have the "*technical ability to bid for the rights*" as they have "*terrestrial, digital, and satellite capabilities; staff resources; production capabilities; and financial capabilities.*" Other than ERTU's assertions in this regard, no evidence is provided to reflect that ERTU would be capable of offering the same level and extent of support, broadcasting quality, and investment as beIN, or that ERTU would be able to expand viewership to a comparable extent across the region.

CAF's Submissions

147. Without prejudice to CAF's agreement to award its future exclusive broadcasting agreement by means of a tender (including in the geographic zone covered by the beIN Agreements), CAF submitted that it is under no legal obligation to do so, since (a) no such statutory obligation or mandatory rule exists, not to mention the (b) potentially detrimental nature of the tender on CAF competitions and their value, as well as African football visibility. Despite the foregoing, CAF stated that it already started tendering its commercial rights as expressed in the context of its discussions with the Commission in matters pertaining to the agreements with SuperSport and Canal+.
148. CAF submitted that in the absence of a positive or statutory or jurisprudential obligation to tender broadcasting rights pertaining to competitions, the Commission's repeated statement that "*tender process are [sic] standard practices for important football events*", lacks any statutory or jurisprudential basis. Further, CAF noted the Commission's failure to provide any evidence in support of this statement. The Commission's use of the example of UEFA and FIFA's offering of media rights through tenders does not suffice to establish that such tendering is "standard practice" for football competitions. If anything, these examples show that certain football associations voluntarily elect to grant some of their competitions' rights through tenders for commercial purposes aimed at maximising their financial gain while satisfying consumer needs and enjoyment, and not because they are bound by a legal obligation. In other words, tenders are granted to secure the highest financial gain to the rights' owner coupled with maximising consumer satisfaction, and not to encourage competition in the market.
149. With reference to the FAPL decision referred to by the Commission, CAF submitted that since this decision constitutes a commitment decision which confirms that tenders can only be voluntarily conducted by the undertaking in question rather than imposed by the EC, the Commission's reliance on this case lacks legal basis. In the EC decision in question, the tendering of the rights was voluntarily accepted by the FAPL in the form of commitments, rather than imposed by the EC.
150. In support of its submission, CAF referred to EC precedents that tendering rights are not a statutory obligation which expressly stated that:⁶⁶

[[I]t is not apparent either from the wording of Article 86(2) EC or from the case-law on that provision that a general interest task may be entrusted to

⁶⁶ See European Commission Decision in Case No. COMP/C.2-38.173, dated 22 March 2006.

an operator only as a result of a tendering procedure. In those conditions, contrary to the applicants claims, there can be no requirement for the contested decision to contain a particular statement of reasons for the absence of such a procedure for entrusting to Trasmediterránea the provision of a maritime service between the Canary Isles.

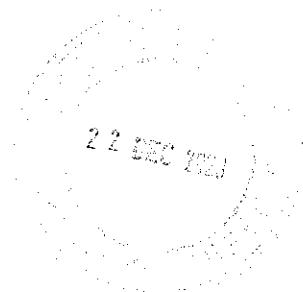
151. Hence, the EC itself considered that it cannot bind any undertaking to tender its rights unless there is an express statutory provision in that sense. It follows that, under the recognised rules of international competition practice, absent any express obligation on CAF to tender its competition broadcasting rights, CAF is under no obligation to tender the broadcasting rights pertaining to its competitions.

152. Notwithstanding CAF's decision to tender its competition broadcasting rights and its intention to continue to do so, CAF therefore requested the CID to dismiss any findings of breach of the Regulations based on the absence of tenders.

153. [REDACTED]

154. CAF further referred to the EC's position that for an undertaking to be deemed a "competitor", it must provide evidence to support that its services or goods are provided at the same level of efficiency and standards as those provided by its alleged competitor. Thus, Article 82 EC prohibits a dominant undertaking from, among other things, adopting pricing practices that have an exclusionary effect on competitors considered to be as efficient as it is itself and strengthening its dominant position by using methods other than those that are part of competition on the merits.

155. Hence, CAF submitted that unless it can be established that undertakings within the Common Market can provide similar or comparable services to those provided by beIN Sports, any discussion of market foreclosure should be deemed moot. It follows that, assuming that CAF is under a legal obligation to tender its competition



broadcasting rights, *quad non*, this obligation only arises where broadcasters in the market can demonstrate both their willingness and technical ability to broadcast CAF competitions, at a level comparable to beIN Sports.

156. According to CAF, the willingness and technical prowess of potential broadcasters within the relevant geographic market are therefore cumulative prerequisites, the absence of which negates any discussion of foreclosure of the market or an

157. CAF observed that the Commission interviewed several “stakeholders” within the Common Market when conducting its investigations to assess the impact of the beIN Agreements. CAF observed that the choice of stakeholders confirmed its position that there is no broadcaster with a demonstrated capacity to compete with beIN. Specifically, CAF noted that the interviewed stakeholders:

- a) were located and operated outside the geographic market covered by the beIN Agreements; or
- b) existed within this geographic market but may not be deemed potential competitors to beIN Sports due to their inability or unwillingness to offer the same services provided by beIN Sports and at a comparable quality that ensures both the protection and enhancement of the CAF brand, as well as consumer demands and satisfaction.

158. CAF submitted that out of the fourteen (14) stakeholders interviewed by the Commission for the purpose of assessing the impact of the beIN Agreements on competition in the market, only three entities were in the geographic area covered

According to CAF, none of these entities can be deemed a serious competitor to beIN Sports, let alone a reliable CAF partner.

159. they did not submit a serious offer (at the upstream or the downstream level); nor do they have a robust background in covering major sporting events of the same stature and prestige as CAF football competitions. CAF referred to the case in France⁶⁷ where a media company was awarded the broadcasting rights for the French Ligue de Football Professionnel (“LFP”) yet, the company failed to honour its financial obligations which led to the termination of the agreement with LFP and

⁶⁷ Summary of Decision 21-D-12, dated 11 June 2021. Paris Court of Appeal judgment in Case No. 21/13216 - N° Portalis 35L7-V-B7F-CEBR5, dated 30 June 2022, accessed at: Conflict on the reallocation of the football Ligue 1's TV rights: the French Competition Authority rejects Canal + complaint against the LFP – Competition Forum.

the necessity to retender the rights. This situation led to disputes between the broadcasters and LFP, which put the broadcasting of the relevant football events at risk pending the resolution of these disputes and finding alternative broadcasters. The successful award of broadcasting rights is therefore contingent upon the existence of serious bidders, whereby the absence of competent broadcasters may cause heavy financial damage to the football association, distortion of the broadcasting market, and an increased risk of inability to broadcast the event in question at the time needed (otherwise known as a “blackout”).

160. Drawing from the above, in light of the absence of ‘serious’ market players demonstrating the technical ability to broadcast CAF competitions, CAF argued that it was under no obligation, statutory or otherwise, to grant such broadcasting rights through open tender, nor would such a tender be fruitful and serve the goal sought by the Commission.
161. CAF also submitted that the Commission went as far as attempting to communicate with several other broadcasters within the Common Market, none of which expressed serious interest or even responded to the Commission. According to CAF, this is reflective of the current status of the broadcasting market which leaves no room to second guess that beIN Sports is currently the only broadcaster that is capable of broadcasting CAF events at the requisite quality with respect to broadcasting of CAF events and competitions.

CID’s Analysis:

162. The CID observed the submissions from the Commission that the prices for the media rights were not subject to competitive forces but were determined through bilateral negotiations with preferred buyers, who have significant purchasing capabilities, that *“other competitors are not afforded the opportunity to compete for these rights or a subset of the rights”* and that the effect was *“to entrench the market position of the broadcaster, as is evident by the prevailing market structure”*.
163. The CID noted the submissions by beIN and CAF that there are no legal requirements for conducting tenders for the award of the media rights. The CID notes that *“consumers have the right to expect the benefits of free and open competition – the best goods and services at the lowest prices. Public and private organizations often rely on a competitive bidding process to achieve that end. The*

competitive process only works, however, when competitors set prices honestly and independently."⁶⁸

164. The CID observed that the argument that there is no legal obligation or jurisprudence that compels CAF to conduct competitive tenders lacked merit and should be dismissed. It would be unreasonable to contemplate that competition laws or indeed any other law would provide for express obligations for every conceivable conduct by market actors. Competition laws have given competition authorities the legal mandate to determine conduct that may be anti-competitive and issue remedies to address the competition concerns. This is trite and is information in public domain that most, if not all competition authorities have this power. The potential for tenders, when conducted in a transparent, non-discriminatory and competitive manner, to promote fair competition and the best outcome for the market, is underlined by the *per se* prohibitions imposed on collusive tendering and bid rigging in most competition laws, including the Regulations.
165. In the same vein, the CID noted that competition authorities have accepted commitments to tenders from parties as a sufficient remedy to address identified competition concerns, as seen in the cases cited by the Commission such as in *Liberty Global/Ziggo* where it was found that "*Licenses for sports broadcasting rights are typically granted through tenders on an exclusive basis for a specific geography and for a limited period.*"⁶⁹
166. The CID further noted that in the *Deutsche Bahn AG/ Stadt-und Regionalbus Göttingen GmbH (SRG)* case, the Bundeskartellamt approved the merger under strict obligations. In particular, as part of the merger clearance, the majority shareholder in SRG undertook to offer through open procedures all contracts for transport services falling within its competence as the authority granting local transport passenger-operating concessions for public tender Europe-wide within a period of four years. It was held that this obligation would offset the strengthening of the dominant position of Deutsche Bahn AG, via its subsidiary Regionalbus Braunschweig GmbH, in the local public transport market in the Göttingen area and open up the market to more competition in future.⁷⁰
167. In addition, the CID observed that good corporate governance typically requires that contracts exceeding a certain threshold are awarded through a form of tender

⁶⁸ <https://www.justice.gov/atr/preventing-and-detecting-bid-rigging-price-fixing-and-market-allocation-post-disaster-rebuilding>

⁶⁹ Paragraph 35 of the Investigation report and see COMP/M.700 *Liberty Global/Ziggo*.

⁷⁰ OECD 'Competition Law and Policy in Germany', paragraphs 59 and 60. Available at: <https://www.oecd.org/germany/34831942.pdf>

process to ensure the best possible suppliers are chosen. This is supported by CAF's own views referred to below:

[T]he adherence to good governance, ethics and global best practices is an essential and crucial part of the culture and the manner in which CAF operates and conducts its business.”⁷¹

168. CAF's vision statement in relation to its procurement activities is further testament to this: ⁷²

[[I]t is necessary for CAF to achieve Best Value for Money in procuring goods & services, according to mandates given to CAF by the General Assembly. It must do so, and be seen to be doing so, with fairness, integrity, and transparency.

These principles are the foundation of CAF procurement. Staff members are expected to comply with these procurement principles in performing their work with a high level of care and professionalism.

These mandates require that the following general principles shall be given due consideration:

- a. Best Value for Money*
- b. Fairness, integrity, and transparency*
- c. Effective international competition*
- d. The interest of CAF.*

169. In its recent tender offers, CAF was quoted as recognising that “[t]he tender process will allow CAF to select the media companies that are best placed to achieve CAF's objectives of providing maximum exposure for the tournament and offering fans in Sub-Saharan Africa and many parts of the world a high-quality viewing experience”. CAF General Secretary, Véron Mosengo-Omba is further quoted as saying that the tender process will enable CAF to leverage on the growing popularity of African football and “the media rights tender process is in line with President Motsepe's commitment to good governance and ethical leadership and ensuring fairness in awarding the African football tv rights. The AFCON is one of the biggest sporting events in the world and naturally, it attracts huge interest from TV organisations”⁷³.

⁷¹ <https://www.cafonline.com/news/caf-is-delighted-to-recommit-to-partnership-with-bein/>

⁷² <https://www.cafonline.com/about-us/tenders/procurement/>

⁷³ <https://allafrica.com/stories/202305150607.html> Africa: CAF Launches Tender Process for Sub-Saharan and Global Media Rights Package Including TotalEnergies CAF Africa Cup of Nations Cote d'Ivoire 2023, TotalEnergies Women's Africa Cup of Nations 2024 and TotalEnergies CAF Africa Cup of Nations 2025, issued 15 May 2023.

170. The CID observed that the benefits of a tender process for such rights is supported by the practices of other football organisations such as FIFA and as seen in the commitments offered by UEFA and the FAPL for instance to the EC. The CID observed that FIFA and UEFA are similar organisations to as CAF and their commitment and approach in other jurisdictions are appropriate and applicable jurisprudence for purposes of this case.
171. It is further worth noting tenders have been issued in respect of African matches as well, with FIFA's tender for the centralised media rights to all of the African qualifying matches, which will determine the African teams that will compete at the FIFA World Cup 26, highlighting that:⁷⁴

The newly opened tender process will allow FIFA to select the media companies that are best placed to meet the required transmission and production commitments that will enable it to achieve its objectives of reaching the widest-possible audience and providing a high-quality viewing experience for fans.

172. The CID observed that the Commission did not need to produce evidence of the foreclosure of a distinct competitor in this context. What is evident is that the exclusive nature of the Agreement for a long duration indisputably creates a foreclosure situation and any argument to the contrary is academic. Foreclosure does not in all instances require elimination of a particular competitor. Where exclusive agreements are entered into for a long duration, it is critical to ensure that the resulting restriction on competition is justified and minimised. One means of achieving this is to protect the competitive process in terms of how the agreement is awarded in the first place. The CID observed that the rights under investigation were never open to the market at least since 2008.
173. Whilst CAF argued that it did not receive any credible offers from players in the market, the CID was of the considered position that there was no credible platform for potential players to compete for the rights throughout the period 2008 to 2028, as the rights had already been locked up through the beIN Agreements. The absence of the tender for the award of a 12-year exclusive agreement, with bilateral extensions, resulted in a complete foreclosure of actual and potential competitors to compete for the media rights for CAF competitions. Further, while CAF argued that the broadcasters which the Commission attempted to contact did not even respond

⁷⁴ <https://www.fifa.com/tournaments/mens/worldcup/canadamexicousa2026/media-releases/tender-process-opens-for-media-rights-to-the-extended-african-qualifying>

to the Commission, which CAF submitted evidence of beIN being the only capable broadcaster, the CID observed that one of the said broadcaster competed for and was awarded media rights in 2021 following a tender launch by CAF for the Sub-Saharan African market.⁷⁵ The CID considered that this is reflective of availability of credible offers from the market in response to an open competitive process.

174. The CID considered that the case cited by CAF regarding the inability of a broadcaster appointed through a tender process to honour its financial obligations does not dilute the relevance of tenders, but rather speaks to ensuring that the relevant requirements for the broadcaster are specified. It is observed that tender specifications do not need to be limited to financial considerations but typically also include technical specifications which serve to confirm the ability of the supplier to carry out the works. Further, it is worth noting that an inability on the part of a broadcaster to fulfil its financial obligations is not a concern that arises solely in the case of tender processes. The CID observed that despite the bilateral negotiations between CAF and beIN, and the various claims made by the two respondents regarding beIN's superior capacity as a broadcaster in the region, around 5 September 2023, it was announced on various media platforms that "*CAF unilaterally ended its 12-year contract with beIN Sports with immediate effect, because it was owed nearly \$100m by the Qatari media group, which contract was subsequently reinstated two months later following an agreement reached on the financial dispute.*"⁷⁶ This is evidence that bilateral negotiations do not automatically shield companies from financial litigations or contract disputes.
175. Having regard to the importance of the CAF competitions for the African market, it is essential that broadcasters are provided a fair opportunity to bid for the rights. The CID thus concurred with the Commission's position that beIN's alleged superior investment capabilities should have been demonstrated as a result of an open and transparent competition for the rights, rather than through exclusive bilateral discussions and transfers.
176. **In view of the foregoing, the CID therefore determined that the lack of an open tender process for the award of pay-TV broadcast rights resulted in a significant prevention, restriction or distortion of competition within the Common Market.**

⁷⁵ <https://amaghanaonline.com/2022/01/04/startimes-secures-2021-africa-cup-of-nations-broadcasting-rights-in-sub-saharan-africa/>

⁷⁶ BBC News, 'African TV broadcast row: CAF broke contract as beIN Sports 'owed \$98m'. Available at: <https://www.bbc.com/sport/africa/66775968>

(iii) Duration of the Agreements

Commission's Submissions

177. The duration of the 2014 Agreement is 8 years, i.e., 2017 to 2024 and it was extended by the 2016 Agreement for another 4-year period i.e., 2025 to 2028. The Commission submitted that the combined duration of the Agreements of 12 years was disproportionately long in view of the cycles of each edition of the CAF competitions which are held every year or every two years.
178. The Commission referred to international jurisprudence where the traditional approach was to reduce the risk of long-term market foreclosure by imposing a limit on the duration of the rights granted on an exclusive basis. Particularly, the Commission referred to the agreement between the Royal Dutch Football Association and broadcaster, Sport 7, where the EC objected to the duration of seven years which it "*deemed to be excessively long for an exclusive contract that denied competitors broadcasting access. This could act as a potential barrier to entry for new operators in the market.*"⁷⁷
179. The Commission submitted that in the **UEFA** case, it was held that the length of the exclusive football media rights contracts should not exceed three football seasons of the decision since the UEFA Champions League takes place on an annual basis. In the subsequent **FAPL** case,⁷⁸ the parties were similarly required to limit the cycle of contract periods to three years. Likewise, in June 2015, the Portuguese Competition Authority with regard to the agreement between Controlinveste Group to license broadcasting and multimedia rights for football matches of the First and Second Portuguese Football Leagues, considered that the agreement foreclosed the market because of the excessive duration of the contracts and the first refusal rights. To this effect, Controlinveste committed not to include exclusivity clauses in future agreements for more than three years and a first refusal right for seasons beyond the term of the agreements.⁷⁹
180. The Commission submitted that given the importance of broadcasting CAF competitions on a live basis for broadcasters in the region, the grant of exclusive rights over such long duration effectively forecloses other pay-TV broadcasters from the market and has as its effect to reinforce the market position of beIN Group in the region. As evidence, the Commission referred to submission by stakeholders it

⁷⁷ Notification of a licensing agreement for the broadcasting of Dutch football matches (Case No IV/36.033 - KNVB/Sport 7), accessed at <https://op.europa.eu/en/publication-detail/-/publication/7066c801-fb22-4ce1-a3ff-b266eec9f14f>.

⁷⁸ COMP/C.2-38.173 — Joint selling of the media rights to the FA Premier League, Commission Decision of 22/III/2006.

⁷⁹ Portuguese Competition Authority, Press Release 10/2015.

interviewed that the ideal duration for granting media rights should be between two years (corresponding to the interval between each edition of the AFCON competition) and five years to allow for recoupment of the investment.⁸⁰ The Commission also referred to CAF's internal Strategic Plan which outlined the preference for shorter duration in view of the uncertainty of the participation of a national team, as follows:

[Short term agreement: Four years 2017 –2020]

- a) This is the shortest period expected by partners/sponsors to be able to allocate recognized investments in African football and that would match by most of the football worldwide investors.*
- b) This offers CAF mobility to respond to the changes in the economy.*
- c) Most of the companies interested in football base their strategies on the FIFA World Cup cycle of four years.*
- d) It is not preferred by TV partners who would always wish to secure the longest agreements possible.*

181. Regarding the counterfactual, the Commission submitted that in the absence of the bilateral negotiations between CAF and beIN, had a tender process been adopted, there was evidence that entry would have occurred. In this regard, the Commission observed that in 2021, following a black-out of the CAF competition in the Sub-Saharan African territories as a result of the termination of the agreement with SuperSport for the pay-TV broadcast rights, CAF issued a tender for the affected territories, which led to the entry of StarTimes in the market for the acquisition of pay-TV broadcast rights for CAF competitions.

beIN's Submissions

182. beIN submitted that CAF sells the rights to a package of its competitions to third parties in order to most effectively monetise these rights and to ensure broad distribution and the best quality match coverage. The ability to attract funding in this way, and over a sustained period provides CAF with financial certainty that facilitates its role and responsibilities in developing African football. beIN further submitted that the nature and scope of sport broadcast rights offered for acquisition by broadcasters are determined by the relevant rights holder, including the duration of the licence period. All rights holders (including CAF) are motivated to maximise the value attributable to the rights that are subject of negotiation, particularly by reference to sporting events that are typically once-off and do not occur regularly

⁸⁰ 2003/778/EC: Commission Decision of 23 July 2003 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/C.2-37.398 — Joint selling of the commercial rights of the UEFA Champions League)

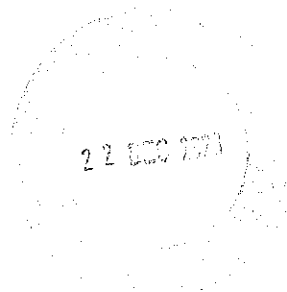
and that may attract high subscriber engagement. In addition, beIN added that it is self-evident that broadcasters such as beIN which can provide high quality coverage and broad distribution to a substantial audience stand best positioned to acquire rights at the level sought by the relevant rights holder such as CAF.

183. beIN submitted that the broadcasters which are best positioned to acquire rights at the level sought by the relevant rights holder such as CAF are those which can provide high quality coverage and broad distribution to a substantial audience. An agreement with a company such as beIN enables the rights holder to maximise the value of its rights and, consequently, in the case of CAF, the investment it is able to inject into the sport of football in line with its overall objectives. Clearly, the broader the scope and longer the duration applicable to the rights in question, the more value is likely to be extracted by CAF from the rights in question. Using AFCON as an example, it is noteworthy that such major tournaments owned by CAF do not occur very often and/or happen only every 2 years, thereby explaining the longer durations of exclusivity that often arise in the context of international sport rights broadcasting agreements. In this regard beIN noted that the MOUs reflect rights and entitlements (including with respect to durations and scope) which accord with similar agreements with other sporting federations or even organisers around the world, be they FIFA, or the International Olympic Committee. CAF-related events generally have a more limited viewership as compared to other, more international football and other sporting events with the consequence that the scope and duration of broadcasting rights and the exclusivity pertaining thereto may need to be enhanced so as to attract the most value or investments possible.

CAF's Submissions

184. CAF submitted that the long duration of the exclusivity granted to beIN Sports is necessary to, among others, secure a fair return on investment, as well as provide security for related markets, which enhances competition and ultimately benefits the Common Market and the end viewers of CAF competitions and events.⁸¹ CAF argued that the case references of the Commission in this respect were incomparable and that the European precedents be approached carefully and applied only when suited to the facts on the ground.
185. CAF argued that such duration of contracts must be assessed by competition authorities on a case-by-case basis, taking into account the factual background and the nature of the market in question i.e., whether such "long duration" and bundling

⁸¹ Page 205 of CAF's Statement of Objection



are justified. In this respect, CAF referred to the French Competition Authority which emphasised:

*The competition Council therefore conducts an in concreto analysis with respect to the effective duration of contracts in order to assess whether it contributes to the foreclosure of the market.*⁸²

186. CAF argued that, bearing in mind the existing competitors, the four-to-five-year duration of agreements suitable for European markets cannot be imported into the Common Market without ensuring that the broadcasting environment (including the quality, quantity, skill, willingness and ability of broadcasters to deliver the required service) can deliver the service at a comparable quality and price. CAF asserted that the broadcasters in the European market that can deliver comparable high-quality services in each of these European jurisdictions separately more than in the total number of States covered by the beIN Agreements in the Common Market. The market in these European jurisdictions is more diverse and competitive and offers rights-owners the opportunity to contract with various broadcasters. In this regard, the rule limiting exclusive broadcasting agreements to four or five years in Europe cannot automatically be transplanted into the Common Market in the absence of an environment that is comparable to that of the EC which otherwise would lead to the application of legal terms in a vacuum, causing a shortage of quality service.
187. In support of this agreement, CAF referred to jurisdictions where competition authorities deemed that terms exceeding ten years were acceptable because *“the benefits of exclusive licensing agreements are well-recognized.”*⁸³ CAF submitted that the Canadian Competition Bureau approved a twelve (12) year exclusive distribution agreement between the National Hockey League and Rogers Broadcasting. According to CAF, this case is comparable to the case at hand since Ice Hockey is the most popular sport in Canada, attracting wide viewership, has significant “cultural value”, and considering that various other equally qualified broadcasters in Canada would pass the as-efficient-competitor test.
188. CAF also referred to the EC practice where it held that competition regulations must not come at the expense of *“security and regularity of supply”*.⁸⁴ CAF submitted that this principle must direct the assessment of the duration of exclusive agreement and that the model of long-term agreements with broadcasters be maintained as it

⁸² French Competition Authority, Decision in Case No. 10-D-17, dated 25 May 2010, para. 145.

⁸³ See David Martimort, Jerome Pouyet. “Why Is Exclusivity in Broadcasting Rights Prevalent and Why Does Simple Regulation Fail?”, dated 6 July 2022, p. 4, footnotes 4 – 5.

⁸⁴ See European Commission press release on the Electrabel case, dated 25 April 1997

ensures the stable enjoyment of CAF competitions by African viewers for a foreseeable period.

189. CAF also referred to the explanation of the French Competition Authority which stated that the valuation of the marketing rights of sports competitions is closely tied to broadcasting.⁸⁵ This would mean that the interest of potential sponsors and CAF partners in specific competitions is tied to the breadth, quality, and consistency of television broadcasting as well as the term of the relevant agreements, which must be of a certain length to attract sponsors to market their brand and products. CAF submitted that the term of the beIN Agreements specifically achieves this purpose by providing a stable environment that is appealing to sponsors.
190. CAF explained that event sponsors rely on the visibility of tournaments and CAF's agreements with qualified broadcasters to ensure that their brands are accessible to consumers on the widest possible scale. The lack of long-term visibility for CAF competitions (in light of the absence of broadcasters that can provide comparable services to beIN Sports) will discourage sponsors to invest in the CAF brand causing the sponsorship market to falter which will deprive African football of significant financial contributions that serve to fund national football federations and the continental football infrastructure. A change in the structure of the broadcasting market will therefore come at great expense. It is unwarranted, costly, unreasonable, and will deliver a blow to continental football and ultimately, to the consumers' enjoyment of the game. In view of this, CAF submitted that shortening the term of the beIN Agreements will most certainly negatively impact the visibility of CAF events and African football, reducing its popularity; and reduce CAF's revenue stream, as a result of the decline in the value of the marketing rights.

CID's Analysis

191. Having regard to the submissions from all the parties, the CID concurred with all the parties that the duration of agreements needs to be evaluated on a case-by-case basis. The CID considered whether the duration of the exclusive agreements granted to beIN Group was more likely than not to result in a significant lessening of competition. Primarily, the CID noted that the RBP Guidelines provide that in order to assess vertical business practices under Article 16 of the Regulations, one of the elements the Commission may consider is “[t]he nature of the agreement looking at the specific restraints imposed by the agreement, duration and percentage of actual sales in the relevant market affected by the restraint.” It is also noted that the RBP Guidelines provide that the size of the affected portion of the market, duration of the

⁸⁵ French Competition Authority, Decision in Case No. 09-D-31, dated 30 September 2009, para. 230

vertical restraints and the market power of the supplier and distributors are the additional factors that will be taken into account in assessing vertical business practices.

192. In view of the foregoing, the CID recognised that the duration of the agreement is an important factor to determining the anti-competitive effect of an exclusive vertical agreement. While exclusivity is not anti-competitive in and of itself, when combined with the duration of the agreement and the market structure, it is capable of resulting in significant anti-competitive effect including foreclosure.
193. The CID observed the experience of the EU based on the cycle of tournaments in setting an optimal maximum length of exclusive agreements for the acquisition of football media rights between three to four years.⁸⁶ As noted above, it is important to recognise the persuasiveness of case law in adjudicating cases. Indeed, in the present case, the parties have presented cases to convince the CID of their position on this matter. The adjudicator must reflect on the context of the cases raised and whether they are comparable to the case at hand.
194. In the present case, the CID is faced with the consideration of the granting of pay-TV broadcast rights for football tournaments, played at continental level, which are also played as FIFA World Cup qualifiers. The CID noted that the case law presented by the Commission involve European tournaments which are played within similar facts and context, i.e., football tournaments, played at continental level, which are also played as FIFA world cup qualifiers. On the other hand, CAF presented a rebuttal case regarding Ice Hockey played at national level and at league level. Understandably, the CID is drawn to reflect on the European cases since they are comparable with the matter at hand. For this reason, the CID finds the European football case more persuasive than the rebuttal Ice Hockey case. Further, the CID took note that even CAF in their internal presentation was alive to the fact that a shorter duration than twelve (12) years was possible.
195. **In the current case, having regard to the fact that the CAF competitions are held annually or every two years, the CID determined that the grant of exclusive agreements for a period of twelve (12) years increased the likelihood of foreclosure. The CID therefore concluded that given the nature of the tournaments and the popularity of the competitions, the duration of the agreement is disproportionately long and by far goes beyond the cycles of the tournaments with a foreseeable foreclosure effect.**

⁸⁶ See European Commission Decision of 23 July 2003, (COMP/C.2-37.398 - Joint selling of the commercial rights of the UEFA Champions League) and also COMP/C.2-38.173 — Joint selling of the media rights to the FA Premier League, Commission Decision of 22/III/2006.

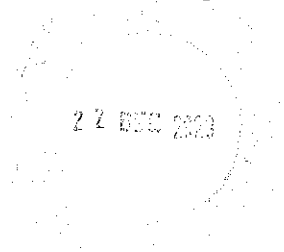
(iv) Scope of Exclusivity – Bundling of Rights

Commission's Submissions

196. The media rights to the pay-TV broadcasters cover TV, internet broadband and mobile transmissions. Further, the TV rights are bundled such that live broadcasts, delayed broadcasts and highlights are all sold as one package. Such bundling denies potential rival pay-TV broadcasters the opportunity to acquire only part of those rights. This would especially be true for the broadcasters who cannot afford to bid for live broadcasts which are more expensive.
197. The exclusivity granted to beIN in the pay-TV broadcast rights market serves to protect it from competitive pressures from other pay-TV broadcasters in the allocated territories. The exclusivity further extends across various types of transmissions including live transmissions which carry a significant value for viewers. The Commission's assessment indicates that an unbundling of the exclusivity rights granted would allow more players to compete for the market, thus enhancing the competitive process and may result in a more efficient exploitation of the various rights.
198. The Commission submitted that it engaged KBC who stated⁸⁷ that for the Kenyan market, the free-to-air broadcasting rights are offered as a bundle by Lagardère Sports. KBC further submitted that the sale of the rights as a bundle made sense in view of the current move towards convergence of audio-visual media (i.e. TV, internet, VOD, etc.) and it would be difficult for them to acquire the various media rights separately. The Commission recognised that for broadcasters who have capacity to broadcast across the different media platforms, it might make commercial and economic sense for them to purchase the rights as a bundle. However, in order for there to be effective competition, broadcasters with capacity to exploit other rights should be afforded the opportunity to compete for a smaller bundle of rights, which would in turn allow consumers to have an option to choose across service providers for their preferred platform.
199. The above submission is in line with views expressed by AB Communications, who runs three radio stations in Zimbabwe.⁸⁸ In particular, AB Communications submitted that the current package from Lagardère Sports which contains radio rights for CAF matches are too expensive for audio broadcasters who are not able

⁸⁷ See Investigation Records of Meeting with KBC on 26th April 2017 in Kenya.

⁸⁸ The three radio stations include: ZiFM covering the whole nation, 98.4 which covers the Midlands province, and HEVOI FM which covers Masvingo area in Zimbabwe. See investigation records of meeting with AB Communications held on 23 May 2017 in Harare, Zimbabwe.



to recoup the investment. AB Communications submitted that there would be a demand for smaller radio packages allowing broadcasters to choose highlights and full-game broadcasts for different customer segments. The demand for audio broadcast of full games tend to be higher among the older generation in rural areas whereas the younger audience in urban areas are more receptive to broadcasts of highlights.⁸⁹

200. Further, the Commission observed that there is significant case precedence in the football broadcasting rights sector that call for the offer of smaller packages in order to promote the competitive process. In *UEFA*, the decision states that “*UEFA will offer its TV rights in several smaller packages on a market-by-market basis.*”⁹⁰ The UEFA proposal was not limited to a segmentation for TV rights, but also all the other media rights. The UEFA undertook to unbundle the media rights into fourteen (14) packages, making it possible for multiple broadcasters to acquire rights to the UEFA Champions League.⁹¹ The packages included rights for radio, television, Internet, universal mobile telecommunications system and physical media such as DVD, VHS, CD-ROM, etc.

201. Of further relevance to the investigation is the statement by the EC when it announced the authorisation of the revised UEFA joint selling policy: “*the sale of the entire rights on an exclusive basis and for a long period of time has the effect of reinforcing the position of the incumbent television companies as the only ones with the financial strength to win the bids. This, in turn, leads to unsatisfied demand from broadcasters and a lesser ability to make an attractive offer to customers.*”⁹² The EC thus observed that the sale of bundled rights may lead to some rights remaining unexploited. This may be the case where the seller was unable to sell those rights; or where some of the rights remain unused by the purchaser of the bundle, in particular rights for deferred transmission and broadcasting over the internet and mobile phones.⁹³

202. The Commission submitted that the FAPL was likewise required to unbundle media rights of Premier League matches into 6 packages covering Live Audio-Visual Rights, Near-Live Audio-Visual Rights, Mobile Audio-Visual Rights and National Radio Rights.⁹⁴ The EC further established in this case that no single purchaser

⁸⁹ AB Communications submitted that they currently have agreements with Talksports for the audio transmission of international football matches.

⁹⁰ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003D0778&from=EN>, paragraph 32.

⁹¹ 2003/778/EC: Commission Decision of 23 July 2003 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/C.2-37.398 — Joint selling of the commercial rights of the UEFA Champions League)

⁹² http://europa.eu/rapid/press-release_IP-03-1105_en.htm?locale=en

⁹³ Match week refers to the week during which all matches for a specific round of the UEFA competitions are played.

⁹⁴ COMP/C.2-38.173 — Joint selling of the media rights to the FA Premier League, Commission Decision of 22/III/2006.

should be allowed to purchase all the packages as this would offset the goal of unbundling the media rights.

203. In 2016, the German Football Association and the German Football League submitted a list of commitments to the Federal Cartel Office concerning criteria *“for the awarding of media rights for the games of the first and second divisions from the 2017/2018 season onward, including, in particular, a no-single-buyer rule, whereby no single bidder will be able to acquire the rights to broadcast all live Bundesliga matches; the Federal Cartel Office declared the commitments legally binding.”*⁹⁵

204. The Commission considered that the demand from the market could support a commercially viable unbundling of the media rights and could boost competition among potential broadcasters. The Commission submitted that it was mindful of the fact that the broadcasting of a match across more than one platform by the same operator could create a more holistic package to consumers in light of emerging technologies and changing consumer behaviour patterns. However, in the absence of an open tender process and in the context of long-term exclusive contracts, a bundling across transmission modes and platforms as per the current system prevents the market from fairly determining whether alternative providers could offer better and enhanced viewing to consumers.

beIN's Submissions

205. beIN submitted that the media rights granted by CAF to beIN Group are provided on a 'platform neutral' basis and *“as such may be broadcast by any number of means including terrestrial, cable, satellite, internet and mobile wireless transmission. The MOUs do not provide exclusivity with respect to radio transmission.”* beIN submitted that while the broadcast rights are afforded to beIN on an exclusive basis (save for Mauritius and Madagascar), *“it bears noting that certain rights or events are reserved or excluded from the rights conferred in order to allow CAF to ensure additional coverage of the CAF competitors is available in the market outside of the exclusive rights granted to beIN. For example, CAF retains a right to offer highlights of matches on its own digital services and social media channels, and significantly, reserves a right to separately grant free-to-air terrestrial broadcast rights in a country in which a particular match or competition is hosted. To this end, free-to-air terrestrial coverage of the upcoming AFCON 2019 will be*

⁹⁵ UNCTAD Secretariat Note, 2018. 'Competition issues in the sale of audiovisual rights for major sporting events', footnote 8.

available in Egypt alongside beIN's coverage of the tournament across the entire MENA region."

206. beIN also submitted that the arrangements are pro-competitive and investment enhancing and that the exclusivity that pertains to the rights enhance the extent to which firms are prepared to invest in their broadcast distribution platforms and their overall programme offerings in the interests of viewers (thereby enhancing consumer welfare).
207. beIN noted that the Commission's response to the lack of viable competitors is to break up the CAF rights in various ways so as to make them more affordable to smaller/local broadcasters. The examples cited above reflect that such an intervention would not necessarily result in wider take-up by broadcasters. The Commission's Report reflects no basis on which such conclusions are reached, and it is submitted that a more credible outcome is that broadcasters would be unwilling to take up the rights packaged in this fashion thereby undermining the value attached to the rights and making the rights less likely to attract market entry. The Commission's interventions may indeed lessen future competition, investment and consumer welfare. The piecemeal nature of the content offerings would undermine CAF's ability to attract broadcasters.
208. The package of media and other rights made available by CAF are key in attracting investment funding for the organisation – CAF sells the rights to a package of its competitions to third parties in order to most effectively monetise these rights and to ensure broad distribution and the best quality match coverage. The ability to attract funding in this way, and over a sustained period provides CAF with financial certainty that facilitates its role and responsibilities in developing African football. In addition to sustained funding for CAF, long-term partnerships provide broadcasters with some certainty over their ability to recoup the costs of their investments considering the challenges and risks associated with the broadcast of rights in the region.

CAF's Submissions

209. CAF submitted that, from an economic and competition law perspective, the bundling of several media platforms is both justified and necessary to preserve the value of CAF competitions and render them available and affordable to African viewers on several platforms. Furthermore, the bundling of platforms, coupled with the bundling of competitions increases the visibility of certain CAF competitions that would otherwise have little to no viewership.

210. CAF recognised that the Commission confirmed the benefits of awarding media rights in bundles for consumers. However, CAF contended that the recommendation of the Commission that CAF separates its transmission modes when awarding the broadcasting rights to its competitions. CAF thus argued that:

- a. The Commission did not provide any legal basis for its recommendation. Instead, it automatically relied on conducts previously adopted in Europe despite the incompatibility of the European broadcasting market with its African counterpart.
- b. The Commission appears to link the issue of bundling with that of absence of a tender and long duration of the beIN Agreements. CAF maintains that these issues are separable notwithstanding its insistence on the lack of statutory or jurisprudential obligation to tender broadcasting rights and the conformity of the term of the beIN Agreements with international practice and their adequacy for the Common Market.
- c. The Commission admitted the benefits that bundling affords consumers, yet recommended that CAF should “experiment” (for lack of better word) with consumers by breaking up broadcasting rights in different packages to emulate European practice at the expense of consumer satisfaction.
- d. The Commission seems to be concerned that “potential” competitors to beIN Sports are unable to access CAF’s content and broadcast it to consumers despite the fact that, to date, no serious competitor to beIN Sports has ever expressed its interest in CAF competitions or its ability to broadcast such content, the Commission did not identify who these potential competitors are and whether they meet the AEC test, and did not conduct a full market test analysis and allow CAF to comment on its content, as explained above in relation to alternative broadcasters to beIN Sports.

211. CAF emphasised that “bundling” complies with international best practice, industry standards, and applicable statutory provisions. CAF referred that the EC previously held that it is inconceivable and economically unsound to sell media rights pertaining to several competitions organised by the same federation in several packages. More specifically, in UEFA case, the EC found that:

It is conceivable that media operators could put such a package together even without joint selling. However, this would require the acquisition of significantly more rights than is currently the case. For a media operator to create the same end product in the context of individual sale of all media rights would risk being significantly less efficient, involving more acquisition and transaction costs. The only guarantee of an equally interesting selection

of matches would be if one media operator were to buy all of the rights available individually either before the start of the football season or consecutively as the football season develops depending on the performance of the football clubs.

212. Furthermore, CAF submitted that in the Decision Relating to a Proceeding Pursuant to Article 85 of the EEC, the EC explicitly stated that:

Television rights to sports events are normally granted for a given territory, usually per country, on an exclusive basis. Exclusivity is as a general rule considered to be necessary in order to guarantee the value of a given sports programme, in terms of the viewing figures and advertising revenues which it can achieve. Exclusivity is generally granted for broadcasting by all technical means (terrestrial frequencies, satellite-to-cable or direct satellite) without distinction between terrestrial rights and cable and satellite rights. The rights are often offered as packages and comprise all matches, rounds or competitions forming one event (championship, tournament, cup, league round etc.).

213. According to CAF, reducing the number of platforms per contract will be counterproductive and will negatively affect African football as it risks (i) curtailing visibility; (ii) cutting CAF's and beIN Sports' return on investment; (iii) creating noticeable disparity in the broadcasting quality depending on the media platform used; (iv) increasing the costs of (losses for) participation for companies broadcasting less popular tournaments (or through less popular media); and ultimately with respect to the unbundling of tournaments; and (v) compelling CAF to stop organising unpopular tournaments in need of promotion (e.g., women's football).

214. Despite and without prejudice to the foregoing, CAF noted that certain transmission media are either licensed to beIN Sports on a non-exclusive basis or not licensed to beIN Sports at all; and where transmission is done on an exclusive basis, the scope of this exclusivity within the Common Market varies from one State to the other. Furthermore, the effects of this exclusivity are tempered by the explicit provision of beIN Sports' right to sublicense media rights to local broadcasters, is recognised according to competition law. Moreover, and to further reduce the effects of exclusivity, and notwithstanding any agreement with beIN Sports, CAF grants local broadcasters the opportunity to broadcast the AFCON games (the most watched and profitable competition) involving their national teams for free on a Free-to-Air

basis so that consumers may enjoy watching their national teams play for free and in the local language.

215. Finally, as further demonstration of beIN Sports' stature and indispensable nature to sponsors due to its popularity among consumers, while beIN Sports' Facebook channel accounted for 6% of the total posts on the AFCON 2021, they generated a volume of impressions that is seven (7) times higher than the global average. In other words, beIN Sports' existence as a broadcaster of CAF tournaments is one of the primary reasons why sponsors fund CAF events, as they know the reach beIN Sports has and its popularity among consumers is higher than that of any other broadcaster.
216. Given the negative impact that separate selling of media rights will have on the Common Market and African football, CAF therefore requested the CID to reject the Commission's conclusion that the bundling of media rights is a breach of the Regulations.

CID's Analysis

217. The CID observed from the submissions of beIN that the scope of exclusivity is limited, in that:
- a. CAF is entitled to authorise (without any payment to beIN) domestic broadcasters to broadcast CAF matches staged in the relevant domestic broadcaster's country (both national team and club) on a free-to-air basis;
 - b. AFCON host countries are granted by CAF the free-to-air terrestrial broadcasting rights within the host country;
 - c. There is no exclusivity related to radio transmission;
 - d. CAF retains a right to offer highlights of matches on its own digital services and social media channels; and
 - e. beIN is also entitled in its discretion to sub-license its rights granted under the beIN MoU to third party broadcasters.
218. The CID further observed the argument made by all the parties that a competition concern is generally seen as arising in the context of an exclusive media rights holder is that it may unduly "warehouse" and not fully utilise all the granted media rights. A concern in the UEFA case was that a broadcaster holding exclusive rights to the UEFA Champions League may "warehouse" and not exploit all the associated media rights, including by means of internet and mobile transmission technologies (thus stifling the development of new media content services).

219. The CID noted the submissions by beIN that the *UEFA* decision was made in 2003 and since then, the convergence in the communications sector and delivery of content over the internet has become commonplace and, in this particular case, there is no evidence of any form of “warehousing” by beIN of CAF rights (or of any other sports rights licensed to beIN). To the contrary, beIN submitted that it makes the CAF competitions available on all its platforms (satellite, cable, OTT internet services/ websites and social media) and offers a wide range of ways in which consumers can access and view the content on a live and delayed basis. This reflects there being no incentive for beIN to not to exploit any rights or not to use all available means of distribution.
220. The CID observed that the Commission similarly acknowledged the benefit of a platform neutral package as adopted by other football organisations such as UEFA and FIFA, having regard to the convenience it offers to consumers. The CID noted that the acquisition of platform and technology neutrality to cover any future developments is key to a broadcaster. However, there is a fine balance to be achieved between consolidating all existing rights and awarding them to one licensee to try and achieve a higher overall fee, or awarding the rights on a piecemeal basis to broadcasters and other parties who can exploit each individual right in the optimum way. According to beIN, complete exclusivity across platforms and technologies is extremely valuable to a broadcaster as it also offers a very powerful marketing message and the ability to create a unique, broadcaster-specific, identity for the rights, and so tends to come with a premium. The desire for exclusivity and platform neutrality is also driven by consumer expectation, consumers increasingly expect to be able to access the same content on a TV, a mobile device, PC, live and on demand and, importantly, do not expect to have to pay more to do so.
221. However, the CID noted that smaller packages may lead to increased viewership at all levels of consumer income, e.g., availability of content through less “traditional” outlets, Facebook, YouTube and other social media limited to overall highlight and clips package. The CID observed that the scope of bundling awarded to beIN is still expansive, considering that the rights span across all the CAF competitions and cover highlights, deferred transmission, as well as clips.
222. The CID observed that UEFA, whilst allowing the rights on a platform neutral basis, offers the rights in various packages. This has further led to additional players entering the market. For the 2024 broadcast of the Champions League, Amazon secured seventeen (17) first-pick Champions League matches on Tuesday nights

for the UK market, whilst BBC would become the home of highlights with a new Wednesday-night Match of the Day.⁹⁶ In addition, the rights are awarded on a market-by-market basis (whether country or region) allowing the possibility of a wider range of broadcasters to compete. The CID also observed that contrary to the beIN arrangements, the UEFA does not award the media rights to its sixteen (16) football competitions in one bundle but offers smaller packages grouping two or three football competitions. It is further reported that UEFA has been able to increase the value of the rights by opening up the tender and packages to more players and is estimated to have upped the value of its rights from £1.2bn to about £1.5bn in its 2022 auction.⁹⁷

223. The CID thus considered that there is evidence both for demand for smaller packages from the market players within the Common Market, and for the commercial viability of smaller packages from the operations of other football organisations.

224. As regards the possibility for beIN to sublicense the media rights, the CID observed that sublicensing of media rights by an undertaking with market power is unlikely to restore a competitive market as it creates incentives for the licensee to protect its market position and reduce the risk of competition from rival pay-TV broadcasters by refusing or dictating unfavourable terms to such competitors in exchange for the right to broadcast the competitions. Further, sub-licensing has the potential to create an environment favourable to collusive behaviour on the market as the pay-TV broadcasters may coordinate on the prices on packages to be offered on their respective retail channels. The CID further noted that specifically with regards to the media sector, *“experience shows that sublicensing is a difficult remedy to apply in practice as it must be ensured that prices and sublicensing conditions are transparent and acceptable. Given that sub-licensing is generally not in the sub-licensor’s interest, it may be necessary to involve a trustee to ensure a satisfactory degree of effectiveness. If remedies cannot solve the competition concerns, the (joint) acquisition of sports media rights may also be prohibited.”*⁹⁸

225. From the above, the CID observed that sublicensing requires monitoring by regulators to ensure the conditions for sublicensing do not create or maintain competitive harm. The CID considered that a system of sublicensing requires

⁹⁶ <https://www.sportcal.com/media/bt-sport-and-amazon-to-share-2024-27-champions-league-rights-bbc-lands-highlights/?cf-view>

⁹⁷ <https://www.theguardian.com/football/2022/jul/01/amazon-and-bbc-break-bt-stranglehold-on-champions-league-football>

⁹⁸ Ibid, section 3.1.4.2.

significant monitoring by the regulator to protect the integrity of the system and would not be cost effective.

226. **In view of the foregoing, the CID determined that the scope of bundling of the Agreements, when taken in conjunction with the lack of a tender process and the duration of the agreements, is excessive and is likely to have resulted in a significant prevention and distortion of competition in the relevant markets.**

CID's Conclusion on the Agreements

227. In view of the foregoing assessment, the CID concluded that the Agreements are in violation of Article 16(1) of the Regulations and should be prohibited as incompatible with the Common Market.
228. Notwithstanding the above conclusion, given that the Respondents made submissions justifying the necessity of the concerned agreements under Article 16(4), the CID deemed it necessary to consider whether the concerned agreements could be justified and that the prohibition under Article 16(1) could be declared inapplicable. The analysis and determination of CID on the issue under consideration is set out below.

IV. Justification Under Article 16(4) of the Regulations

229. The CID noted that any act of justifying an anti-competitive agreement shall be presented in a manner laid down under Article 16(4) of the Regulations and satisfy the cumulative conditions provided therein. Accordingly, the CID observed that the following cumulative elements of Article 16(4) of the Regulations need to be satisfied:

- a) Whether the agreements contribute to an improvement in the production or distribution of services or to promote technical or economic progress;
- b) Whether the restriction is indispensable to achieve the above benefits;
- c) Whether consumers get greater benefits from the agreements than the anti-competitive advantage; and
- d) Whether the agreements afford the parties the possibility of eliminating competition in a substantial part of the Common market.

CAF's Submissions

230. CAF argued that the Agreements have benefits for consumers, sponsors and broadcasting market in the Common Market which can only have a positive impact on the increase of popularity of African football. In particular, CAF in justifying the bundling of media rights in the form of a package to a single operator submitted that the bundling of unpopular and unknown tournaments with popular ones guarantee a wide visibility, increased viewership and fair return on investment for the least popular CAF competitions that ultimately serves the purpose of injecting further investments into African football infrastructure. CAF reiterated that the packaging of CAF competitions presented benefits to African consumers and players that outweigh the alleged risk of foreclosure and harm to the market.
231. CAF also argued that the Agreements benefitted African football consumers submitting that beIN is the most popular, competent and reliable broadcaster, with highest standard and quality, which has the lion's share of consumer satisfaction and enjoyment in terms of hours of exposure, cumulative audience and event impressions.
232. CAF also argued that the exclusive licencing of broadcasting rights to beIN was the only way to guarantee that consumers are granted access to CAF competitions on a plethora of platforms; all competitions, including the least popular ones, are accessible to all consumers, thereby rendering such tournaments more visible; the services and benefits are made available for affordable prices; and CAF is able to compete with other football federations within the Common Market.
233. CAF further submitted the Agreements enshrined the possibility of sublicensing the rights beIN has been granted which could be a valid remedy to the alleged restrictive exclusive agreement.

beIN's Submissions

234. beIN stated that the arrangements were pro-competitive, and investment and consumer welfare enhancing. beIN further argued that, absent the Agreements, investment in broadcasting rights and the development of football in Africa would be undermined as beIN was best positioned to allow CAF to achieve substantive wider viewership for competitions and obtain value for its rights. beIN also submitted that the exclusivity that pertained to the rights enhanced the extent to which firms are prepared to invest in their broadcasting distribution platforms and their overall programme offerings in the interest of viewers, thereby enhancing consumer welfare.

235. beIN added that its acquisition of rights to CAF competitions enabled CAF to maximise the potential value from these rights and, as a result, ensure funding is obtained by CAF in order to increase CAF's revenues as well as promote and develop football across the various football federations in Africa. beIN added that, because of the Agreements, a significant funding was made available to CAF which was an investment and a competition enhancing outcome as compared to circumstances where the scope of the rights, and the duration for which the rights apply, could be limited.
236. beIN also submitted that if CAF was not permitted to maintain its agreement with beIN, CAF's revenue would be significantly adversely impacted as CAF's revenue was generated primarily from beIN, with knock-on detrimental effects for national football federations as well as football development in Africa in addition to its adverse effect on viewership and coverage of football matches as beIN is the most capable broadcaster in the region which it covers.

Commission's Submissions

237. In its reply to the submissions of the Respondents with respect to their efficiency claims and the procompetitive effects of the agreements, the Commission argued that not every benefit or procompetitive gain can justify an anticompetitive agreement that is prohibited under Article 16(1) of the Regulations. The Commission added that any claim of justification or procompetitive effect by Respondents should be analysed and satisfy the cumulative conditions set out under Article 16(4) of the Regulations which is the legal exception to Article 16(1) of the Regulations. The Commission submitted that, despite the claims by the respondents, the Agreements did not satisfy the cumulative conditions provided under Article 16(4) of the Regulations.
238. The Commission reiterated that neither respondent demonstrated with clear and sufficient evidence that such cumulative requirements have been met. In particular, the Commission challenged the efficiency claims on the ground of elimination of competition stating that because of the Agreements, it was likely that competition has been eliminated in the substantial part of the Common Market given the exclusive nature and long duration of the agreements coupled with lack of a transparent tender process. The Commission also argued that the burden of proving that the conditions of Article 16(4) had been met was on the respondents claiming the justification and submitted that CAF and beIN had not discharged their burden

of proving the existence of the conditions by producing convincing arguments and evidence.

CID's Analysis

239. The CID considered the submissions made by the Respondents in justifying the Agreement in terms of the benefits it could bring to CAF, consumers, the broadcasting market and the African football in general.

240. As stated above, any act of justifying an anti-competitive agreement shall be presented in a manner laid down under Article 16(4) of the Regulations and satisfy the cumulative conditions provided therein. Accordingly, the CID analysed the justifications provided by CAF and beIN in relation to the following:

- a) Whether the agreements contribute to an improvement in the production or distribution of services or to promote technical or economic progress;
- b) Whether the restriction is indispensable to achieve the above benefits;
- c) Whether consumers get greater benefits from the agreements than the anti-competitive advantage; and
- d) Whether the agreements afford the parties the possibility of eliminating competition in a substantial part of the Common market.

241. The CID noted that the conditions of Article 16(4) were cumulative and that all must be satisfied if an agreement is to benefit from the provision. The CID further noted that the burden of submitting claims to prove that a business practice satisfies four cumulative conditions lies with the Undertakings claiming justification under Article 16(4) and the Commission had to satisfy itself that the submitted claims justified the practice.

242. The CID considered whether the restrictions in the Agreements would be reasonably necessary to achieve the efficiency claims submitted by the respondents. It was noted that for efficiency claims to satisfy the elements of Article 16(4), they must be specific to the agreement in the sense that there should not be other economically practicable and less restrictive means of achieving them as provided under the RBP Guidelines and affirmed by the practices of other jurisdictions including the European Union.⁹⁹

⁹⁹ The EC Guidelines on the application of Article 101(3) of the Treaty, paragraph 75.

243. In view of this, the CID assessed whether the alleged efficiencies submitted by the respondents meet the requirement of indispensability. The CID noted that the respondents did not demonstrate that there was no less anti-competitive means of attaining the objectives of the Agreements. To the contrary, the CID observed that the exclusive licensing of the media rights for CAF competitions could have been awarded for a less restrictive duration to an efficient broadcaster, including beIN, through an open and transparent tender process. Thus, the CID did not accept the argument that the only way to guarantee the alleged efficiencies was through the exclusive licencing of bundled broadcasting rights to beIN Sports for a period of twelve (12) years.
244. Further, the respondents did not demonstrate that the Agreements would not substantially eliminate actual or potential competition, in particular, where competition is already weakened in the market such as in this case. Having regard to the scope and duration of the exclusive Agreements, the CID noted that the respondents have not demonstrated that the Agreements will not significantly affect entry. The CID, having regard to the challenges raised by sub-licensing as discussed above, also considered that the mere act of providing the possibility of sub-licensing in the Agreement is not sufficient to demonstrate that the agreement will not substantially eliminate competition in the market.
245. The CID observed that the Respondents submitted claims to address the first and second criteria of Article 16(4) that the Agreements contribute to efficiencies in production and distribution whilst allowing consumers a fair share of the resulting benefits. However, the Respondents did not demonstrate that the restrictions were indispensable, and the Agreements would not substantially eliminate competition.
- 246. Therefore, the CID concluded that the Respondents did not provide evidence that the cumulative conditions of Article 16(4) of the Regulations are met. The CID thus holds that Article 16(4) of the Regulations has not been satisfied and cannot be exempted from the application of Article 16(1) of the Regulations. In view of the foregoing, the CID determined that the Agreements were in breach of Article 16 of the Regulations and had or were likely to have an appreciable negative effect on competition within the Common Market, and further incompatible with the objectives of the Common Market.**

F. REMEDIES

247. The CID noted that CAF and the Commission had negotiated proposed remedies which are referred to at paragraph 18 of this decision. However, the CID observed that in its submissions at the hearing, CAF deviated from the negotiated remedies. The CID will therefore assess the remedies as recommended by the Commission in its report to address the identified competition concerns:

- a) In relation to the award of future media rights, the acceptance of the proposed remedies, as set out in paragraph 18 of this decision.
- b) In relation to the 2016 beIN Agreement, the Commission recommended that all media rights awarded to beIN pursuant to the MOU entered on 16 February 2016 between Lagardère Sports and beIN, with regard to its operationalisation within the Common Market, shall cease on 31 December 2024. Any formal agreement concluded between CAF and beIN Group shall not go beyond the year 2024; and
- c) The closure of the investigation on the basis of the foregoing.

248. In assessing the proposed remedies, the CID observed that regard must be had to the effectiveness, necessity and proportionality of the remedies in restoring competition to the level that would have likely prevailed absent the anticompetitive conduct.

Open, Transparent and Non-Discriminatory Tender Process

249. The CID considered that a remedy requiring CAF to award future media rights by way of an open, transparent, and non-discriminatory tender process is sufficient and proportionate to address the competition harm identified. However, the CID observed that the wording of the proposed remedy was not expressly clear on whether the criteria would be widely publicised on different platforms including CAF's website. Further, the reading of the proposed remedy suggested that CAF was only obliged to publish the outcome of the tender process and not the tender criteria itself. The CID further observed that a timeline should be provided for CAF to provide the set of objective criteria to the Commission, for proper monitoring of compliance with this remedy.

250. In this regard, the CID determined that in order to address the concern relating to the manner in which future media rights are awarded:

- a) ***CAF shall award all future exclusive media 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.

- b) CAF shall, within 60 calendar days of the date from the CID's decision, submit the set of objective criteria to the Commission for its consideration and determination.*
- c) Upon approval by the Commission, CAF shall widely publicise the set of objective criteria on different platforms including CAF's website.*
- d) Where any material departure from the approved objective criteria is necessary due to prevailing market circumstances, CAF shall submit an amended set of objective criteria to the Commission for approval before launching any tender.*
- e) CAF shall publish the results of the winning bidders on its website.*

Duration of Exclusive Agreements

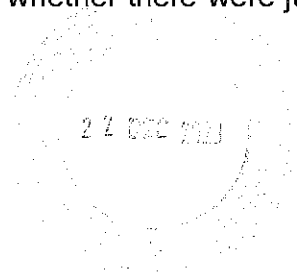
251. The CID observed that the proposed remedy was for CAF to limit future exclusive agreements to a period of four years, coupled with the possibility of extending such agreements to a longer period provided that such agreements would be notified to the Commission for its consideration and determination.
252. The CID observed that a duration of four years would be in line with the extensive jurisprudence on the optimal maximum length of exclusive agreements for the acquisition of football media rights based on the cycle of the tournaments.¹⁰⁰ Given that CAF competitions are played annually or every two years, the grant of exclusivity for a maximum period of four years would be sufficient to allow the commercial partners to recoup their investment for the viable operations of the CAF competitions while not disproportionately foreclosing competition. As such, a period of 4 years would include two editions of CAF's most popular tournament, i.e., the AFCON, in addition to four editions of the annual tournaments.
253. The CID further considered that the award of rights was time sensitive and therefore, the consideration and determination by the Commission should be made within 60 calendar days from the date of notification, i.e., after submission of complete information as determined by the Commission.
254. In this regard, the CID determined that to address the competition harm arising from the long-term exclusive agreements:

¹⁰⁰ See European Commission Decision of 23 July 2003, (COMP/C.2-37.398 - Joint selling of the commercial rights of the UEFA Champions League) and also COMP/C.2-38.173 — Joint selling of the media rights to the FA Premier League. Commission Decision of 22/III/2006.

CAF shall not enter into new exclusive agreements for the exploitation of media rights of CAF competitions within the Common Market for a duration longer than four years. Where CAF has justifiable grounds to enter into a future agreement for the exploitation of media rights of CAF competitions within the Common Market for a duration longer than four years, before implementation, CAF shall notify such an agreement to the Commission for its consideration and determination within 60 calendar days from the date of notification, i.e., after submission of complete information as determined by the Commission.

Bundling of Media Rights

255. With regard to the bundling of the media rights, the CID noted the following remedies proposed by the Commission:
- a) CAF should offer various media rights as separate commercially viable packages having regard to the media platform and transmission modes;
 - b) no single Undertaking shall be allowed to purchase all the packages; and
 - c) where CAF has justifiable grounds to grant all the media packages to a single purchaser, it shall duly inform the Commission.
256. The CID observed that there has been a shift towards the award of rights on a platform/technology neutral basis in recognition of certain benefits arising from it and having regard to emerging technologies. This is recognised in the Commission's submission that broadcasting a match across more than one platform by the same operator could create a more holistic package to consumers in light of the changing patterns in consumer behaviour. In view of this, the CID considered that the requirement for unbundling the media rights should be conducted on a platform neutral basis.
257. The CID further observed that the obligation for CAF to inform the Commission as part of the proposed remedy did not impose a requirement on CAF to notify the Commission for the latter's consideration and determination. In particular, it was noted that the award of the rights was time sensitive, and the time taken to assess the requests for authorisations could present some delays. The CID was, however, not convinced that an obligation on CAF to inform the Commission in the event that the rights are offered to a single purchaser was a sufficient remedy as it would allow CAF the ability to engage in the conduct of concern before the Commission would have adequate time to investigate whether there were justifiable grounds to award



the rights to a single purchaser. Being cognisant of the time sensitivity of the tournaments, the CID therefore considered that CAF should be under the obligation to notify the Commission of the proposed single purchaser for its consideration and determination within 60 calendar days from the date of notification before its implementation.

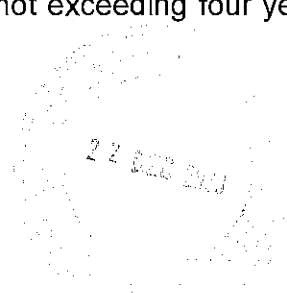
258. In this regard, the CID determined that:

- a) *CAF shall offer the various media rights as separate, commercially viable packages on a platform neutral basis.*
- b) *No single Undertaking shall be allowed to purchase all the media packages.*
- c) *Where CAF has justifiable grounds to grant all the media packages to a single Undertaking, CAF shall, before implementation, notify the Commission for its consideration and determination.*
- d) *The Commission shall issue its determination within 60 calendar days from the date of notification, i.e., after submission of complete information as determined by the Commission.*

Termination of the 2016 Agreement

259. It is recalled that the CID determined that the 2016 Agreement violated Article 16 of the Regulations since it was established that the lack of competitive tender processes for awarding the contract and the extensive scope of exclusivity granted to beIN likely led to a significant prevention, restriction, or distortion of competition in the relevant markets in the Common Market.

260. **To this effect, the CID accepted the recommendation of the Commission that all media rights awarded to beIN pursuant to the 2016 Agreement with regard to its operationalisation within the Common Market should cease in order to stop the continued harm on the market arising from the anti-competitive effects of the Agreement.** The CID observed that pursuant to Article 16(3) of the Regulations, an Agreement which is prohibited under Article 16(1) of the Regulations is considered void. For purposes of minimising disruptions on the market, the CID found the recommendation of the Commission for the 2016 Agreement to cease on 31 December 2024 proportionate. The CID further considered that the termination of the Agreements by end of 2024 would enable CAF to implement the orders pertaining to the award of exclusive agreements for a shorter, more optimum duration not exceeding four years, unless approved by the Commission.



G. FINES

261. The CID observed that Article 8(4) of the Regulations provides that the Commission shall, to the extent required to remedy or penalise anti-competitive activity:
- a) order the termination or nullification as the case may require of agreements, conduct, activities or decisions prohibited by Part 3 of the Regulations;
 - b) direct the enterprise to cease and desist from anticompetitive conduct and to take such steps as it believes may be necessary to overcome the effects of abuse of its dominant position in the market, or any other business conduct inconsistent with the principles as set out in the Regulations;
 - c) order payment of compensation to persons affected;
 - d) impose fines for breaches of the provisions of the Regulations.
262. The CID observed that the Commission considered that a breach of the Regulations had occurred, however, it did not address itself to the imposition of administrative fines and penalties. The CID noted that fines are an important tool in enforcing the Regulations and that the primary objective of fines is deterrence. Fines serve as a specific deterrent against future anti-competitive behaviour by Undertakings that have contravened the Regulations and as a general deterrent to other firms that may be contemplating engaging in anti-competitive conduct.
263. The CID is of the view that the Commission erred in failing to address itself on the issue of fines. The Commission should have stated its reasons for not considering a fine in this case, especially having regard to the nature of the breach.
264. The CID observed that the current case contains three breaches of the Regulations, i.e., lack of open and transparent tender processes, long term duration of exclusive agreements and expansive scope of bundling of rights which were critical for stakeholders in the relevant markets, which resulted in market foreclosure. In view of this, the CID contended that a fine is warranted in this case and therefore determined that a fine should be imposed on CAF and beIN.
265. In determining the fine, the CID considered the following:
- a. Article 8(4) of the Regulations
 - b. Rule 45 of the COMESA Competition Rules
 - c. Rule 79 of the COMESA Competition Rules
 - d. The COMESA Competition Commission Guidelines for Determination of Administrative Fines and Penalties.

266. Having regard to the base amount provided for in the COMESA Competition Commission Guidelines for Determination of Administrative Fines and Penalties for vertical agreements, the CID determined that a fine of 2% of their respective turnover in the Common Market be imposed on each of belN and CAF. The CID observed that the fine should not exceed the maximum monetary penalty for each contravention of Article 16 under Rule 79(1)(d) of the COMESA Competition Rules of **Three Hundred Thousand United States Dollars (USD 300,000)**. This cumulatively translates to a total fine of **one million and eight hundred thousand United States Dollars (USD 1,800,000)**. In its consideration, the CID observed that the Commission did not direct its mind to the analysis of a fine. However, noting the need to impose an appropriate fine to deter future violations of the Regulations, the CID resolved to impose a reduced fine of **Three Hundred Thousand United States Dollars (USD 300,000)** on each Respondent.

H. ORDER

267. Having regard to the foregoing assessment, the CID **determined that the Agreements are in breach of Article 16(1) of the Regulations.**

268. **NOW THEREFORE**, in the exercise of the powers conferred upon it by the Regulations, the CID hereby orders that:

- a. **All media rights awarded to belN pursuant to the Agreements, with regard to its operationalisation within the Common Market, shall cease on 31 December 2024.**
- b. **CAF shall award all future exclusive media 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, as outlined below:**
 - i. *CAF shall, within 60 calendar days of the date from the CID's decision, submit the set of objective criteria to the Commission for its consideration and determination.*
 - ii. *Upon approval by the Commission, CAF shall widely publicise the set of objective criteria on different platforms including CAF's website.*
 - iii. *Where any material departure from the approved objective criteria is necessary due to prevailing market circumstances, CAF shall submit an amended set of objective criteria to the Commission for approval before launching any tender.*

- iv. *CAF shall publish the results of the winning bidders on its website.*
- c. CAF shall not enter into new exclusive agreements for the exploitation of media rights of CAF competitions within the Common Market for a duration longer than four years. Where CAF has justifiable grounds to enter into a future exclusive agreement for the exploitation of media rights of CAF competitions within the Common Market for a duration exceeding four years, before implementation, CAF shall notify the agreement to the Commission for its consideration and determination within 60 calendar days from the date of notification, i.e., after submission of complete information as determined by the Commission; and
- d. CAF shall offer the various media rights as separate, commercially viable packages on a platform neutral basis, as outlined below:
 - i. *No single Undertaking shall be allowed to purchase all the media packages.*
 - ii. *Where CAF has justifiable grounds to grant all the media packages to a single Undertaking, CAF shall, before implementation, notify the Commission for its consideration and determination.*
 - iii. *The Commission shall issue its determination within 60 calendar days from the date of notification, i.e., after submission of complete information as determined by the Commission.*
- e. The CID hereby imposes a fine of Three Hundred Thousand United States Dollars (USD 300,000) on each of CAF and beIN, to be paid within a period of 90 calendar days from the date of the CID's decision.

269. Pursuant to the Regulations, failure to comply with the above orders shall constitute a breach of the Regulations and parties shall be liable to a fine and/or any such penalties as may be assessed. These Orders shall take effect from the date of the decision of the CID.

270. A party aggrieved by the decision of the CID may refer the matter to the Appeals Board within 60 days of the decision being made, failing which the decision of the CID shall be final and binding.

Issued this 22nd day of December 2023 in Lusaka, Zambia

Commissioner Ellen Ruparanganda

Commissioner Brian Muletambo Lingela

Commissioner Vipin Naugah

