



**COMESA Competition Commission**

Kang'ombe House, 5th Floor-West Wing

P.O. Box 30742

Lilongwe 3, Malawi

Tel: +265 (0) 1 772 466

Email: [compcom@comesa.int](mailto:compcom@comesa.int)



**Common Market for Eastern  
and Southern Africa**

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

**ECONOMIC SECTOR: Sports marketing rights**

**10<sup>th</sup> March 2021**

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

This document is the intellectual property of the COMESA Competition Commission and the same or any part thereof shall not be used in any manner whatsoever, without the express permission of the COMESA Competition Commission.

## **Table of Contents**

<b>Executive Summary</b> .....	<b>3</b>
<b>Introduction</b> .....	<b>4</b>
<b>The Parties</b> .....	<b>6</b>
<b>CAF</b> .....	<b>6</b>
<b>The main CAF Competitions</b> .....	<b>7</b>
<b>The Lagardère Group</b> .....	<b>9</b>
<b>Orange</b> .....	<b>10</b>
<b>The Agreement under Investigation – the Orange Sponsorship Agreement</b> .....	<b>10</b>
<b>Legal Provisions</b> .....	<b>11</b>
<b>Whether there exists an ‘agreement’ between undertakings</b> .....	<b>12</b>
(a) <i>Whether the parties qualify as ‘undertaking’</i> .....	12
(b) <i>Whether there exists an ‘agreement’</i> .....	14
<b>Whether the agreement was implemented or intended to be implemented in the Common Market</b> .....	<b>16</b>
<b>Competition Analysis and Relevant Observations</b> .....	<b>18</b>
<b>Consideration of Relevant Markets</b> .....	<b>18</b>
<i>Relevant Product Market</i> .....	19
<i>Relevant Geographic Market</i> .....	23
<b>Consideration of Restriction of Competition by Object or Effects</b> .....	<b>25</b>
<b>The “Effects” Test</b> .....	<b>25</b>
<b>Market Structure</b> .....	<b>25</b>
<b>Barriers to Entry and Expansion</b> .....	<b>26</b>
<b>Consideration of Effects on Competition</b> .....	<b>26</b>
<b>Consideration of Exemption under Article 16(4)</b> .....	<b>34</b>
<b>Consideration of Effect on Trade between Member States</b> .....	<b>36</b>
<b>Conclusions</b> .....	<b>36</b>
<b>Determinations</b> .....	<b>37</b>

## **Executive Summary**

### **Background**

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

### **Relevant Market**

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

### **Effects on Competition**

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

### **Conclusion**

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

### **Determination**

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

## **PREAMBLE**

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

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

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

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

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

## **Introduction**

1. On 13<sup>th</sup> February 2017, the Commission commenced an investigation, pursuant to Article 22 of the Regulations, into possible violations of Article 16 and Article 18 of the Regulations by the Confédération Africaine de Football (“**CAF**”) into agreements entered into relating to the commercialisation of media and marketing rights for CAF competitions.
2. On 16<sup>th</sup> April 2019, following additional information gathered during the investigation, the Commission identified additional respondents, which led the Commission to issue Notices of Investigation to Lagardère Sports SAS (“**Lagardère Sports**”), and Orange SA (“**Orange**”).
3. This report is concerned with the agreement entered into between CAF, Lagardère Sports, and Orange, for the commercialisation of the marketing rights. Specifically, the concerned agreement is the Sponsorship agreement for the Marketing of CAF Football Events entered with Orange Brand Services Ltd on 12<sup>th</sup> December 2016 (the “**Orange Sponsorship Agreement**”).
4. The aim of the investigation was to determine whether the Orange Sponsorship Agreement is in contravention of the Regulations. The alleged competition infringements assessed in this report concern:
  - i. the award of marketing rights for CAF competitions in the absence of an open and competitive tender process; and
  - ii. the long-term duration of the contract for the award of CAF marketing rights to Orange.
5. The Commission’s investigation findings are set out in this Report.

*Statutory timeline for conclusion of the Investigation*

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

## **The Parties**

### **CAF**

7. Article 1 of the CAF Statutes provides that CAF is an international non-governmental organisation with its own legal persona, founded in 1957 in Khartoum, Sudan. The headquarters of CAF is located in Cairo, Egypt. CAF is the governing body of football in Africa and has fifty-four (54) Member Associations, which are the national football associations of the African countries, and two (2) Associate Members (Reunion Island and Zanzibar).
8. The legislative body and supreme authority of CAF is the General Assembly<sup>1</sup>. Each of the fifty-four (54) Member Associations have one vote at the General Assembly. The General Assembly elects the President of CAF and the members of the Executive Committee<sup>2</sup> and is the only body which can make amendments to the CAF Statutes and the Regulations Governing the Application of the Statutes<sup>3</sup>.
9. The executive body of CAF is the Executive Committee and consists of the President, thirteen (13) members and one (1) female member. The Executive Committee is responsible for implementing the policies and decisions of the General Assembly, and the management and the administration of CAF. It is the supreme authority for all matters concerning CAF competitions<sup>4</sup>.
10. Currently CAF has exclusive rights to organize eleven (11) competitions<sup>5</sup>, namely:
  - For national teams
    - i. Africa Cup of Nations (“AFCON”);
    - ii. African Nations Championship “(CHAN”);
    - iii. U-20 AFCON;
    - iv. U-17 AFCON;
    - v. U-23 AFCON;
    - vi. Women’s AFCON;
    - vii. Futsal AFCON;
    - viii. Beach Soccer AFCON;
  - For Clubs
    - ix. CAF Champions League;
    - x. CAF Confederation Cup; and
    - xi. CAF Super Cup

---

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

<sup>2</sup> *Ibid.*

<sup>3</sup> Article 19 of the CAF Statutes.

<sup>4</sup> Article 23 of the CAF Statutes.

<sup>5</sup> Article 58 of the CAF Statutes. The Competitions are described further below.

11. Further, CAF has the exclusive right to organize any other continental or intercontinental football competitions.
12. The Executive Committee is assisted in the fulfilment of its duties by standing and ad-Hoc Committees. The relevant Standing Committees involved with the Orange Sponsorship Agreement are the following:
  - i. TV and Marketing Committee which advises the Executive Committee with regard to marketing and television matters, as well as on the drafting and execution of marketing, sponsorship, broadcasting, television and multimedia contracts with CAF's partners<sup>6</sup>; and
  - ii. Strategic Committee which deals with global strategies as well as political, economic and social aspects of football<sup>7</sup>. The Strategic Committee consists of CAF representatives as well as representatives from Lagardère Sports<sup>8</sup>.
13. According to Article 59 of the CAF Statutes, CAF and the national football associations of African countries are the legal owners of all rights arising from competitions and other events which fall under their respective areas of responsibility. These rights include, among others, all kinds of pecuniary rights, audio-visual recording rights, reproduction and broadcasting rights, multimedia rights and marketing and promotional rights, copyright as well as intellectual property rights; for example, covering emblems.
14. The Executive Committee is responsible for determining how and to what extent these rights are exploited. Under the CAF Statutes, it is provided that the Executive Committee is sovereign in relation to the exploitation of these rights and that it can exploit them either directly, or with third parties, or delegate their exploitation totally or partially. The Commission understands that CAF is thus entitled to make decisions pertaining to the exploitation of the media and marketing rights, and in so doing, it may choose to delegate these powers to any third party, for example such as Lagardère Sports.

## **The main CAF Competitions**

### ***The Africa Cup of Nations***

15. The AFCON (officially CAN: Coupe d'Afrique des Nations) is the main regional football competition of CAF and is held every two years. The AFCON is open to the national representative male teams of the national associations affiliated to CAF, each association being entitled to enter one team. The AFCON is organised in two phases: a qualifying phase; and a final phase.

---

<sup>6</sup> Article 45 of the CAF Statutes.

<sup>7</sup> Article 47 of the CAF Statutes.

<sup>8</sup> Paragraph 15 of the Investigation Records of CAF on 5<sup>th</sup> March 2017.

16. The AFCON recorded for its 2006 edition a cumulated audience of more than 4.2 billion TV viewers, placing the competition to the 3<sup>rd</sup> row of the world football events<sup>9,10</sup>. The global TV audience for the 2013 AFCON tournament was estimated at 6 billion viewers<sup>11</sup>.

### ***CAF Champions League***

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

### ***CAF Confederation Cup***

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

### ***CHAN***

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

### ***The CAF Super Cup***

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

---

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

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

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



### ***The U-20 AFCON***

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

### ***The U-23 AFCON***

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

### **The Lagardère Group**

24. Lagardère Sports is a French simplified company limited by shares (*Société par actions simplifiée*) registered under No. RCS NANTERRE 873 803 456, with its registered offices at 1618 rue du Dome, 92100 Boulogne-Billancourt, France.
25. Lagardère Sports belonged to the Lagardère Group (i.e. Lagardère SCA and any entity directly or indirectly controlled by Lagardère SCA), which describes itself as the global leader in content publishing, production, broadcasting and distribution, whose powerful brands leverage its virtual and physical networks to attract audiences. It is noted that the Lagardère Group sold its sport business (including Lagardère Sports SAS and IFAP Sports) to H.I.G Capital in April 2020 (retaining only a minority, non-controlling interest in the divested entities) at which point Lagardère Sports SAS and IFAP Sports ceased to form part of the Lagardère Group. Subsequent to this transaction, Lagardère Sports has been re-named Sportfive EMEA.
26. The Lagardere sports' division previously traded under Sportfive S.A.S ("**Sportfive**"). The Sportfive Group was active in the trading of sport broadcasting rights, especially football, marketing services for events, including sport events. In the sector of broadcasting rights, its role is to act as an intermediary between the original rights holders and the content users<sup>12</sup>. 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<sup>13</sup>.
27. It is noted that the other party to the Orange Sponsorship Agreement is IFAP Sports. IFAP Sports obtained the rights to commercialise the media and marketing rights of the

---

<sup>12</sup> Case No COMP/M.4519 - LAGARDERE / SPORTFIVE, decision of 18.01.2007, paragraph 4. Accessed at [http://ec.europa.eu/competition/mergers/cases/decisions/m4519\\_20070118\\_20310\\_en.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m4519_20070118_20310_en.pdf)

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

three CAF competitions (namely Women's AFCON, U17 AFCON, and Futsal AFCON) for a duration of 12 years<sup>14</sup>.

## **Orange**

28. Orange is one of the largest operators of mobile and internet services in Europe and Africa and a global leader in corporate telecommunication services<sup>15</sup>. Orange was incorporated as a French société anonyme on December 31, 1996 for a 99- year term. Orange has its registered office at 78, rue Olivier de Serres, 75015 Paris, France. Orange provides a range of fixed telephony and mobile telecommunications, data transmission, and other value-added services to consumers, businesses, and other telecommunications operators in Europe, Africa, and the Middle East. The company offers mobile services, such as voice, SMS, and data; fixed broadband and narrowband services, as well as fixed network business solutions, including voice and data; and convergence packages. It also sells mobile phones, broadband equipment, and connected objects and accessories.
29. According to its 2018 annual report, Orange is one of the world's leading telecommunications operators with revenue of 41 billion euros and 151,000 employees worldwide, including 92,000 in France, at December 31, 2018. Orange is the parent company of the Orange group. The Group served 264 million customers at December 31, 2018, of which 204 million were mobile customers and 20 million fixed broadband customers. The Group is present in 27 countries<sup>16</sup>.

## **The Agreement under Investigation – the Orange Sponsorship Agreement**

30. Pursuant to Clause 4.1 of the Orange Sponsorship Agreement, CAF granted to Orange the status of "Official Sponsor" of the Events and the right to use the related marketing rights and opportunities. Orange was entitled to use the Sponsorship Rights on an exclusive basis<sup>17</sup> for the following product category: fixed or mobile electronic communication services including IP telephony, IPTV, public telephony, messaging services, providing the public with internet access; sim cards that allow access to these services; distribution of television services (linear and catching).
31. Orange was entitled to use the Sponsorship Rights for a period of time starting December 12<sup>th</sup>, 2016 and ending on the day following the final Match of the last Event among the Events (2024). Events covered under the sponsorship agreement include:

---

<sup>14</sup> See Press Release from CAF dated 27<sup>th</sup> October 2015, 'CAF AND IFAP SPORTS CONTRACTUALLY BOUND TILL 2028'. Accessed at <http://www.cafonline.com/en-US/NewsCenter/News/NewsDetails?id=Sq5IYbHKGFXvK%2Fs89uviZQ%3D%3D>

<sup>15</sup> <https://www.orange.com/en/Group/Key-facts/Discover-Orange-s-key-facts>

<sup>16</sup> Orange 2018 Registration Document – Annual Financial Report.

<sup>17</sup> Clauses 4.2 and 5.1(j).

- Final tournament of AFCON: four (4) editions (2017, 2019, 2021, and 2023);
  - Final tournament of U-20 AFCON: four (4) editions (2017, 2019, 2021, and 2023);
  - Final tournament of Women AFCON: four (4) editions (2018, 2020, 2022, and 2024);
  - Second phase of CAF Champions League: eight (8) editions (yearly from 2017 to 2024);
  - CAF Super Cup: eight (8) editions: yearly from 2017 to 2024.
32. Fees payable by Orange pursuant to Appendices 8 and 9 of the agreement included<sup>18</sup>:
- a) a license fee of USD [REDACTED] payable to Lagardère Sports and USD [REDACTED] payable to IFAP Sports for the account of CAF;
  - b) Sponsorship fee of USD [REDACTED] payable to Lagardère Sports and USD [REDACTED] payable to IFAP Sports for the account of CAF;
  - c) Service Fee of USD [REDACTED] payable to Lagardère Sports as technical service provider.
33. The Orange Agreement further states that in the event that Orange wishes to add new activities, products or services within the Products Category which constitute new technologies, it will meet with CAF to discuss the conditions of such inclusion. Additionally, Orange is granted a right of first refusal in relation to such new activities, products or services provided it first gives notice to CAF and that such new activities, products or services constitute new technologies related to Orange's business.

### **Legal Provisions**

34. Article 3(2) of the Regulations provides that the Regulations apply to conduct covered by Parts 3, 4 and 5 which have an appreciable effect on trade between Member States and which restrict competition in the Common Market. Under Part 3 of the Regulations, Article 16(1) further provides that:
- “The following shall be prohibited as incompatible with the Common Market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which:*
- (a) may affect trade between Member States; and*
  - (b) have as their object or effect the prevention, restriction or distortion of competition within the Common Market.”*
35. Article 16(2) provides that Article 16(1) applies “...*only if the agreement, decision or concerted practice is, or is intended to be, implemented within the Common Market.*”

---

<sup>18</sup> Contains confidential information which has been redacted.

36. Article 16(3) provides that any agreement or decision which is prohibited by Article 16(1) is void. It is noted that in line with established case law<sup>19</sup>, this nullity only applies to clauses in an agreement which are caught by the prohibition. It is only the offending clauses which would be required to be amended or terminated, and not the agreements as a whole, to the extent that this does not affect the performance of the agreements. The agreement as a whole will only be void where those clauses are not severable from the remaining terms of the agreement.
37. Under Article 16(4), the provisions of Article 16(1) may be declared inapplicable if the agreement under review “*contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:*
- (a) *impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;*
  - (b) *afford such undertakings the possibility of eliminating competition in respect of a substantial market for the goods or services in question.”*
38. Thus, in assessing whether agreements within the meaning of Article 16 infringe the Regulations, the following cumulative elements must be established:
- (a) Whether there exists an agreement between undertakings;
  - (b) Whether the agreement is or is intended to be implemented within the Common Market;
  - (c) Whether the agreement has the object or effect to prevent, restrict or distort competition within the Common Market;
  - (d) Whether it affects trade between Member States.

### **Whether there exists an ‘agreement’ between undertakings**

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

#### ***(a) Whether the parties qualify as ‘undertaking’***

40. An undertaking is defined under Article 1 of the Regulations as any natural or legal person, public or private, involved in the production of, or the trade in goods, or the provision of services. Thus, any entity engaged in the offer of goods and services on a given market, regardless of its legal status and the way it is financed, constitutes an undertaking within the meaning of Article 1 of the Regulations.

---

<sup>19</sup> See *Société Technique Minière v the EC*, Case 56/65 [1966] ECR at page 250.

41. As described previously, Lagardère Sports and Orange are both clearly engaged in the offer of goods and services on the market, and thus fall within the statutory definition of ‘undertaking’ for the purposes of the Regulations.
42. As regard the activities of CAF, the Commission considered that while CAF is a sporting body, it engages in economic activities by offering rights for exploitation of media and marketing rights for CAF competition on the market and it generates economic revenues through activities such as the conclusion of broadcasting and marketing contracts, and exploitation of CAF emblems. CAF therefore qualify as an ‘undertaking’ for the purposes of the Regulations.
43. It is noted that CAF previously submitted that they qualify for an exemption from the provisions of the Regulations under Article 4(1)(c) which provides that “*These Regulations shall not apply to activities of professional associations designed to develop or enforce professional standards reasonably necessary for the protection of the public interest.*”
44. CAF submitted that “it is a non-for-profit professional association constituted of football national federations that aim to develop -*inter alia*- the professional standards of football in Africa, which constitutes indeed a public interest”<sup>20</sup>.
45. “Professional services, also known as ‘liberal professions’ are generally defined as occupations requiring special training in the arts or sciences, such as lawyers, engineers, architects and accountants.”<sup>21</sup> The OECD further recognised that professional regulation is often necessary to address a perceived ‘market failure’ in the respective markets for the professional service<sup>22</sup>, noting that “in some cases, consumers are unable to assess the quality of services that have been provided to them and, in some cases are not in a position to determine which services they should purchase. As a result, it is feared that competition in professional services will lead to consumers being offered low quality and inappropriate services.”<sup>23</sup>
46. In view of the foregoing characteristics, professional associations would refer mainly to associations formed for persons whose academic training is specialized for the purpose of providing a specialist function; further that the function of professional associations is to regulate activity of undertakings within a market to ensure greater access to quality services for consumers.
47. Even if the Commission were to consider CAF as a professional association, it is noted that the provision of Article 4(1)(c) does not exempt **all** the activities of a professional association. The provision exempts only those activities which are “*reasonably*

---

<sup>20</sup> Paragraph 40 of CAF letter to COMESA dated 28<sup>th</sup> March 2017.

<sup>21</sup> Canton E., Ciriaci D., Solera I., *The Economic Impact of Professional Services Liberalisation* taken from [http://ec.europa.eu/economy\\_finance/publications/economic\\_paper/2014/pdf/ecp533\\_en.pdf](http://ec.europa.eu/economy_finance/publications/economic_paper/2014/pdf/ecp533_en.pdf)

<sup>22</sup> OECD paper (2002) on *Competition in Professional Services*

<sup>23</sup> OECD paper, supra pg. 7

*necessary for the protection of public interest*”, which have not been demonstrated in the case under review<sup>24</sup>.

48. The Commission further noted that, the fact that an organisation lacks a profit-motive or does not have an economic purpose does not, in itself, mean that an activity is not economic<sup>25</sup>. In *Distribution of Package Tours during the 1990 World Cup*<sup>26</sup>, the European Commission (the “EC”) held that FIFA, which carry out similar activities as CAF, as well as the Italian football association were considered as undertakings which were subject to Article 101 of the Treaty for the Functioning of the European Union (the “TFEU”), which is the equivalent of Article 16 of the Regulations. The EC recognised that FIFA is a federation of sports associations and accordingly carries out sports activities. However, it also considered that FIFA carried out lucrative economic activities such as the conclusion of advertising contracts, exploitation of World Cup emblems and the conclusion of television broadcasting contracts.
49. In view of the foregoing, the Commission considered that CAF’s request for exemption under Article 4 was not founded and is satisfied that the activities of CAF qualifies the latter as an undertaking whose conduct is subject to the provisions of the Regulations.

*(b) Whether there exists an ‘agreement’*

50. The Commission has next considered whether there exists an agreement between the above undertakings. The COMESA GUIDELINES ON RESTRICTIVE BUSINESS PRACTICES provides that the defining criterion of an “agreement” within the meaning of Article 16 of the Regulations is the existence of a concurrence of wills between the parties. This is consistent with the decision of the General Court in *Bayer AG v Commission*, wherein it was held that the concept of an agreement between undertakings “centres around the existence of a **concurrence of wills** between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties’ intention”<sup>27</sup>. “It is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way”<sup>28</sup>. 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.

---

<sup>24</sup> It is further noted that in Case C- 519/04 P Meca- Medina v Commission [2006], it was held that the International Olympics Committee was held as an undertaking and further the Court of Justice confirmed that “rules on sport are subject to community law in so far as it constitutes an economic activity. If those rules do not constitute restrictions on freedom of movement of persons and freedom to provide services because they concern questions of purely sporting interest, that fact does not mean that the sporting activity in question necessarily falls outside the scope of the Community rules on competition”.

<sup>25</sup> Whish R., Bailey D., *Competition Law* 7<sup>th</sup> & 8<sup>th</sup> ed.

<sup>26</sup> 92/521/EEC: Commission Decision of 27 October 1992 relating to a proceeding under Article 85 of the EEC Treaty (IV/33.384 and IV/33.378 - Distribution of package tours during the 1990 World Cup), paragraph 43 – 47.

<sup>27</sup> Judgment of the Court of First Instance of 26 October 2000, Bayer AG v Commission of the European Communities, paragraph 69.

<sup>28</sup> *Ibid*, paragraph 67.

51. It is noted that the application of Article 16 is not restricted to horizontal agreements (i.e. agreements between undertakings operating at same levels of the value chain or economy, where the undertakings in question are usually actual or potential competitors) but is also applicable to vertical agreements (i.e. agreements between undertakings operating at different levels of the value chain or economy). In case of vertical agreements, as in the present case, it becomes important to distinguish conduct agreed upon (whether expressly or tacitly) between the undertakings to the agreement from purely unilateral conduct.
52. There is clear documentary evidence of the conclusion of the Orange Sponsorship Agreement, which sets out the parties' joint intention to conduct themselves as per the terms of the agreements for the exploitation of the marketing rights of CAF competitions. The Commission considered that the conclusion of the Orange Sponsorship Agreement cannot be construed as unilateral conduct by CAF.

*Submissions by Orange*

53. Orange disputes the existence of an agreement within the meaning of Article 16(1) of the Regulations. Orange submits that although it "signed the Orange Agreement under investigation, the decision to award the marketing rights for the CAF competitions from 2017 to 2024 to Orange without conducting a competitive tender process was a unilateral decision taken by CAF and Lagardère only". Furthermore, Orange had neither control nor visibility on the process actually implemented by CAF and Lagardère for the conclusion of the various marketing agreements.
54. The Orange Agreement was based on a standard template provided by CAF and the terms of such template were very similar to the previous agreement signed by the parties. In particular, the duration of the marketing rights granted to Orange was not the result of a negotiation between CAF and Orange but was unilaterally determined by CAF (and Lagardère) in line with previous and similar agreements concluded with other sponsors. For the above reasons, Orange considers that the award of the marketing rights for a period of eight (8) years in the absence of an open and competitive tender process constitutes a unilateral decision which cannot fall under the prohibition laid down in Article 16(1) of the COMESA Competition Regulations.
55. As a result, Orange submits that it cannot be accused of anti-competitive behaviour falling within Article 16(1) of the COMESA Competition Regulations as it neither decided on the procedure for the award of the marketing rights under investigation nor on the duration of these rights.

*The Commission's Assessment*

56. The Commission notes that Orange has itself stated that the duration of the contract, which is the main issue under consideration in the Orange agreement, is consistent with the geographical location of CAF competitions that are held in specific Orange

territories; and necessary for Orange to secure a proper return on the investments it has made. Orange further submits that the investments by Orange under the Orange Agreement would not have been made if it were for a shorter term. It is evident from these submissions that there was a ‘meeting of minds’ or strong mutual interest for both CAF, represented by Lagardere Sport, and Orange as regard the duration of the agreement for a period of 8 years.

57. Further, the Commission was informed by CAF that sponsors have the ability to negotiate the duration of the contract, contrary to Orange’s claim.
58. For the above reasons, the Commission maintains that the agreement between CAF, Lagardere Sports, and Orange falls within the ambit of an agreement as contemplated by Article 16(1) of the Regulations.
59. The Commission is thus satisfied that the agreement under review must be regarded as an agreement between undertakings within the scope of Article 16(1) of the Regulations.

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

60. The Commission has assessed the scope of the agreements to determine whether these were or would be implemented within the Common Market. The concept of ‘implementation’ require that the business practice must have taken place within the Common Market; must have involved companies established within the Common Market; or must have targeted customers in the Common Market. In *Woodpulp*<sup>29</sup> case, the European Court of Justice (the “ECJ”) established that the criterion for determining whether an agreement has been “implemented” is satisfied by direct sales of the relevant products to purchasers established in the Community, irrespective of the location of the sources of supply and the production plant, and where the anticompetitive agreement was formed. The ECJ stated that:

*“It should be noted that the main sources of supply of wood pulp are outside the Community, in Canada, the United States, Sweden and Finland and that the market therefore has global dimensions. Where wood pulp producers established in those countries sell directly to purchasers established in the Community and engage in price competition in order to win orders from those customers, that constitutes competition within the common market.”*<sup>30</sup>

61. The Commission notes that while some of the parties to the agreements are domiciled outside the Common Market, the Orange Sponsorship Agreement cover the exploitation of marketing rights directly to customers and consumers located in the

---

<sup>29</sup> JUDGMENT OF 27. 9. 1988 — JOINED CASES 89, 104, 114, 116, 117 AND 125 TO 129/85

<sup>30</sup> *Ibid*, paragraphs 12-13.



- Member States. The Commission thus considers that the Agreements satisfy the territorial scope of Article 16(2) of the Regulations.
62. Lagardère Sports argued that the Commission did not have jurisdiction in the investigation of the agreements, submitting that *“the geographic and financial scope of Commercial Agreements largely exceeds the Common market as COMESA Member States represent a small minority of the overall scope of such agreements”* and that *“the CAF/LS Agreements and the Commercial Agreements have their economic “centre of gravity” outside of the Common market”*.
63. Lagardère Sports further submitted that *“the commercialisation of sport (media and marketing) rights outside of COMESA (e.g. to third parties outside of COMESA) fall outside the jurisdictional scope of the Regulations. As a result, LS understands that the Commission may not intervene in contractual relationships outside of its jurisdiction. Any intervention beyond COMESA (i.e. regarding any agreement that is either worldwide or regional (beyond COMESA) in scope) would be ultra vires in relation to the COMESA Treaty and the Regulations”*.
64. It is noted that Articles 3(2) and 16(2) of the Regulations empowers the Commission to investigate conduct which has an effect within the Common Market. The argument that the Commission cannot review an agreement because the agreement also covers territories which do not fall within the Common Market cannot be sustained. The underlying principle for the effects doctrine is not whether a country or geographic market constitutes a significant share of the geographic reach of the alleged conduct (this may have other implications for financial penalties), but whether the conduct significantly harms competition within the relevant geographic markets.
65. Despite Lagardère Sports’ submission that the Member States account for a minority of the scope of the agreements, it is noted that the value of football rights is linked to the performance/ popularity of the clubs and countries participating in the competitions. According to a Club ranking as at June 2019<sup>31</sup>, eight out of the top ten clubs competing in CAF competitions represent COMESA Member States (being 2 clubs from Egypt, 2 clubs from the DRC, 2 clubs from Tunisia, and 2 clubs from Sudan), which clearly illustrate the significance of COMESA Member States in the context of the CAF competitions.
66. Further, by virtue of their membership to CAF and participation in the competitions, the Member States are directly affected by the effects of the Agreements. It is a misdirection at law and fact to contend that the Commission lacks jurisdiction on the premise that the commercial value of these agreements in the Common Market relative to the entire value of the agreements is diminutive; rather the jurisdiction test should be

---

<sup>31</sup> <https://footballdatabase.com/ranking/africa/1> [Updated after matches played on 9 June 2019].

concerned with the effect of the agreements on the competitive process and consumers within the Common Market.

67. It should be noted that in relation to the concern raised by Lagardere Sports regarding an intervention by the Commission outside COMESA, any remedy envisaged in this Report relates strictly to the effects of the agreements in question in the COMESA Member States. The commercial agreements would be considered null and void in their entirety only in an event where the parties to the agreement(s) are unable to amend the relevant provisions to ensure their compatibility with the prevailing laws in the Common Market, including the Regulations.
68. The Commission has next sought to determine whether the conduct has the object or effect of restricting competition and trade between Member States. Such an analysis can only be undertaken following the identification of the relevant markets within which the parties concerned compete, and thus within which the competition effects from the conduct under review can be assessed. This is considered in the section further below dealing with competition analysis.

## **Competition Analysis and Relevant Observations**

### **Consideration of Relevant Markets**

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

*“Market definition is a tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which competition policy is applied by the Commission. The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure”*

70. The constituent product market and geographic market are typically defined having regard to demand and supply substitution factors, notably possible consumer and supplier responses to the imposition of a "small but significant and non-transitory" increase in the relative price of the focal product supplied by the undertakings concerned (the "SSNIP test").
71. From a demand perspective, the SSNIP test seeks to assess whether customers would switch to other products in response to a hypothetical small but significant increase in the price of the focal product. From a supply perspective, the test seeks to assess whether suppliers of other products could switch to production in response to a

hypothetical small but significant increase in the price of the focal product, without incurring significant additional costs and risks.

***Relevant Product Market***

72. Paragraph 7 of the Commission’s Guidelines on Market Definition states that:
- “A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products’ characteristics, their prices and their intended use”.***
73. The rights under consideration affect different levels of the supply chain. The upstream level is concerned with the interactions between the rights owners and their intermediaries, if any; and the interactions between the rights owners or their intermediaries and the commercial partners; while the downstream levels is concerned with the interactions between the commercial partners and the consumers, in this case the football fans.
74. At upstream level, the Commission has considered that the market for acquisition of marketing rights can be distinguished from the market for acquisition of intermediation right, for reasons discussed below.
75. The players in the intermediation market consist of the right owners of sporting competitions (such as CAF) and intermediaries/sports marketing agencies (such as Lagardère Sports) who are engaged to perform a certain function, *inter alia*, the management of commercial rights. The motive of the rights holder is to ensure that maximum revenues are received from the exploitation of its rights. The objective of the sports marketing agency is to secure relevant third parties, who wish to exploit these rights. In their submission<sup>32</sup>, Lagardère Sports stated that the intermediation sport market is one where demand comes from rights holders such as CAF while commercialisation and management services are provided by sport agencies.
76. The birth and growth of the market for sports marketing has led to the development of the profession of intermediary agencies specialized in this market. The increasing complexity of the implementation of these rights - from a technical, legal, economic and commercial point of view - has led to the rights owners appointing specialized agencies to ensure complete or partial management of the rights. Commercialisation of the media and marketing rights often cannot be managed directly by sports federations and sports clubs which may not have the capabilities to deal with the complexity of these services.
77. There are certain considerations that a rights holder would have to take into account when determining whether to exploit the rights internally through an in-house division, or by appointment of an intermediary. The choice of a marketing option in-house

---

<sup>32</sup> Submission by Lagardere Sports dated 21<sup>st</sup> April 2017.

- necessitates the acquisition of an internal marketing skill that generates fixed costs, the profitability and performance of which may not be adapted to the portfolio of rights managed by the holder. In addition, the intermediary ensures the legal, financial and operational follow-up of the contracts on all of these services.
78. In this market, intermediary agencies purchase media and marketing rights or, in most cases, obtain a mandate from the right owners to commercialise them to broadcasters or advertisers. The function of the agencies entails the selling, negotiation of contracts and collecting of revenues for the rights holder.
79. In the case of media rights, the activity of the intermediary will include obtaining the best possible audio-visual exploitation of the competition for the rights holder by seeking out the interested broadcasters to obtain the best possible price and coverage; while in the case of marketing rights, the intermediary will seek out marketing agencies to sponsor the matches in exchange for their brand name to be associated with the competitions.
80. In these circumstances, it is clear that intermediaries perform a distinct role and incur distinct risks and costs from broadcasters and sponsors operating at a downstream level. Thus, the Commission is satisfied that the market for intermediation services is distinct from that of the acquisition of market rights. For purposes of this report, the market for intermediation services will not be further considered in the competitive assessment as it is not relevant to the Orange Sponsorship Agreement.
81. Within the marketing rights market, the Commission has considered whether sub-segmentation is required.
82. Sponsors seek to purchase the rights to use the marks of the sports events or otherwise affiliate with the rights owners or the events for purposes of advertising and promoting goods and services. These goods and services broadly entail shirt and equipment sponsoring, selling panel advertising, billboard advertising in the stadium, as well as a variety of activities generally categorised as ‘public relations’ which involve organizing public relations and hospitality events.
83. Marketing communication activities in the field of sports may be construed as a distinct market given that *“from a demand perspective, sports events may be especially suitable to attract certain groups of customers”*<sup>33</sup>. Sponsors seek to secure marketing rights for sport events based on the popularity of the events and as such its expected returns from the publicity i.e. they gauge the level of publicity that an event is expected to achieve in order to weigh whether or not to associate their brands with that particular event. The OECD observed that *“the profits advertisers make from the TV channel increase in parallel with the increase of number of viewers.”*<sup>34</sup>

---

<sup>33</sup> EU Case No. COMP/M.2483 Canal+/RTL/GFCD/JV para 27

<sup>34</sup> OECD Policy Roundtables supra 2013 pg. 87

*Submissions by Orange*

84. Orange submitted that marketing and media rights present different characteristics (in terms of purpose, structure, value and purchasers) and therefore belong to different product markets. This is reflected by the practice of competition authorities which traditionally distinguishes:
- i. a market for the acquisition of TV broadcasting rights for sport, with a segmentation for football events, and further sub-segmentations based on the type of events (regular events and events that are played more intermittently) and the category of rights (e.g. pay TV versus free TV);
  - ii. a market for the acquisition of marketing rights in the field of sport, with no other sub-segmentation [referring to the European Commission Decision of 13 November 2011, COMP/M.2483 - Groupe Canal + / RTL / GJCD / JV].
85. Orange submits that there is no need to mirror the sub-segmentation of the market for the acquisition of broadcasting rights into the market for the acquisition of marketing rights as it only makes sense in relation to the former. In this respect, the decision-making practice of competition authorities has so far considered that there is no reason to segment this market according to the type of sport and the type of events as such are deemed substitutable from a marketing rights perspective.
86. For example, in its Decision No.09-D-3110, the French Competition Authority (hereinafter, "the FCA") noted that: "Accessorily, Sportfive considers that, if there is a market for sports marketing, it must include all sports disciplines. According to Sportfive, Football is only one sport among others to reach a high audience in that it does not gather, even for its most followed competitions, a higher number of spectators than the Tour de France, Roland Garros, or the French Grand Prix of F1, nor a higher TV audience than other competitions such as the Rugby World Cup or the Six Nations tournament. Furthermore, Sportfive observes that its competitors, such as IMG, have adopted a positioning which covers several sports disciplines. It comes to the conclusion that the substitutability of the offer is also reflected in the market for the purchase of marketing rights and invites to consider a single product market".
87. The FCA finally concluded that "the aforementioned examples advocate in favour of a possible substitution of one sport for another for the companies' sports marketing, particularly in view of rapid changes in the popularity of sports and, more importantly, the results of national teams and national champions. The existence of a possible market for football marketing rights alone does not appear to have been demonstrated".
88. In a decision dated 29<sup>th</sup> August 2019, the FCA confirmed that market definition, and in particular the fact that it is not necessary to further delineate the market for marketing rights according to the type of sports [referring to Decision 19-DCC-160 du 21 August

2019 pertaining to the acquisition of sole control by Ineos group of SASP Olympique Gymnaste Club de Nice].

89. Such a definition is also consistent with the European Commission practice which defines a general market for acquisition of marketing rights, with no further delineation based on the type of sporting event. In Group Canal + / RTL / GJCD / JV, the European Commission states that: *“The market investigation of the Commission in the present case has resulted in some indications that a separate market for marketing communications services in the field of sports may be considered. From a demand side perspective, sports events may be especially suitable to attract certain groups of customers”*.
90. In light of the foregoing, Orange submits that there is no reason to define a market for the acquisition of marketing rights specific to football competitions, in particular for CAF competitions.

#### *The Commission’s Assessment*

91. Sports sponsorship is an essential component of the marketing strategy of many companies. According to industry reports, *“sports sponsorship is a powerful and impactful marketing technique. It consists of the suggestion between a company (sponsor) and a sports club or event (sponsee)... Visibility and media exposure are guaranteed. Also, it gives the user a chance to stand out and differentiate. Sports sponsorship has witnessed a lucrative growth as more money has been put into marketing with athletes, sports team, or sporting events. In times of advertising message overloads, sport offers something extremely valuable: real emotions. In connection with the digital possibilities, enormous opportunities arise for global players as well as small start-ups. Nowadays, sponsorship accounts for an enormous portion of the sports business industry.”*<sup>35</sup> The foregoing is clearly illustrative of the demand for sports sponsorship, in a manner which cannot be easily substituted by most non-sporting events. The Commission is therefore satisfied that a distinct market exists for sports marketing.
92. Further, the Commission observed that most sponsors tend to direct their marketing efforts towards more than one sporting discipline e.g. Heineken is an official partner of Formula 1<sup>®</sup>, the UEFA Champions League and Rugby World Cup, amongst others. The Commission considered that the rationale for companies to promote their brands through multi-sports sponsorship is illustrative of the fact that the different sports target different category of audiences.
93. Demand for sponsorship is driven by the popularity of a sport. It is important to consider the special characteristics of football and in particular CAF competitions, for

---

<sup>35</sup> Sports Sponsorship Market Statistics, Size, Trends, Growth and top sponsorship companies 2019 companies. Accessed at: <https://www.marketwatch.com/press-release/sports-sponsorship-market-statistics-size-trends-growth-and-top-sponsorship-companies-2019-companies-2019-09-17>

the African continent. An internet search for the most popular sport in Africa identifies football as the top sport. Total SA, the official Title sponsor for AFCO, recognises on its website that “[I]n Africa, football is more than just a sport—it’s a unifying force like no other that brings together the different cultures of the continent.”<sup>36</sup> During the official signing of the agreement, the Chairman and CEO of Total SA expressed that the company was looking for “something emblematic of Africa, an iconic team sport”.<sup>37</sup> Likewise, CAF has submitted that “With Total, Orange, and the many other CAF-event-sponsors looking to develop their businesses across Africa, the selection of CAF as a partner only seems natural”. In this regard, the Commission observes that sponsors seeking to target the African audience may have fewer effective options outside continental events such as those offered by CAF tournaments.

94. However, it is important to recognise the quickly evolving nature of sport popularity, and the performance of sports teams which impact on the attractiveness of CAF events for sponsors. Further, it is noted that the Orange Sponsorship agreement entails general marketing rights which do not include the provision of sporting goods or equipment to CAF.
95. As opposed to the intermediation and media markets where the operators are engaged in their core business, in the context of the Orange Sponsorship agreement, sponsorship plays a secondary role to the sponsor’s business activities. The marketing aims to assist with the promotion of a given sponsor’s business to increase its brand visibility. It is the sponsor who seeks access to the brand of the sporting event. In this regard, the Commission considered that there would be no significant restraint preventing a general sponsor to switch across different sporting events as it entails no technical requirements or services to be provided by the sponsor.
96. The Commission has thus considered that the relevant product market is **the acquisition of marketing rights for sporting events**.

#### ***Relevant Geographic Market***

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

***“The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas”.***
98. The Commission considered that advertising is typically adapted to fit the tastes and languages of a certain territory. In the *Sportfive* case, the Autorité de la Concurrence

---

<sup>36</sup> Total – Our Partnership with CAF. Accessed at: <https://www.football-together.total.com/en/our-partnership-caf>

<sup>37</sup> <https://www.total.com/en/media/video/official-signing-partnership-between-total-and-caf>

- held that for the market for marketing rights of sports, the geographic market can be national because the marketing rights are concerned with viewers in specific territories. This argument is reasonable based on the fact that the local premier league (the rights of which were subject of that particular case) would appeal most to local supporters, and as such sponsors would tailor their advertisements to that particular customer set.
99. On the other hand, since the competitions affected by the agreements under review are continental in nature, the sale of advertising rights would be tailored to fit the tastes of the viewers on the continent. Advertisers would tailor their advertisements to appeal to a continental audience, as opposed to a national audience. They would typically seek to maximise visibility of their brand within Africa, regardless of the location of a particular tournament. As such, the geographic market for marketing rights of CAF competitions is the entire continent. Lagardère Sports submitted<sup>38</sup> that “*the sponsorship rights over CAF’s competitions confer visibility and allow communication strategies toward an audience which is much wider than national, if not worldwide*”.
100. Orange has disputed the finding of a continental geographic market, arguing that a continental approach of the geographical market does not reflect the reality of the market. It should be wider than continental, if not worldwide, at least for the following reasons:
- i. sponsors are based in different countries and invest in various sports and competition, regardless of location and national borders; and
  - ii. in the Orange Agreement between CAF and Orange, the territory is defined as being worldwide.
101. The Commission noted that in previous EU cases, parties has argued that the geographic market “was at least European/EEA- wide or more likely worldwide”<sup>39</sup>. The European Commission however concluded that the geographic market could be left open as even on the basis of a national market, the merger transactions considered would not have led to affected markets. In fact, in the GROUP CANAL + / RTL / GJCD / JV case, the European Commission carried out the assessment of the market for sports marketing on a national basis<sup>40</sup>.
102. The Commission considered that while potential sponsors may indeed be located anywhere in the world, the advertisements need to resonate with the targeted audience. As such, it is unlikely that sponsors without some presence in the African countries or knowledge of the taste of African consumers would be able or willing to quickly switch to offering marketing services without incurring significant costs or risks. Along the same line of reasoning, it is unlikely that an increase in the price of marketing rights for

---

<sup>38</sup> Submission from Lagardere Sports dated 21<sup>st</sup> April 2017.

<sup>39</sup> Case No COMP/M.2483 - *GROUP CANAL + / RTL / GJCD / JV*, paragraph 27; Case No COMP/M.4519 – *LAGARDERE / SPORTFIVE*, paragraph 15.

<sup>40</sup> Case No COMP/M.2483 - *GROUP CANAL + / RTL / GJCD / JV*, paragraph 59.



international sports events would provoke a substitution away from CAF competitions unless if it offers a similar vector to reach African consumers. As such, the Commission considered that the identification of a continental market is warranted.

103. On the basis of the foregoing, the Commission identified the relevant market **as the market for the acquisition of marketing rights for sporting events in Africa.**

### **Consideration of Restriction of Competition by Object or Effects**

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

#### *Duration of Exclusivity*

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

### **The “Effects” Test**

#### **Market Structure**

107. Market structure generally refers to the features that may affect the behaviour and performance of the firms operating in an industry. The structure of the market indicates the relative number of buyers and sellers in the market and therefore the nature of competition that is expected to take place. Market conditions can vary from perfectly competitive to monopolistic, and the consequences of these can be seen in market conduct and performance outcomes. An analysis of market structure remains critical to ascertain the nature and extent of market power of the players. The competitiveness of

the market indicates the extent to which an individual firm has power to influence market price or the terms on which its product is sold.

108. The Commission noted that there exist several players who have been awarded various marketing rights for the CAF competitions, including Total, Orange, Visa, 1XBET.
109. The competitive assessment for the marketing rights market need to be considered in conjunction with the markets where the sponsors have their core activities. In this regard, the Commission observed that Orange is a significant player in the broad market for telecommunications services. Nonetheless, it still faces competition from other players in the Common Market, including MTN, Airtel, Africell.
110. Further, it is noted that there exist alternative sporting events on the continent to which sponsors can turn to promote their image, including rugby, cricket, and athletics.
111. In this regard, the Commission considered that neither Orange as the sponsor nor CAF as the rights holder would have a dominant position on the market for acquisition of marketing rights for sporting events.

### **Barriers to Entry and Expansion**

112. The main element that affects the structure of the market is barriers to entry and expansion. Barriers can take the form of structural barriers or artificial barriers. Barriers to entry are a critical element in determining whether the incumbent has market power or not. Where the barriers to entry or expansion are high, the incumbents have more freedom to abuse their position in the market because they do not face any competitive restraint from potential competition.
113. In the present case, the Commission did not identify significant barriers to entry as regard to the market for marketing rights, as evidenced by the availability of alternative sponsors and sporting rights. The barriers to entry are likely to manifest themselves in the form of availability of capital by the sponsors, and brand recognition.

### **Consideration of Effects on Competition**

114. The Commission identified potential concerns relating to the duration of the Orange Sponsorship agreement, and the manner in which the agreement was concluded in the absence of an open tender process.

#### *Duration of the Agreement*

115. The Commission noted that the agreement entered with Orange run for a duration of eight (8) years. The sponsorship agreement can be seen as an investment by the corporate sponsor in exchange for the exploitable commercial potential associated with the sports event or property. Sponsors enter into such agreements with sports properties for a multitude of reasons, including brand exposure, brand image association, and the

potential to influence consumer purchase behaviour<sup>41</sup>. The Commission is thus mindful that a reasonable amount of time may be required to allow the sponsors to recoup their investments. The Commission has next considered the practice by other rights holders in relation to the duration of marketing arrangements.

*Submissions by Orange*

116. Orange submits that the Orange Sponsorship Agreement is in line with usual market practices of football marketing rights. This is highlighted by the fact that:

- the Orange Agreement is a standard agreement, whose duration is exactly the same as the former 2009 Agreement;
- there are other sport marketing agreements such as naming contracts that have a long-term duration because they require a certain period of time for the spectators to associate a particular brand with a certain stadium, as well as for recouping the costly investments made in this respect.
- For example, in France naming agreements were concluded with a duration of<sup>42</sup>:
  - nine (9) years for the “Allianz Riviera” stadium in Nice;
  - ten (10) years for the “Orange Velodrome” stadium in Marseille;
  - ten (10) years for the “MMArena” in Le Mans; and
  - ten (10) years for the “AccorHotels Arena” in Paris.

117. In any case, a concrete analysis of the circumstances of the present case demonstrates that the duration of the Orange Agreement is unlikely to foreclose the market for the acquisition of marketing rights in the field of sport for the following reasons.

118. Firstly, sponsors have effective substitutes to promote their products or services as they are able to acquire marketing rights for:

- other sport competitions in view of the fact that there is a possible substitution of one sport to another from a sponsor’s perspective.
- Such an alternative would still be relevant should the geographical market be defined as being continental (Africa) as there are other important competitions in Africa that may be sponsored (the African Games, the Rugby Africa Cup, the African Championships in Athletics).

---

<sup>41</sup> John A. Fortunato, J.A., and Martin. S.E., *American needle v. NFL: legal and sponsorship implications*.

<sup>42</sup> <http://www.lefigaro.fr/immobilier/2012/07/23/05002-20120723ARTFIG00479-le-stade-de-nice-devient-allianz-riviera.php>; <https://www.lesechos.fr/pme-regions/provence-alpes-cote-dazur/orange-velodrome-le-contrat-de-naming-seleverait-a-pres-de-25-millions-deuros-par-an-141167>; <https://sportsmarketing.fr/1/?p=21097>.

- other football events that trigger an equal or bigger audience than CAF's competitions (e.g. the FIFA World Cup, the Champions League, the Euro, the national league).
119. Secondly, the exclusivity is limited in time. In particular, the Orange Agreement does not contain any preferential renewal right or automatic renewal clauses. Therefore, at the end of the exclusivity period, nothing will prevent CAF from re-evaluating Orange's performance, as well as the other offers on the market, and therefore from maintaining a certain competitive pressure on the market.
120. Thirdly, the marketing rights are limited in their scope.
- i. The Orange Agreement indeed states that: "Sponsor wishes [...] to become official sponsor of the Events and obtain from CAF [...] certain marketing rights and related opportunities owned by CAF for the Events, and to be provided with certain services in connection with the marketing rights and related opportunities granted" (Recital E).
  - ii. [REDACTED]
  - iii. The marketing rights and services are to be used on an exclusive basis only for a defined Products Category (Article 4.2), which de facto limits the foreclosure effect as sponsors may acquire marketing rights for other services (including banking).
  - iv. The Right of First Refusal is similarly very limited [REDACTED]
121. A further distinction can also be made between:
- i. local sponsors, which do not have any economic incentive to acquire marketing rights; and
  - ii. continental and international sponsors, which may be interested in acquiring marketing rights in the field of sport, but nonetheless will be provided with effective substitutes (other sport competitions and other football events), as indicated above.
122. In addition, certain marketing rights which do not exist at the moment could be granted to other competitors than Orange in the future.

123. Fourthly, the marketing rights are limited in their application. For instance, the Orange Agreement provides for specific durations for commercial videos<sup>43</sup> and for specific locations for advertising boards at the stadiums<sup>44</sup>.
124. Fifthly, the Orange Agreement does not prevent the parties from terminating the contract early under certain conditions, notably by mutual consent. In the present case, such an analysis is very important as it alleviates the effects of the exclusivity.
125. For the above reasons, it can be reasonably concluded that the Orange Agreement does not foreclose the market for the marketing rights in the field of sport, notably because the exclusivity is limited in time, scope and application.

*Submissions by CAF*

126. CAF submits that it is the industry practice for marketing agreements to be longer in time and wider in scope. The length of a sponsorship agreement is necessary to enable the sponsor to make its brand as visible as possible and achieve return on its investment. This is more pronounced in the case of main sponsors (or title sponsors) who pay higher fees so that a tournament could be associated with their name for the duration of the sponsorship agreement.
127. In fact, most sponsorship agreements (in relation to main sponsors) of major sporting events last an average of eight (8) to ten (10) years, and some of which exceed thirty (30) years; yet in none of these cases was a breach of competition legislation found. Examples of sports competitions covered by sponsorship agreements lasting for eight (8) to ten (10) years include the Mumbai Marathon, the English Premiership Rugby, the Olympics and the Australian Open which are sponsored respectively by Tata, Aviva, Coca Cola and Kia. Examples of other sports competitions covered by agreements lasting between fifteen (15) to thirty (30) years include the English Premier League and the Qatar Open, which are sponsored by Barclays and ExxonMobil. Finally, the Classic PGA Gold Tour and the Long Beach Grand Prix have been sponsored for more than thirty (30) years by Honda and Toyota. The foregoing is to be contrasted with contracts over media rights where European and certain national regulators limit contract terms to three (3) to four (4) years.
128. CAF submits that it does not preclude any prospective sponsors from sponsoring CAF events<sup>45</sup>. The only restriction, which is in line with the marketing industry practice, is that sponsors may not be of the same product categories. In other words, CAF cannot be sponsored by both Coca Cola and Pepsi, or Orange and Vodafone, or Stella and

---

<sup>43</sup> Appendix 4 of the Sponsorship Agreement.

<sup>44</sup> Appendix 5 of the Sponsorship Agreement.

<sup>45</sup> CAF submits that there are large numbers of sponsors of CAF events whose sponsorship terms were for one (1) to two (2) years (e.g., Qnet, Yamaha, Visa, and others). The sponsorship packages did not exclude parties from sponsoring CAF events and tournaments and all parties could have opted for visibility. Furthermore, local advertising banners could also use the CAF logo in relation to CAF championship to promote their products.

Heineken at the same time, since none of the sponsors would have any interest in sponsoring an event co-sponsored by its direct brand competitor.

*The Commission's assessment*

129. The Commission observed that while the UEFA has long standing partnerships with sponsors such as Heineken, adidas, and Carlsberg, from the recent announcements made on its website, these commercial contracts are typically awarded for initial periods covering three or four years<sup>46</sup> through open calls, at the end of which the partnership with the sponsor can be renewed through another call for tender<sup>47</sup>:
- i. Wednesday 29 November 2017: Banco Santander's partnership with the UEFA Champions League is the third partnership to be agreed as part of the 2018-21 sponsorship sales process for the UEFA Champions League. Heineken and Nissan have both already confirmed that they have extended their sponsorship of the competition for another three years<sup>48</sup>;
  - ii. Monday 23 October 2017: UEFA has announced that the Japanese sports ball manufacturer Molten Corporation has signed a three-year agreement to become the Official Matchball Supplier of the UEFA Europa League<sup>49</sup>;
  - iii. Thursday 19 October 2017: UEFA and Booking.com are proud to announce a new four-year global partnership for all UEFA national team football competitions from 2018 to 2022. Booking.com becomes the Official Accommodation and Attractions Booking Partner for all events, including UEFA EURO 2020<sup>50</sup>.
  - iv. Monday 11 September 2017: UEFA today announced the extension of Nissan's partnership of the UEFA Champions League for the 2018-21 cycle. The agreement also includes the UEFA Super Cup in 2018, 2019 and 2020<sup>51</sup>.

---

<sup>46</sup> See for instance: <http://www.campaignlive.co.uk/article/heineken-extends-champions-league-football-sponsorship/1422861>; [PlayStation extends Champions League sponsorship for 2012-2015](http://www.campaignlive.co.uk/article/playstation-extends-champions-league-sponsorship-for-2012-2015); [UEFA and Carlsberg EURO sponsorship agreement for 2014 to 2017](http://www.campaignlive.co.uk/article/uefa-and-carlsberg-euro-sponsorship-agreement-for-2014-to-2017); [Heineken extends Champions League sponsorship for another three seasons](http://www.campaignlive.co.uk/article/heineken-extends-champions-league-sponsorship-for-another-three-seasons); [Sharp Signs EUROTOP Sponsorship Agreement with UEFA for 2010 to 2013](http://www.campaignlive.co.uk/article/sharp-signs-eurotop-sponsorship-agreement-with-uefa-for-2010-to-2013)

<sup>47</sup> See for instance: <https://www.uefa.com/insideuefa/about-uefa/administration/marketing/news/newsid=2453158.html#:> UEFA has announced that it is giving interested parties the opportunity to become commercial partners with the UEFA Champions League in three categories; <http://www.campaignlive.co.uk/article/heineken-extends-champions-league-football-sponsorship/1422861>; [PlayStation extends Champions League sponsorship for 2012-2015](http://www.campaignlive.co.uk/article/playstation-extends-champions-league-sponsorship-for-2012-2015); [UEFA and Carlsberg EURO sponsorship agreement for 2014 to 2017](http://www.campaignlive.co.uk/article/uefa-and-carlsberg-euro-sponsorship-agreement-for-2014-to-2017); [Heineken extends Champions League sponsorship for another three seasons](http://www.campaignlive.co.uk/article/heineken-extends-champions-league-sponsorship-for-another-three-seasons); [Sharp Signs EUROTOP Sponsorship Agreement with UEFA for 2010 to 2013](http://www.campaignlive.co.uk/article/sharp-signs-eurotop-sponsorship-agreement-with-uefa-for-2010-to-2013)

<sup>48</sup> [http://www.uefa.com/insideuefa/about-uefa/administration/marketing/?redirectFromOrg=true#post\\_1875250](http://www.uefa.com/insideuefa/about-uefa/administration/marketing/?redirectFromOrg=true#post_1875250)

<sup>49</sup> [http://www.uefa.com/insideuefa/about-uefa/administration/marketing/?redirectFromOrg=true#post\\_1692604](http://www.uefa.com/insideuefa/about-uefa/administration/marketing/?redirectFromOrg=true#post_1692604)

<sup>50</sup> [http://www.uefa.com/insideuefa/about-uefa/administration/marketing/?redirectFromOrg=true#post\\_1644250](http://www.uefa.com/insideuefa/about-uefa/administration/marketing/?redirectFromOrg=true#post_1644250)

<sup>51</sup> [http://www.uefa.com/insideuefa/about-uefa/administration/marketing/?redirectFromOrg=true#post\\_1321686](http://www.uefa.com/insideuefa/about-uefa/administration/marketing/?redirectFromOrg=true#post_1321686)

130. On 15<sup>th</sup> March 2020, UEFA launched bidding process to seek sponsors in the beer category for a single competition, namely the UEFA EURO 2020, as a result of which Heineken was appointed.
131. Further, on 1<sup>st</sup> March 2019, UEFA announced the launch of bidding processes for various product categories for the UEFA EURO 2020<sup>TM</sup> National Sponsorship rights, including telecommunications services and systems.
132. The market practice adopted by UEFA point towards duration with sponsors for a contract period not exceeding four years.
133. The Commission observed that the examples provided by Orange relate to naming sponsorships, which are not relevant to the assessment of the duration of the Orange agreement. Orange has submitted that its Agreement does not foreclose the market for the marketing rights in the field of sport, notably because the exclusivity is limited in time, scope and application. The Commission notes that the exclusivity is indeed limited in scope and application as they relate solely to a specific sector, which is common practice.
134. The Commission further observed that in more recent agreements with other sponsors such as Visa and Continental, a significantly shorter duration has been considered, four years and five years respectively.
135. The above notwithstanding, it is recalled that the Commission recognised the need to consider the competitive effects of other sport rights in the sponsorship market. The Commission noted that there was no conclusive evidence that competitors to Orange were foreclosed as a result of the duration of the sponsorship, nor that Orange's market position was enhanced directly as a result of the duration of the agreement.
136. The Commission observed submissions from Orange that although Orange was an Official Sponsor of the 2019 AFCON held in Egypt and the tournament was held in one of its major territories (Egypt), this did not prevent another telecommunications operator and major competitor in that territory, Telecom Egypt, from activating its own sponsorship of the Egypt National Football Team during the same period. Telecom Egypt actively leveraged their agreement with the National Football Team to ensure association with the AFCON tournament and was able to promote its products and services before and during the tournament period. In addition, Telecom Egypt secured the tender to provide WIFI in major stadiums during the AFCON, (this is outsourced by CAF to a nominated Local Organising Committee) which was also leveraged to actively showcase Egypt Telecom's capabilities. The Commission also noted submissions from CAF during its meeting of 16<sup>th</sup> December 2019 that CAF is not precluded from entering into agreements with other sponsors, outside the product category of the Orange Sponsorship agreement.

137. The Commission also considered the submission by Lagardere Sports that “relocation of the Competitions may lead to wasted activation or other product costs by Sponsors”. It was submitted that “*only two months before the start of the event, Morocco withdrew as host of the 2015 AFCON edition due to the Moroccan government's concerns relating to Ebola outbreak. CAF was required to find an alternative host (Equatorial Guinea) within a very short period. This relocation caused significant damage to the sponsors as well as to CAF. The sponsor Orange has estimated its losses to be nearly USD 3 million due to their preparation for the event (e.g. goodies branded with the name of the initially-planned host country)*”.
138. In view of the foregoing, the Commission observed that there was no evidence to establish that the duration of the Orange Sponsorship agreement by itself resulted in anti-competitive effects on the sponsorship market or the respective market in which the sponsor carries out its core activities.

*Lack of Tender Process*

*Submissions by Orange*

139. Orange submitted that the mere fact that there is no tender process does not imply, as such, that the exclusive agreements (and in particular the Orange Agreement) entail anticompetitive effects. It is indeed important to assess whether the lack of competitive tender process effectively had the effect of foreclosing the market by preventing other sponsors from competing. In that respect, it follows from the case-law of both the FCA and European Commission that tendering procedures are only imposed for premium broadcasting rights, i.e. for rights that allow pay-tv broadcasters to attract a large audience on a regular, sustained and continuous basis and which therefore constitute a main driver of the sale of subscriptions<sup>52</sup>.
140. As summarised by the FCA in its Decision 14-MC-01 relating to the broadcasting rights for the French Rugby 1st Division Championship: “National and European *decision-making practice has provided a framework for the allocation of rights by professional leagues in the sector of the **marketing of premium sports broadcasting rights** [...].*

*The European Commission has considered that these rights (rights of the Champions League, of the German Bundesliga and the English Premier League), **having regard to their premium character**, were to be marketed on the basis of a competitive tender procedure, providing for a splitting of rights into different lots with an autonomous attractiveness, so that these packages are open to all broadcasters and for a period not disproportionate.*

---

<sup>52</sup> European Commission, COMP/C.2-37.398 - Joint selling of the commercial rights of the UEFA Champions League, para 68.



*[...] In fact, the analysis relates in all cases to the competitive problem posed by the existence of a single seller marketing **very attractive premium rights** by resorting to allocation procedures which may lead to foreclosure effects” (emphasis added).*

141. Indeed, for these premium rights, a competitive, transparent and non-discriminatory tender process is of particular importance as these rights are indispensable for the broadcasters to be present on the market, as indicated by the European Commission in the UEFA case: *“In most countries football is not only the driving force for the development of pay-TV services but is also an essential program item for free-TV broadcasters. Joint selling of free-TV and pay-TV rights combined with wide exclusive terms therefore has significant effects on the structure of the TV broadcasting markets as it can enhance media concentration and hamper competition between broadcasters. If one broadcaster holds all or most of the relevant football TV rights in a Member State, it is extremely difficult for competing broadcasters to establish themselves successfully in that market”* (emphasis added).
142. The Commission’s position is inconsistent with the position adopted by the European Commission in the UEFA case. Indeed, in this case, the European Commission clearly concluded that the award of exclusivity for marketing rights was outside the scope of its review given the likely absence of anticompetitive effects on the downstream markets. In that case, the European Commission explained that:
- “UEFA jointly sells a number of other commercial rights related to the UEFA Champions League such as sponsorship, suppliership and product licensing. These commercial rights are likely to form part of wider product markets for commercial advertising. However, since it is not likely that UEFA’s sale of these commercial rights would appreciably restrict competition, it is not necessary for the purposes of this case to exactly define the scope of the relevant product markets”.*
143. Therefore, if the Commission wants its decision to be in line with EU principles and case-law, as stated at several occasions in the Preliminary Report, it should follow the analytical framework of the European Commission. In particular, Orange considers that the proper execution of a robust legal and economic analysis of the actual effects likely to result from the award of the exclusivity for CAF marketing rights on the downstream markets (in the case of Orange in the communications markets) should have led the Commission to exclude the possibility of anti-competitive foreclosure effects.
144. Firstly, CAF marketing rights are not critical for sponsors to be present on the market. Indeed, sponsors may promote their products through (i) sports other than football, (ii) events other than CAF’s events and (iii) communication tools other than sponsoring (see below).
145. Secondly, the lack of any tender process did not prevent competition between sponsors for the grant of CAF’s rights, as illustrated by the fact that:

- i. the former agreement concluded with Orange for the granting of the marketing rights related to certain CAF's football competitions did not contain any obligation on the CAF nor Lagardère Sports to renew the partnership. It was therefore CAF/Lagardère's decision to approach Orange to discuss future marketing rights for certain CAF's events.
  - ii. nothing prevented CAF and Lagardère from approaching other market players with a view to concluding marketing rights agreements with them. During the negotiations for the Orange Agreement, Orange was aware that CAF and Lagardère were simultaneously talking to other banking partners and offering rights on an ad hoc basis (e.g. Russian OneXBet, Visa, Oppo)
  - iii. When it came to negotiating the Orange Agreement, Orange lost the position of Title Sponsor it had been granted with under the 2009 Agreement (for the benefit of Total), which further demonstrates the competitive pressure exerted on the market.
146. In addition, as the Orange Agreement does not contain any preferential renewal right or automatic renewal clauses, nothing will prevent the CAF from re-evaluating the situation after the end of the eight (8) year term.

*The Commission's Assessment*

147. It is noted that Orange's submission relating to the UEFA case is misdirected as the issue under consideration was joint selling of media and marketing rights by the UEFA, which is clearly different from the issues being considered by the Commission. It is further recalled that the UEFA carries out tender procedures for both media and marketing rights, unlike the CAF/Orange arrangement.
148. While the Commission is of the view that tender procedures provide a useful mechanism to prevent potential anti-competitive behaviour or outcomes on the market, it acknowledges that the CAF rights may not constitute critical rights for sponsors operating or wishing to operate on the continent, such that a tender process for CAF marketing rights may not be an essential requirement.
149. The Commission concluded that there was not sufficient evidence to establish that the lack of a competitive tender process for the award of the Orange Sponsorship agreement caused anti-competitive harm on the respective markets where Orange operates.

**Consideration of Exemption under Article 16(4)**

150. The respondents have made submissions for exemption under Article 16(4) of the Regulations with respect to the Orange Sponsorship Agreement.
151. Orange submitted that the Orange Sponsorship Agreement:

- (a) allows Orange to use sponsorship rights and services to promote products and services belonging to the Product Category, it being clarified that this notion encompasses various high-technology products or services in the field of telecommunication;
  - (b) Orange invested significantly to achieve the maximum benefits of its sponsorship rights and services;
  - (c) these significant investments can be used by CAF to improve the football practice in Africa; and
  - (d) finally, the Orange Agreement does not impose restrictions which are not indispensable to the attainment of these objectives, considering that an eight (8) year duration is a usual commercial practice, that is also duly justified in the present circumstances.
152. Orange submitted that the termination date of the Orange Agreement allows Orange to promote its products and services through CAF competitions that take place in the territories where Orange is active on the communication markets. In other words, the eight (8) years duration is consistent with the geographical location of CAF competitions that are held in specific Orange territories.
153. Orange submitted that the eight (8) years duration is necessary to allow:
- Orange to secure a proper return on the investments it has made as an official sponsor. In its Preliminary Report, the Commission itself states several times that a sufficient period of time may be required to allow sponsors to recoup their investments; and
  - Viewers to consider Orange as a legitimate sponsor of CAF competitions. Indeed, the longer the marketing rights are granted, the stronger the association the audience make between the brand and the events.
154. As a result, the investments by Orange under the Orange Agreement would not have been made if it were for a shorter term.

*The Commission's position*

155. As discussed above, the Commission has not identified evidence of anti-competitive harm occurring in the relevant markets for marketing rights, nor on the telecommunications market where Orange operates. In this regard, a further assessment of the justifications provided by the sponsor is not warranted with regard to the duration of the agreements.

## **Consideration of Effect on Trade between Member States**

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

## **Conclusions**

159. The evidence, facts and law analysed in this report has led to the conclusion that the Orange Sponsorship Agreement does not contravene Article 16(1) of the Regulations. The Commission has established that:
- i. the duration of the agreement has not foreclosed competitors of Orange or other potential sponsors from the market for acquisition of marketing rights for sporting events in Africa;
  - ii. CAF marketing rights are not critical rights for general sponsors, who have the option of seeking sponsorship deals with other sporting rights holders; and,
  - iii. CAF is not precluded from entering into agreements with other sponsors, outside the product category of the Orange Sponsorship agreement.
160. In this regard, the Commission considered that the conclusion of the agreement in the absence of a tender process did not result in foreclosure of competition in the relevant market.

## **Determination**

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