COMESA Competition Commission

Common Market for Eastern and Southern Africa

DECISION OF THE APPEALS BOARD ON THE APPEAL LODGED BY CONFÉDÉRATION AFRICAINE DE FOOTBALL AND beIN MEDIA GROUP LLC AGAINST THE DECISION OF THE COMMITTEE RESPONSIBLE FOR INITIAL DETERMINATIONS DATED 22 DECEMBER 2023 WITH REGARD TO THE MEMORANDUM OF UNDERSTANDING BETWEEN LAGARDÈRE SPORTS SAS AND beIN MEDIA GROUP LLC IN RELATION TO MEDIA RIGHTS OF COMPETITIONS ORGANISED BY CONFÉDÉRATION AFRICAINE DE FOOTBALL

28 MARCH 2025

Appeal References:	CCC/APPEAL/4/2/2024 CCC/APPEAL/4/3/2024
In the Appeals lodged by:	Confédération Africaine de Football ("**CAF**") and beIN Media Group LLC ("**beIN")** (collectively referred to as the "**Appellants**")
Respondent:	COMESA Competition Commission (the "**Respondent**") (the Appellants and the Respondent are collectively referred to as the **"Parties"**)
In the matter:	Appeal against the decision of the Committee Responsible for Initial Determinations (the "**CID**") dated 22 December 2023 regarding the Memoranda of Understanding between Lagardère Sports S.A.S and beIN Media Group LLC in relation to media rights of competitions organised by Confédération Africaine de Football.

APPEALS BOARD MEMBERS

Commissioner Lloyds Vincent Nkhoma (Chairperson)
Commissioner Emmanuel Adelbert Booto Nkaimana
Commissioner Beatrice Uwumukiza
Commissioner Luyamba Kizito Mpamba
Commissioner Cicilia Mashava

IN ATTENDANCE

CAF	Tarek Badawy (Meysan) Salma Abdelaziz (Meysan) Ismael Lamie (Meysan) Aya Elfar (Meysan) Felix Majani (Director of Legal Affairs & Compliance, CAF)

COMESA COMPETITION COMMISSION
23 MAR 2025

beIN	Joyce Karanja (Bowmans Coulson Harney LLP) Cynthia Waweru (Bowmans Coulson Harney LLP) Derek Lotter (Bowmans Gilfillan) Daniel Mech (Bowmans Gilfillan) Richard Bryce (Bowmans Gilfillan) Caroline Besse Gunneteau (Deputy General Counsel, beIN Media Group) Philip Christofides (beIN Media group) Stephan Rigdway- (beIN Media Group)
COMMISSION	Dr Willard Mwemba (Chief Executive Officer) Boniface Makongo (Director Competition) Alexia Waweru (Manager, Legal Affairs (CEOs office)) Yonas Abebe Anteneh (Principal Legal Officer) Griven Stasion Kangwa (Principal Legal Officer) Barnabas Andiva (Principal Analyst)
REGISTRAR	Meti Demissie Disasa (Appeals Board Secretary)

I. BACKGROUND

1. On 4 April 2024, CAF and beIN (hereinafter collectively referred to as **"the Appellants** and individually referred to as the **1st** and **2nd Appellant** respectively**"**) filed their respective Notices of Appeal, in accordance with Articles 9 and 10 of the COMESA Competition Commission (Appeals Board Procedure) Rules 2017 (the "Appeals Board Rules"), against the decision of the CID dated 22 December 2023, which was rendered with regard to the Memorandum of Understanding between Lagardère Sports SAS (**"Lagardère Sports")** and beIN in relation to media rights of competitions organised by CAF,

2. Following the filing of the Notices of Appeal, on 5 July 2024, the COMESA Competition Commission (hereinafter referred to as the "**Respondent**") filed the Record of the Proceedings of the CID matter being appealed against in accordance with Article 16 of the Appeal Board Rules. On 31 July 2024, the Appellants filed their respective Statements of Appeal pursuant to Article 17 of the Appeal Rules. On 24 October 2024, the Respondent filed its Statements of Response to the Statement of Appeals filed by Appellants.

COMESA COMPETITION COMMISSION
28 MAR 2025

3. Pursuant to Article 13 of the Appeals Board Rules, a pre-appeal conference was held on 7 November 2024 to consider procedural issues pertaining to the Appeal, in particular, the possibility of consolidating the Appeals lodged by the Appellants. The Appeals Board allowed the consolidation of the two appeals since they resulted from the same cause of action and the questions of facts and law for determination were substantially the same. Subsequently, the Appeals Board set the consolidated Appeal for hearing on 11-13 February 2025 in accordance with Article 20 of the Appeal Board Rules.

4. The matter under appeal concerned the decision of the CID dated 22 December 2023 regarding the investigation of the two Memoranda of Understanding ("**MOUs**") entered into between Lagardère Sports and beIN for the commercialization of media rights of football competitions organised by CAF. Specifically, the concerned MOUs (together referred to as the "**beIN Agreements**") are:

   a) MOU dated 22 October 2014 between Sportfive and beIN Group (the "**2014 Agreement**"); and

   b) MOU dated 16 February 2016 between Lagardère Sports and beIN Group (the "**2016 Agreement**").

5. The investigation was aimed at determining whether or not certain provisions contained in the beIN Agreements were in violation of the COMESA Competition Regulations (hereinafter referred to as (the **"Regulations"**). The Respondent identified the following concerns:

   a) the award of media rights of CAF competitions in the absence of an open and competitive tender process;

   b) the long-term duration of the contract for the award of media rights of CAF competitions to beIN; and

   c) the bundling of media rights across platforms, transmission mode and competitions.

COMESA COMPETITION COMMISSION
28 MAR 2025

II. PROCEEDINGS BEFORE THE CID

6. The Respondent submitted the findings of its investigation to the CID and the matter was heard on 24 October 2023. In its findings, the Respondent submitted that the duration of the beIN Agreements, coupled with the lack of a competitive tender process and the extensive scope of exclusivity granted to the 2nd Appellant, was likely to lead to a significant restriction of competition in the relevant markets in the Common Market. The Respondent further submitted that it had established that certain provisions contained in the beIN Agreements contravened Article 16 (1) of the Regulations as they affected trade between Member States and had as their effect the restriction of competition in the Common Market. In view of addressing the competition concerns identified during the investigation, the Respondent recommended the termination of the 2016 beIN Agreement by 31 December 2024 and the adoption of certain behavioral remedies on CAF in respect of future broadcasting agreements.

7. On the other hand, the Appellants argued against the Respondent's finding of breach of Article 16 (1) of the Regulations, claiming, among others, that the Respondent had not established the effects of beIN Agreements on competition and did not consider the potential pro-competitive benefits of the Agreements.

8. Having heard the submissions of the Parties, the CID, in its decision dated 22 December 2023, determined that the beIN Agreements breached Article 16 (1) of the Regulations on the basis that the scope of exclusivity of the Agreements when taken in conjunction with the lack of a tender process and long duration of the Agreements resulted in a significant distortion of competition in the relevant markets. In view of the foregoing, the CID ordered that all media rights awarded to the 2nd Appellant pursuant to the beIN Agreements, with regard to its operationalization within the Common Market, shall cease on 31 December 2024. Further, the CID imposed a fine of Three Hundred Thousand United States Dollars (USD 300,000) each on the Appellants in accordance with Article 8 (4) of the Regulations. In respect of future broadcasting agreements, the CID also issued the following orders:

    a) **CAF shall award all future exclusive media rights of CAF competitions within the Common Market on the basis of an open, transparent, and non-discriminatory tender process, based on a set of objective criteria, as outlined below:**

COMESA COMPETITION COMMISSION
28 MAR 2025

i. *CAF shall, within 60 calendar days of the date from the CID's decision, submit the set of objective criteria to the Commission for its consideration and determination.*

ii. *Upon approval by the Commission, CAF shall widely publicise the set of objective criteria on different platforms including CAF's website.*

iii. *Where any material departure from the approved objective criteria is necessary due to prevailing market circumstances, CAF shall submit an amended set of objective criteria to the Commission for approval before launching any tender.*

iv. *CAF shall publish the results of the winning bidders on its website.*

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

c) **CAF shall offer the various media rights as separate, commercially viable packages on a platform neutral basis, as outlined below:**

i. *No single undertaking shall be allowed to purchase all the media packages.*

ii. *Where CAF has justifiable grounds to grant all the media packages to a single undertaking, CAF shall, before implementation, notify the Commission for its consideration and determination.*

iii. *The Commission shall issue its determination within 60 calendar days from the date of notification, i.e., after submission of complete information as determined by the Commission.*

COMESA COMPETITION COMMISSION 28 MAR 2023

9. Thereafter, the Appellants appealed against the decision of the CID pursuant to Articles 9 and 10 of the Appeals Board Rules.

III. SUMMARY OF THE PARTIES' SUBMISSIONS TO THE APPEALS BOARD

10. The Appellants contend that the CID erred by:

a) finding that the beIN Agreements have an appreciable effect on trade between Member States without presenting any evidence to prove this;

b) defining the relevant product market narrowly in a manner which is inconsistent with international precedents and ignores other substitutable national, continental and international football competitions;

c) finding that the beIN Agreements have anticompetitive effects and result in foreclosure without conducting an effects-based assessment and identifying a credible and efficient competitor who has been foreclosed;

d) relying on inadequate and irrelevant evidence and stakeholders' views in arriving at its conclusion on the definition of relevant market and the restrictive effects of the beIN Agreements;

e) failing to consider the pro-competitive effects and benefits of the beIN Agreements and finding that the elements of Article 16 (4) of the Regulations were not met; and

f) unilaterally imposing fines on the Appellants when the Respondent did not recommend for the imposition of fines in its investigation report.

11. In response to the Appellants' Statements of Appeal, the Respondent, in its written and oral submissions before the Appeals Board challenged the Appellants' grounds of appeal on the basis that the Respondent had:

a) sufficiently demonstrated the beIN Agreements effect on trade between Member States and duly established its jurisdiction;

b) properly defined the relevant product market guided by the test of substitutability and international precedent;

COMESA COMPETITION COMMISSION
28 MAR 2025

c) conducted adequate and relevant stakeholders' interviews by engaging undertakings and individuals with knowledge of the industry;

d) established that the manner in which the media rights were granted in conjunction with the longer and excessive duration and extensive scope of the beIN Agreements was likely to result in a significant restriction of competition;

e) established that the beIN Agreements should not benefit from Article 16 (4) of the Regulations as the Appellants did not discharge the onus of demonstrating, with clear and sufficient evidence, that the cumulative conditions of the provision are met; and

f) inherent power of the CID to impose fines on undertakings which are found to be in breach of the Regulations.

12. The Parties' submissions are summarized below:

Regarding the Contention on Jurisdiction and the beIN Agreements' Effect on Trade between Member States

13. With respect to the issue of beIN Agreements' effects on trade between Member States, the 1st Appellant argued that the CID assumed that the Respondent had jurisdiction on the investigated matter on the basis that the beIN Agreements affected trade between Member States without any evidence that proves the consideration of the effect of the beIN Agreements on trade between Member States, adding that the Respondent had not discharged its duty of conducting a comprehensive market analysis to determine the appreciable effect of the beIN Agreements. The 1st Appellant further observed that the Respondent defined the relevant geographic market as the national market for the broadcasting rights in Egypt, Libya, Djibouti, Tunisia, Sudan, Mauritius and Madagascar. In view of this, the 1st Appellant faulted the Respondent's conclusion that the beIN Agreements had an effect on trade between Member States.

14. In response, the Respondent argued that case law is replete with precedent where even when the defined relevant geographic market was as narrow as a certain location in a Member State, effect on trade between Member States was established. The Respondent recalled that in the case involving the proposed joint venture of ***SAS Shipping Agencies Services Sarl, Kenya Ports Authority and Kenya National***

COMESA COMPETITION COMMISSION
28 MAR 2023

Shipping Lines[1], the CID held that the relevant geographic Market was the port of Mombasa in Kenya. Similarly, in the case involving ***Corporation of Pilots of the port of Genoa and Tourship Italia***,[2] although the European Commission defined the relevant market as the port of Genoa in Italy, it was determined that an effect on trade between Member States was established. Thus, the Respondent argued that it is possible to have a localized relevant geographic market with the effects of conduct at that relevant geographic market having an effect on trade between Member States.

15. In responding to the issue of whether an appreciable effect on trade between Member States was established, the Respondent referred to the ***Societe Technique Minière (STM) v Maschinenbau Ulm***[3] where it was established that the concept of effect on Trade between Member States goes beyond traditional movement of goods and services across borders but also concerns the establishment of firms. Following this, the Respondent contended that its jurisdiction in this matter was indisputable as it had established that the conduct of the Appellants led to an effect on trade between Member States.

16. According to the Respondent, the granting of all media rights, on an exclusive basis for a long duration, in the absence of a competitive process to a single broadcaster limits the ability of potential broadcasters to compete for specific rights and therefore makes it more difficult for other undertakings to enter, establish themselves and expand in the relevant market. The Respondent argued that the Appellants ignored the consideration of potential effects in the analysis of effect on trade between Member States and just focused on the actual effects. The Respondent citing the ***Societe Technique Minière (STM) v Maschinenbau Ulm***[4] case argued that the effects could be direct or indirect, actual or potential and that in this case, the potential effects undoubtedly were established.

Regarding the Contention on the Relevant Market Definition

17. With respect to the market definition, the Appellants submitted that the Respondent erred in defining the relevant product market narrowly as the market for CAF

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[1] See CCC/MER/02/12/2022 https://www.comesacompetition.org/notice-of-inquiry-into-the-joint-venture-involving-sas-shipping-agencies-services-sarl-kenya-ports-authority-and-kenya-national-shipping-lines-limited/

[2] EC decision relating to a proceeding pursuant to Article 90(3) of the EC Treaty regarding tariffs for piloting in the port of Genoa (97/745/EC).

[3] Case 56-65, Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.), Judgement of 30 June 1966.

[4] Ibid.

COMESA COMPETITION COMMISSION 23 MAR 2023

competitions. Particularly, the Appellants contended that the Respondent failed to consider the global market for football competitions and the substitutability of CAF competitions with other national, regional and international football events, despite acknowledging the relationship between the viewership for different competitions. The Appellants argued that the Respondent failed to consider CAF's competitors and deviated from international practice on market definition in football broadcasting. The Appellants contended that if viewers are not able to watch CAF tournaments, they would obtain the same utility by switching to other competitions such as UEFA or African national leagues. The 1st Appellant further pointed out that the Respondent appeared to overstate the distinction between the Free to Air (FTA") and Pay-Tv markets by ignoring the possible interplays between them and the mutual impact they have on each other.

18. Further, the 1st Appellant also argued that the Respondent failed to conduct the Small but Significant Non-transitory Increase in Price (SSNIP) test in accordance with the COMESA Guidelines on Market Definition (2019) to assess demand substitutability. The 1st Appellant further argued that by failing to conduct the SSNIP test as required by the COMESA Guidelines on Market Definition, the Respondent erroneously defined the relevant product market.

19. The 2nd Appellant, on the other hand, argued that, in defining the relevant product market, the Respondent relied on inappropriate and historic foreign precedent. The 2nd Appellant further contended that an assessment of viewer preferences and consumers demand was not conducted. The 2nd Appellant also challenged the Respondent's findings of the importance and cultural significance of CAF competitions stating that the media landscape suggests that political content may be more important than sports content.

20. In responding to the issue of the SSNIP test, the Respondent submitted that the definition of the relevant market is not solely dependent on the SSNIP test but also other parameters. The Respondent contended that the utility of the SSNIP test was only appropriate when considering the price parameter. The Respondent argued that the COMESA Guidelines on Market Definition are unequivocally clear that the SSNIP test is not the only tool available for defining the boundaries of relevant markets. The Respondent emphasized that the relevant product market comprises all products that are regarded as interchangeable or substitutable by consumers by reason of the product's price, characteristics and intended use. The Respondent observed that while reference to price in the definition of the relevant product market implied that the

COMESA COMPETITION COMMISSION
28 MAR 2025

SSNIP should be applied, other parameters in the definition such as product characteristics and intended use suggested that non-price considerations were permissible in defining the relevant product market. The Respondent stated that while the SSNIP test is a quantitative test applied for defining the relevant market, qualitative tests can also be used by competition authorities.

21. The Respondent cited the ***United Brands Company v. the European Commission*** case[5] where qualitative factors were considered in defining the relevant market. Even from a quantitative point of view, the Respondent recalled that stakeholder interviews revealed that the high price for CAF broadcasting rights had a huge impact in that most fans were unable to watch CAF tournaments, which would not have been a concern had these rights been effectively substitutable. The Respondent also averred that it is incredibly unrealistic for the Appellants to assume that if viewers are not able to watch the AFCON game, they will obtain the same utility and value by switching to other competitions given the cultural significance and popularity of CAF competitions for African viewers which cannot be replicated by other football events. The Respondent reaffirmed that SSNIP is just one way of defining the relevant market and is not applicable in all cases.

22. The Respondent advanced its argument that the importance and significance of CAF competitions is critical to the test and determination of substitutability. The Respondent contended that CAF competitions cannot be substituted with other national, continental and international competitions due to the special characteristics of CAF competitions as a result of its special cultural value to African audience due to the participation of national players and teams of African countries. The Respondent argued that its submission has been recognised by the statements of stakeholders such as Total SA and the African Union (AU) assembly which are provided as follows:

    a) ***"In Africa, football is more than just a sport- it's a unifying force like no other that brings together the different cultures of the continent"[6](Total)***

    b) ***"..... one of the most unifying and momentous events in the world..... and these prohibitive and inconsiderable fees, which our broadcasters cannot afford, much less hundreds of millions of young Africans,***

[5] The United Brands Company vs Commission of the European Communities (1976) C- 27/76.
[6] Total press statement on its partnership with CAF. Available at https://football-together.totalenergies.com/en/total-and-african-football/notre-partenariat-avec-la-caf.

deprive them the right to participate in an event which should be an African festival and a great opportunity for rapprochement and sharing of cultures among our peoples."[7] (AU Assembly)

23. Regarding the issue of the use of foreign precedent, the Respondent stated that foreign precedent used mainly served to confirm its approach in defining the relevant markets. Further, regarding the issue of including FTA within the relevant product market, the Respondent argued that the differences among Pay-Tv and FTA markets in terms of their characteristics, pricing and content support the finding that CAF competitions are a distinct market.

Regarding the Contention on the Effects of the beIN Agreements and Foreclosure

24. The Appellants argued that the Respondent erred by reaching a conclusion on the anticompetitive effects of beIN Agreements in the absence of adequate or relevant market analysis. In advancing their arguments, the Appellants made reference to the Commission's Restrictive Business Practices Guidelines ("**RBP Guidelines**") which provides that the assessment of a business practice under Article 16 (1) of the Regulations must be made within the actual legal and economic context in which competition would occur absent the business practice. The Appellants submitted that the RBP Guidelines state that the burden of proving that an agreement has the object or effect of restricting competition lies with the Respondent, and this burden must be discharged on a balance of probabilities. The Appellants further submitted that the Respondent bears the onus of showing that the conduct in question have the effect of preventing, restricting or distorting competition within the Common Market. In view of the foregoing, the Appellants held the position that the Respondent failed to discharge its onus of proving that the Agreements had these effects.

25. In particular, the Appellants made reference to the CID remarks in the decision that ***"the Commission did not need to produce evidence of the foreclosure of a distinct competitor. What is evident is that the exclusive nature of the Agreement for a long duration indisputably creates a foreclosure situation and any argument to the contrary is academic."*** According to the Appellants, such reasoning in the decision was inconsistent with the requirement under paragraph 42 of the RBP Guidelines which states that the Respondent must provide evidence to substantiate its conclusions on whether or not the agreement in question has the effect of restricting competition.

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[7] Motion of Heads of States, Assembly/AU/Decl.1(XXVIII), 28th Ordinary Session of the Assembly of the Union, 30 - 31 January 2017, Addis Ababa, accessible on Assembly AU Motion (XXVIII) E.pdf.

26. The Appellants advanced their argument that the RBP Guidelines recognise that vertical agreements, such as the beIN Agreements, are not inherently anti-competitive and should be assessed based on their effects. To this effect, the Appellants argued that the Respondent failed to undertake an appropriate effects-based assessment, required by the Regulations and the RBP Guidelines.

27. The Appellants submitted that purely speculative effects do not suffice for a business practice to be deemed to contravene the Regulations. It is therefore imperative for the legal and economic context of the agreement to be considered when assessing whether a vertical agreement is anticompetitive, which means considering the market concentration, shares, structure etc of the relevant market.

28. Thus, the Appellants submitted that the CID erred in its application of the onus and standard of proof required under Article 16 (1) of the Regulations as it is for the Respondent to properly assess the conduct to not only show harm but also identify any procompetitive outcomes and then to balance the extent to which the harm outweighs the benefits. Therefore, the Appellants submitted that the Respondent failed to discharge this burden of proof.

29. Additionally, the Appellants submitted that the Respondent failed to establish that the beIN Agreements appreciably restrict competition as per the RBP Guidelines. The Appellants contended that the Respondent did not fully consider the economic and legal context in which the beIN Agreements operate.

30. The Appellants also submitted that the Respondent failed to conduct an effect-based test or establish foreclosure. The Appellants contended that the Respondent's view that demonstrating foreclosure is not necessary because the nature of the beIN Agreements automatically foreclose the market, is contrary to its acknowledgement that exclusive agreements are not object violations under the Regulations, and that their effects on the market must be examined. The Appellants further contended that this creates conflating form-based reasoning applicable to an object restriction.

31. The Appellants further argued that the Respondent failed to assess the "likelihood" of harm and overall effects of the beIN Agreements on the market. According to the Appellants, the Respondent seem to have neglected that the term "likelihood" entails "having a high probability of occurrence." The Appellants contended that a high degree of probability of occurrence is established by interviewing the right stakeholders; adopting established market research methodologies; and examining the benefits of the agreement on the market.

COMESA COMPETITION COMMISSION
23 MAR 2023

32. The Appellants disputed the CID's observation that ***"the Commission did not need to produce evidence of foreclosure of a distinct competitor in this context".*** The Appellants further submitted that the Respondent also failed to conduct the "as efficient competitor test" (AEC) to demonstrate foreclosure and that foreclosure cannot occur without the presence of an entity capable of being foreclosed as referred from international practices such as a) ***Intel Corporation Inc. v European Commission***[8]; b) ***Post Danmark A/S v Konkurrencerådet***[9]; c) ***Unilever Italia Mkt. Operations Srl v. Autorità Garante della Concorrenza e del Mercato***[10]***;*** and d) ***Qualcomm Inc. v European Commission***.[11]

33. The Appellants further argued that the Respondent did not present any evidence to demonstrate that the beIN Agreements resulted in the foreclosure of any credible competitor from the relevant markets. According to the Appellants, the Respondent did not identify credible competitor broadcasters in the Common Market that would satisfy CAF's requirements and are willing to or be capable of bidding for the rights in the Common Market.

34. In response to the arguments of the Appellants concerning foreclosure, the Respondent submitted that the AEC test is not provided for in the Commission's Regulations, Rules and Guidelines. The Respondent observed that even in the European jurisdiction where the Appellants borrowed the test, it is usually used in abuse of dominance cases, which is not the concern of the investigation. The Respondent contended that the ***Unilever Italia***[12] ***and Qualcomm***[13] *cases* on which the Appellants relied upon clearly indicate that the AEC test is utilised in assessment of abuse of dominance. The Respondent submitted that potential broadcasters could have participated in the market if CAF had implemented an open and transparent tender process and disregarded the practice of right of first refusal extended to beIN before the end of the duration of the Agreements. Consequently, in the absence of an open and competitive tender process, the Appellants cannot on their own conclude that beIN is the most efficient competitor and capable broadcaster and other broadcasters are not willing and able to compete at the same level as beIN.

35. Citing the ***Societe Technique Minière (STM) v Maschinenbau Ulm***[14] case, the Respondent advanced its argument that, to demonstrate how the agreements may

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[8] Case T-286/09 RENV., Intel Corporation Inc. v European Commission, Judgment of the General Court (Fourth Chamber, Extended Composition) of 26 January 2022, Para. 30.
[9] Case C-209/10 Post Danmark A/S v Konkurrencerådet, 27 March 2012, at. Para. 21, 22, and 25.
[10] Case C-680/20 Unilever Italia Mkt. Operations Srl v. Autorità Garante della Concorrenza e del Mercato (2023), at Para. 56.
[11] Case T-235/18, Qualcomm Inc. v European Commission.
[12] Supra note 9.
[13] Supra note 10.
[14] Supra note 3.

have an effect on competition, it does not need to always establish the actual effects of the Agreements. Establishing that the agreements have the potential of affecting competition would suffice. In view of this, the Respondent argued that in the matter at hand it has adequately established that the beIN Agreements are capable of having such an effect.

36. In the same vein, the Respondent pointed out that in the absence of an open and competitive tender process, the Appellants cannot on their own conclude that beIN is the most efficient competitor and capable broadcaster and that other broadcasters are not willing and able to compete at the same level as beIN.

Stakeholder Interviews

37. With respect to stakeholder interviews, the Appellants submitted that the Respondents failed to interview any potential competitor that was capable of providing the quality of the services offered by beIN Sports. The Appellants made reference to the COMESA Guidelines on Market Definition which require the Commission to contact the main customers and the main undertakings in the industry to inquire into their views about the boundaries of product and geographic markets and to obtain the necessary factual evidence to reach a conclusion. The Appellants contended that eleven (11) out of fourteen (14) of the interviewees were not from the relevant jurisdiction and out of the remaining three, two were not broadcasters while one did not operate in the Pay-tv market but FTA. The Appellant further argued that the individuals interviewed were not experts. The Appellant submitted that equally no consumer association was interviewed in the jurisdictions subject to the investigations.

38. In response, the Respondent argued that it can conduct interviews, gather evidence and information from any third party (including potential competitors) and in the non-affected Member States as long as the stakeholders have knowledge of the industry and the information is accurate, sufficient and relevant. The Respondent submitted that potential competitors/ Pay-Tv broadcasters such as *Azam, Wananchi, presentation Sports, Promo Media* were interviewed. The Respondent stated that it is not bound to interview only competitors from the Common Market or even the identified relevant geographic markets but can interview any one with knowledge of the industry as it did in the instant case.

Nature of the Agreement

39. Regarding the duration of the Agreements, the Appellants contended that the duration is not excessive and cannot be considered a breach of the Regulations. The

Appellants maintained their position that the four-to-five-year duration of the agreements in European markets as argued by the Respondent cannot be imported into the Common Market without analyzing the socio-economic environment in that market or conducting adequate market analysis. The Appellants observed that the CID recognised the need for the duration of agreements to be evaluated on a case-by-case basis. Specifically, the 1st Appellant made reference to examples where longer duration agreement was adopted such as the Canadian Competition Bureau approval of a twelve (12) year exclusive distribution agreement between the National Hockey League ("NHL") and Rogers Broadcasting and Dutch Eredivisie 12-year exclusive broadcasting agreement with Fox Sports, now ESPN. The Appellants submitted that shortening the duration of the agreement will negatively impact the visibility of CAF events and African football by reducing their popularity and subsequently reducing CAF's revenue stream as a result of the decline in the value of marketing rights.

40. In response, the Respondent argued that the beIN Agreements are inordinately long taking cognizant of their combined duration and the cycles of each edition of CAF competitions which are held every two (2) years in the case of the AFCON. The Respondent noted that the scope of exclusivity under the beIN Agreements is evidently extensive since it covers ten (10) competitions and different platforms. The Respondent further noted that the disproportionately long duration of the agreements was confirmed by the feedback of stakeholders i.e. Wananchi and Zuku Tv. On long duration, the Respondent noted that the 1st Appellant gave the example of Sky which broadcasts Premier leagues since 1992. The Respondent underlined that it is worth noting that these rights, unlike for CAF competitions, were awarded through open and transparent tender procedures typically covering three to four (3 – 4) seasons and in smaller packages. The Respondent noted that 1st Appellant gave an example of an eleven (11) year agreement between the National Football League and ESPN. The Respondent pointed out that unlike the beIN Agreements, the NHL also entered into similar agreements with CBS, FOX, Amazon (all digital package) at the same time, without bundling the competitions across platforms. With respect to the example of long-term exclusive agreements for the NHL of Canada, the Respondent pointed out that unlike the case at hand, there were safeguards in place to protect the competitive process in the form of limiting the scope of exclusivity or granting the rights through a tender process.

41. With respect to the Commitment to have an open and transparent tender process, the Appellants argued that they have no legal obligation to subject the award of the media rights to an open tender process as this did not guarantee the most competitive outcome. The Appellants advanced the argument that firms are not required to

COMESA COMPETITION COMMISSION * 28 MAR 2023

undertake a tender process even in the context of exclusive arrangements and where dominant firms are a party to the agreements.

42. In response, the Respondent observed that the rights were offered to beIN through bilateral discussions and that the beIN Agreements contained the right of first refusal clause allowing for extension of the Agreements before they expiry date, thus making it difficult for other potential players from competing for the rights from 2009 to 2028.

43. The Respondent further indicated that during its engagement with stakeholders, Presentation Sports stated that the renewal of the agreements before expiry of the duration of the previous agreement limits the ability of competitors to anticipate the timing at which they should submit their bids to the 1st Appellant CAF. Thus, the Respondent established that the acquisition of the media rights was not subject to competitive forces. In this regard the Respondent submitted that the 1st Appellant can therefore not argue that there is no capable alternative broadcaster when there was never a credible opportunity for broadcasters to compete for the said rights since 2009.

44. The Respondent further submitted that the tender process serves to identify and attract credible broadcasters who can offer the desired and objective level of investments. Particularly, the Respondent observed that there is incontrovertible evidence that when the 1st Appellant subjected the award of broadcasting rights to a competitive tender process, it obtained the biggest investment by New World Tv for FTA and Pay-TV English and local languages media rights for sub-Saharan territories for CAF Competitions and events from 2023 to 2025.[15]

45. The Respondent argued that the fact that a certain practice is not required by law does not mean that such practice will not have an anticompetitive effect. In such circumstances, competition authorities have the power to order appropriate remedial actions to address the competition concern. The Respondent observed that the open and transparent tender practice was exercised in similar cases like the UEFA/FIFA and the International Olympic Committee. This principle was also recognized by CAF's president Patrice Motsepe who stated that: "the tender process will allow CAF to select the media companies that are best placed to achieve CAF's objectives of providing maximum exposure for the tournament".[16]

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[15] CAF concludes historic Media Rights Agreement with New World TV for CAF's Free to Air and Pay-TV English and Local languages Media Rights for Sub-Saharan territories, accessible on: https://www.cafonline.com/news/caf-concludes-historic-media-rights-agreement-with-new-world-tv-for-caf-s-free-to-air-and-pay-tv-english-and-local-languages-media-rights-for-sub-saharan-territories/

[16] CAF launches Tender process for Sub-Saharan and Rest of the World media rights package for TotalEnergies CAF Champions League and TotalEnergies CAF Confederation Cup 2024/25 season, accessible on::

46. To this end, the Respondent concluded that given the nature of the beIN Agreements, the 1st Appellant should have awarded the media rights to the 2nd Appellant in an open and transparent tender process inorder to preserve and safeguard the process of competition.

47. With respect to the exclusive nature of the beIN Agreements, the Appellants contended that despite the fact that the broadcasting rights were afforded to 2nd Appellant on an exclusive basis there are carve outs such as: a) in Mauritius and Madagascar where the rights are granted on a non-exclusive basis except in French; b) the 1st Appellant retains its right to offer highlights of matches on its own digital services and social media channels; c) the 1st Appellant specifically reserves the right to separately grant free to air terrestrial broadcast to a country in which a match or competition is hosted; d) the 2nd Appellant is entitled to sub-license all or part of its media rights. The Appellants further submitted that the CID's position on bundling is unfeasible and lacks a legal basis.

48. In response, the Respondent stated that the bundling practice denies potential Pay-Tv broadcasters and other platform providers the opportunity to acquire only part of those rights given the high broadcasting fees charged for the rights. The Respondent further explained that unbundling would allow more players to compete for the rights, thus enhancing the competitive process and would result in a more efficient exploitation of the various rights. According to the Respondent, there exists sufficient demand for smaller packages and that the sale of bundled rights may result in the locking out of potential bidders. Further, the Respondent stated that due to bundling, some rights may remain unexploited.

Justification under Article 16 (4)

49. Notwithstanding the above arguments that there was no breach of Article 16 (1) of the Regulations, the Appellants submitted that the beIN Agreements met the requirement under Article 16 (4) of the Regulations which provides as follows:

a) Whether the practice creates efficiencies, that is whether it contributes to improving the production or distribution of goods or to promoting technical or economic progress;

b) Whether consumers receive a fair share of the resulting benefits;

https://www.cafonline.com/news/caf-launches-tender-process-for-sub-saharan-and-rest-of-the-world-media-rights-package-for-totalenergies-caf-champions-league-and-totalenergies-caf-confederation-cup-202425-season/

c) Whether the practice imposes restrictions which are indispensable to create the efficiencies; and

d) Whether the practice does not eliminate competition in respect of a substantial market for the goods or services in question.

50. In terms of meeting the above requirement under paragraph 49, the Appellants submitted the following:

a) That the beIN Agreements demonstrate: (i) better capacity utilization (ii) qualitative efficiency – providing technological advances as an example; and (iii) that the magnitude of the efficiencies outweighs the anticompetitive effects of the practice.

b) That beIN Sports increased the broadcast duration of some of the competitions over the past years. For example, in comparison to 2019, beIN Sports increased the broadcast duration of the U-20 AFCON 2021 – a less favorable tournament in comparison with the AFCON - by 47% and nearly doubled the audience leading to a 79% leap of media value for its channels. the Appellants provided the data of broadcast audit in terms of total exposure, cumulative expression and event impressions.

c) That the only way 1st Appellant can afford its expenses and carry through with its 2023-2027 goals and objectives is for it to commercialize its rights with well-equipped broadcasters and sponsors.

51. In response, the Respondent submitted that the Appellants did not establish that they met all the cumulative requirements under Article 16 (4) of the Regulations and that the onus to do so was on them. Specifically, the Respondent contended that the Appellants did not demonstrate that the restrictions were indispensable to the attainment of the objectives of the beIN Agreements. The Respondent concluded that subjecting the award of the broadcasting rights to a tender process would still result in the attainment of the objectives of the beIN Agreements. Therefore, failure to discharge this onus, meant that the beIN Agreements cannot benefit or be exempted under Article 16(4) of the Regulations.

Commitment Decision verses Prohibition Decision

52. Appellants submitted that the CID conflated "prohibition decision" and "commitment decision". The Appellants explained that the CID's proceeding was a commitment proceeding intended to analyse the effectiveness of the Committment offered by the

COMESA COMPETITION COMMISSION
23 MAR 2023

1st Appellant. The Appellants observed that the proceedings at the CID could not have been prohibition proceedings because they were not afforded the opportunity to be heard as provided under Rules 29 and 49 of the COMESA Competition Rules. In response, the Respondent clarified that no commitments were offered by the Appellants to meet the competition concerns in respect of both current and future agreements. Subsequently, the Respondent made a finding of breach of the Regulations and recommended to the CID the termination of beIN Agreements. In this regard, a full hearing was conducted by the CID on 24 October 2023 which gave the Appellants the opportunity to be heard and argue against the Respondent's infringement finding.

Fines Imposed and Due Process

53. The Appellants contested the CID's decision which imposed a fine without providing them with any information or the opportunity to present their defense. The Appellants stated that the issue of fine was never raised during the hearing or recommended by the Respondent and the imposition was done without market analysis and assessment. Thus, the Appellants submitted that the CID disregarded their right to be heard which is enshrined under Rules 29 and 49 of the COMESA Competition Rules. In this regard, the Appellants contended that the fine imposed by the CID should be reversed.

54. The Appellants submitted that the fines were unlawful since the CID was also not entitled to impose a monetary fine in circumstances where they did not form part of the investigation Report. Further, the Appellants contended that e they were not afforded an opportunity to make representations in respect of the fine and the basis for the calculation of the fine, thereby making the decision unlawful

55. In response, the Respondent argued that by virtue of the powers conferred to it by the Regulations, the CID can independently consider and impose fines on any breach pursuant to Article 8 (4) of the Regulations and Rule 45 of the Rules. The Respondent further noted that the possibility of a fine and its quantum, and the applicable legal provision was communicated through the respective Notices of Investigation issued on 13 February 2017 and 16 April 2019 to the 1st and 2nd Appellants respectively.

COMESA COMPETITION COMMISSION
23 MAR 2025

Reliefs Sought

Appellants

56. The 1st Appellant sought the following reliefs:

- *Primary Relief Sought- that the Appeals Board: a) admit CAF's Statement of Appeal; b) find and determine that the CID failed to establish the beIN Agreements' effect on trade between Member States and lacks jurisdiction to initiate and/or pursue the investigation into the beIN Agreements; c) quash the CID Decision; and d) order the closure of the investigation into the beIN Agreements.*

  Alternatively- that the Appeals Board a) admit CAF's Statement of Appeal; find and determine that CAF is not in a dominant position in the relevant market; c) confirm the compliance of the beIN Agreements with the Regulations; d) quash the CID Decision; and e) order the closure of the investigation into the beIN Agreements

  In further Alternative- Should the Appeals Board determine that the Commission and the CID have grounds to further to investigate the beIN Agreements, the Appeals Board to a) admit CAF's Statement of Appeal; b) confirm the beIN Agreements are covered by Article 16 (4) of the Regulations; c) quash the CID Decision; and order the closure of the investigation into the beIN Agreements.

  Finally: Should the Appeals Board determine that the Commission and the CID have grounds to further investigate the beIN Agreements, and that the beIN Agreements are not covered by Article 16 (4) of the Regulations, the Appeals Board to: a) admit CAF's Statement of Appeal; b) refer the matter back to the Commission; and c) direct the Commission to conduct a comprehensive effect based test and market analysis to which CAF and beIN must be invited to comment."

57. The 2nd Appellant sought the following reliefs:

a) *quashing the Decision in its entirety;*

b) *confirming that the MOUs are not in contravention of the Regulations such that the prevailing provisions of the MOUs are permitted to endure for the duration thereof (until 2028, as contemplated under the MOUs);*

c) *ordering the closure of the Commission's investigation into the MOUs; and*

d) making any necessary, incidental or consequential orders."

Respondent

58. The Respondent submitted that the Appeals Board should uphold the decision of the CID and dismiss the appeal for lack of merit.

IV. THE COMMITMENT AGREEMENT

59. After hearing the lengthy written and oral submissions of the Parties, the Appeals Board noted that the Parties requested to be provided with an opportunity to negotiate Commitments intended to address the competition concerns identified by the Respondent concerning the beIN Agreements. The Parties observed that their positions remained opposed. The Appellants submitted they had established that the Respondents failed to prove that there was a breach of the Regulations, while the Respondent submitted that it had established that the Appellants had breached the Regulations. Notwithstanding the foregoing, the Parties were of the view that there was still sufficient scope to negotiate Commitment that would address the competition concerns.

60. Subsequently, the Parties indicated to the Appeals Board that they negotiated and agreed to enter into a Commitment Agreement having regard to the length of the investigation of the matter, judicial economy, and the interest of achieving an expedient resolution of the matter and in order to avoid the costs and waste of ongoing litigation. The Commitment Agreement was subsequently submitted to the Appeals Board for confirmation.

V. APPEALS BOARD'S ANALYSIS

61. After considering the written and oral submissions of the Parties to the proceeding, the Appeals Board notes that there are a number of factual and/or legal issues in dispute which require the Appeals Board consideration. Notwithstanding this, the Appeals Board also notes the willingness of the Parties to resolve the matter through a Commitment Agreement which was subsequently submitted to itfor consideration and confirmation.

62. Before delving into the examination of the terms of the Commitment Agreement which was presented to it, the Appeals Board notes that the principal issue which requires its determination relates to the question of whether it has the power to consider the Commitment Agreement which was never presented to the CID while the latter has

already made a determination on the compatibility of beIN Agreements with the provisions of the Regulations. The Appeals Board examined the aforementioned issue in light of the relevant provisions of the Regulations and Appeals Board Rules, in particular Article 15 (1) of the Regulations and Article 3 (2) of the Appeals Board Rules.

63. The Appeals Board notes that Article 15 (1) of the Regulations read together with Article 3 (2) of the Appeals Board Rules vests it with a wide array of powers in considering any appeal, including making any judgement that the circumstances require and making any order as may be necessary or incidental to the appeal. The Appeals Board, therefore, takes a position that it has the requisite power to consider and decide on the Commitment Agreement. Further, in the interest of achieving an expeditious resolution of the matter, and having regard to judicial economy, the Appeals Board determines that it should make a pronouncement on the matter since reverting the matter to the CID would delay the proceedings and determination of this matter.

64. In view of the foregoing, the Appeals Board directed itself to the issue of examining the terms of the Commitment Agreement to determine whether the commitments offered by the 1st and 2nd Appellants were sufficient to address the competition concerns identified by the Respondent.

65. With respect to the remedies imposed on the 1st Appellant by the CID in respect of future broadcasting rights, the Appeals Board notes that some of the terms under the Commitment Agreement deviate from the Orders of the CID dated 22 December 2023 which are also the subject of this Appeal. The Appeals Board also notes that the proposed Commitment Agreement has terms similar to those that the 1st Appellant entered into with the Respondent in respect of the ***Canal+ Agreement***[17] and ***SuperSport Agreement***[18] which were subsequently confirmed by the CID on 7 June 2024, and the Appeals Board on 19 December 2024 respectively. Thus, for the purpose of ensuring consistency in the treatment of CAF's behaviour in tendering future media rights, the Appeals Board, by virtue of the power vested in it pursuant to Article 15 (1) of the Regulations and Article 3 (2) of the Appeals Rules, considered the new set of agreed Commitments and determines to accept and confirm the same Commitments regarding the award of future media rights. The Appeals Board is further

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[17] Case No: CCC/RFA/01/01/2017/R4 (7 June 2024), Decision of the 104th meeting of the Committee Responsible for Initial Determinations regarding the License Agreements for Media Rights of CAF Competitions between Confederation of African Football, represented by Lagardère Sports SAS, and Canal+ Overseas and Canal+ International.

[18] Appeal Reference No: CCC/APPEAL/03/01/2024 (18 December 2024), Decision of the Appeals Board on the Appeal against the decision of the Committee Responsible for Initial Determinations dated 4 December 2023with regard to the Memorandum of Understanding between Lagardere Sports SAS and SuperSport International (PTY) Limited.

COMPETITION COMMISSION * ZAMBIA
28 MAR 2025

satisfied that the competition concerns identified by the Respondent in respect of the award of future media rights would be addressed by the agreed Commitments under the Commitment Agreement.

63. With respect to the status of the beIN Agreements, the Appeals Board observes the Respondent's submission that it would not oppose the continuation of the duration of the 2016 Agreement until 31 December 2028. The Appeals Board takes note of the Parties' submissions that the immediate termination of the 2016 Agreement will create a blackout in the CAF competitions which the 2nd Appellant is expected to broadcast and this will eventually compromise the expected quality of the broadcasting services. The Appeals Board further notes the explanation from the Appellants that the preparation of the tender for the CAF broadcasting rights takes time. In view of the foregoing, the Appeals Board takes a position that maintaining the decision of the CID to terminate the 2016Agreement by end of 2024 may result in an undesirable consequence which may have an adverse impact on viewers of CAF competitions. The Appeals Board, therefore, takes a reasoned view that allowing the Agreement to run until 2028 may not jeorpadise the prospects of addressing the Commission's competition concerns given the other terms of the Commitment Agreement.

66. The Appeals Board further notes the Commitments of the 1st Appellant and the 2nd Appellant to pay a sum of USD 300,000 each on a non-admission of liability basis.

VI. APPEALS BOARD CONFIRMATION OF THE COMMITMENT AGREEMENT

67. Premised on the above, the Appeals Board hereby accepts and confirms the Commitment Agreement attached as Annex I to this decision.

68. With regard to the contentious substantive and procedural issues referred to in Section III of this Decision, the Appeals Board determines that it is not necessary to dwell upon them in view of the Commitment Agreement between the Parties. Accordingly, the Appeals Board will not pronounce itself on the issues in dispute.

COMESA COMPETITION COMMISSION
23 MAR 2023

VII. ORDERS

69. In view of the foregoing, the Appeals Board makes the following ORDERS :

a) That the Appellants comply with the Commitment Agreement.

b) That failure to comply with the Commitment Agreement by the Appellants shall be a breach of the Order of the Appeals Board and shall be liable to a fine pursuant to Article 8 (5) of the Regulations and any other remedy that may be applicable pursuant to the Regulations and the Appeals Board Rules.

c) That the investigation into the two Memoranda of Understandings entered into between Lagardère Sports and beIN for the commercialization of media rights of football competitions organised by CAF, is hereby closed.

d) That the orders shall take effect on the date of the decision.

ISSUED THIS 28TH DAY OF MARCH 2025

Commissioner Lloyds Vincent Nkhoma (Chairperson)

Commissioner Emmanuel Adelbert Booto Nkaimana (Member)

Commissioner Beatrice Uwumukiza (Member)

Commissioner Luyamba Kizito Mpamba (Member)

Commissioner Cicilia Mashava (Member)