

Kluwer Competition Law Blog

The COMESA Appeals Board Upholds CAF's Defence and Closes Investigations into Intermediation Agreement with Sportfive, Setting Precedent for Years to Come

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On 16 January 2023, the Common Market for Eastern and Southern Africa (the “**COMESA**” or the “**Common Market**”) Competition Appeals Board (the “**Appeals Board**”) published its seminal [decision](#) upholding the commitments provided by the *Confédération Africaine de Football* (the “**CAF**”) in relation to contracts for the commercialization of CAF's media and marketing rights (the “**Intermediation Agreements**”) with Sportfive EMEA (“**Sportfive**”), thus putting an end to a five-year legal battle. [1]

The decision, which is the first rendered by the Appeals Board in matters of sports media and marketing rights and the functioning of the COMESA Competition Commission (the “**Commission**”) and its relation to other COMESA competition adjudicative bodies, sets several ground-breaking precedents that will guide the Commission's practice for years to come.

Background

In 2007, CAF executed an agreement for the commercialization of media and marketing rights of the CAF competitions and events with Sportfive for an eight-year term, which the parties renewed for an additional term of twelve years (the combined term of the Intermediation Agreements was 20 years). The Intermediation Agreements granted Sportfive the exclusive right to commercialize the broadcasting and sponsorship rights for the CAF competitions in exchange for a commission.

On 13 February 2017, the Commission [initiated](#) its investigations into the Intermediation Agreements alleging that they raised concerns of a possible breach of Article 16(1) of the [COMESA Competition Regulations](#) (the “**Regulations**”), which prohibit restrictive business practices. More specifically, the Commission had issues with the combined terms of the Intermediation Agreements, in light of their exclusive nature and Sportfive's enjoyment of a right of first refusal with respect to their renewal. The Commission was equally concerned with the fact that the intermediation rights for the CAF competitions and events were awarded without a public tender.

Initial findings and CAF's commitments

On 14 August 2019, following its initial assessment, the Commission issued its *Preliminary Investigations Findings Report in the matter relating to the Agreements for the Commercialisation of Media and Marketing Rights of competitions organized by the Confédération Africaine de Football* (the “**Preliminary Report**”), whereby it concluded that the Intermediation Agreements breached Article 16(1) of the Regulations insofar as their object and effect foreclosed the market, given that “*the long-term duration of the exclusivity period was exacerbated by the right of first refusal provisions*”.

The Commission recommended, *inter alia*, the termination of the Intermediation Agreements at the end of the last CAF competition of 2022, and the imposition of fines on both CAF and Sportfive whilst providing for a monitoring mechanism to ensure compliance with all recommendations in the future. Under the **COMESA Competition Rules** (the “**Rules**”), the fines can reach up to 10% of the parties’ annual turnover.

CAF terminated the Intermediation Agreements with Sportfive shortly after the Preliminary Report was issued, and commenced discussions with the Commission in view of remedying their anticompetitive effects.

Following extensive discussions, on 23 August 2020, CAF signed the commitments approved by the Commission, whereby it undertook to (i) remove any right of first refusal clause in any ongoing and future exclusive intermediation agreements for its competitions; (ii) award intermediation rights through an open and transparent tender process; (iii) limit exclusive agreements for intermediation rights to a maximum of four years; and (iv) notify the Commission where there are justifiable grounds to execute intermediation agreements for a longer term.

On 23 June 2021, the Commission issued its Staff Paper Number 2021/06/09 confirming its satisfaction with CAF’s commitments and recommending that the COMESA Committee Responsible for Initial Determination (the “**CID**”) close the investigation. By way of background, the CID is a quasi-judicial body comprised of three commissioners whose role is to make determinations confirming or reversing recommendations made by the Commission.

The CID's unexpected reaction

On 29 June 2021, despite the Commission’s recommendations, the CID **rejected** the commitments ruling that the matter cannot be considered on a “*no-admission of guilt basis*” as it was “*not convinced that the Regulations have not been breached*”. The CID added that the parties to the Intermediation Agreements should be offered the opportunity to be heard within thirty days, although it never held a hearing within this time, which prompted CAF to file an objection requesting the CID to revisit its June decision. On 2 September 2021, the CID **denied** CAF’s request (the June and September decisions are referred to as the “**CID Decisions**” or the “**Decisions**”) leaving CAF no choice but to challenge the CID Decisions before the Appeals Board.

On 16 December 2022, the Appeals Board upheld CAF’s claims, quashed the CID Decisions, and ordered the adoption of the commitments and the termination of the investigation, marking the closure of a lengthy legal battle.

The grounds for CAF's challenge and the Appeals Board's final ruling

CAF challenged the CID Decisions on several grounds, including the improper constitution of the CID while deliberating and issuing the September decision, the denial of CAF's right to be heard, the CID's conflation of a prohibition (i.e., decisions to impose fines) and a commitment decision (i.e. decisions to close investigations and adopt proposed commitments), and the CID's failure to reason its decisions.

CAF emphasized that prohibition and commitment decisions are mutually exclusive and that by requesting CAF to admit its culpability, the CID deviated from the essence of the Regulations (not to mention its duty to act impartially). CAF submitted that the grounds of the challenge left no doubt that the CID committed errors of fact and law that justify the quashing of the CID Decisions, upholding CAF's commitments, and closing the investigation without any fines being imposed on CAF.

In the absence of any COMESA-related precedent on the issues raised before the Appeals Board, CAF and the interested parties, notably Sportfive and the Commission, relied on international best practices including the European Commission (the "EC") and Court of Justice of the European Union (the "CJEU") decisions.

Main procedural defences

CAF challenged the CID's September decision on the basis that it was deliberated and issued by two commissioners instead of the statutory three members as provided in Article 13(4) of the Regulations. CAF argued that the defective constitution of the CID renders its September decision void *ab initio*, as the provisions of the Rules are mandatory, not to mention that it is a matter of best practice and a legal requirement in similar *fora* (e.g., the number of the board of commissioners, and the judges of the COMESA Court of Justice) that an adjudicating panel be comprised by an odd number of decision makers. This, CAF averred, was a fundamental element of the right to due process.

The Commission disagreed with CAF and relied on the terms of reference of the CID (which were not publicly available), which set the quorum of the CID at two commissioners. The Appeals Board upheld the terms of reference but emphasized the need to amend them to avoid similar disagreements in the future and to ensure compliance with international best practices.

CAF further maintained that the CID Decisions were devoid of any reasoning as the CID only indicated that "*it was not convinced*" that the Regulations had not been breached while the scope of the CID's powers should have been limited to assessing the validity of the commitments and their impact on competition in the market. CAF argued that such vague reasoning not only equated absence of reasoning for its failure to provide "*sufficient information to make it possible to determine whether the decision is well founded or whether it is vitiated by an error which make it possible for its validity to be contested*" (Case T-45012 *Anagnostakis v. EC*, 30 September 2015), it also reflected the CID's wish to find a breach at any cost at the expense of the alleviation of the Commission's competition concerns.

The Appeals Board upheld CAF's defence and ordered that all future CID decisions (i) set out the facts and the historical background of the issue at hand; (ii) set out the issues submitted for determination; (iii) be corroborated with legal authorities supporting the CID's conclusion; and (iv) provide the reasons leading to the findings and determination of each issue.

Substantive defences

The Appeals Board upheld the parties' submissions that commitments serve the purpose of ending an investigation while ensuring that competition within the Common Market is safeguarded without the need to establish the existence of an infringement.

The Appeals Board further confirmed that the CID's failure to consider the content of the commitments and the role they played in alleviating the Commission's concerns or allowing the parties to express their views thereon ultimately vitiated the Decisions. Hence, the Appeals Board found that the CID Decisions "*may set an undesirable precedent and compromise (...) the [Commission]'s ability to engage with parties in finding rapid resolution in future cases*".

Furthermore, the Appeals Board endorsed international best practice by determining that prohibition decisions and commitment decisions are mutually exclusive, which meant that where the Commission finds that commitments are to be adopted, a party should not be required to admit guilt since this would defeat their purpose. Indeed, commitments favour judicial economy over punishment. These considerations led the Appeals Board to conclude that the CID had committed an error of law by rejecting CAF's commitments even as they were made without any admission of guilt.

The Appeals Board noted that the proposed commitments were the result of extensive negotiations between CAF and the Commission that had consulted various market players to assess the impact of commitments on the market. In the absence of any competition law rationale that may justify the CID's rejection of the commitments and the reversal of the Commission's decision, the CID erred, especially as the parties were not offered the opportunity to be heard on the content of the commitments and their restoration of competition in the market (i.e., proportionality).

Conclusion

The Appeals Board's decision reflects international best practices and paves the way for constructive cooperation between the Commission and parties doing business within the Common Market. Besides inviting the Commission to revisit the Regulations and terms of reference following the procedural arguments made by CAF, the Appeals Board emphasized that where the Commission and a party agree on certain commitments, the CID may not overturn them without conducting its own assessment of the commitments and their impact on the market after providing the parties with the opportunity to be heard. Where the CID remains dissatisfied with the commitments notwithstanding the parties' pleadings, it must issue a well-reasoned decision.

This is the first instance where the Commission and the CID disagreed on the most appropriate remedy to address competition concerns. Whereas the Commission opted for a commitment decision and a speedy resolution of the investigations, the CID favoured penalizing the parties

based on the Intermediation Agreements, irrespective of the impact this may have on the market. The Appeals Board settled the disagreement by expressing its preference for commitment decisions and judicial economy. This is in line with international best practice that reserves the rejection of commitment decisions to cases of the most egregious violations of competition rules such as hardcore cartel cases.

[1] COMESA publications use the term “*undertakings*” instead of “*commitments*” as used in EU and US competition law. The authors use the term “*commitments*” instead to avoid any confusion with the concept of undertakings under EU and US law.

** Any opinions or conclusions provided in this blog entry shall not be ascribed to Meysan Partners or any clients of the firm involved in the case.*

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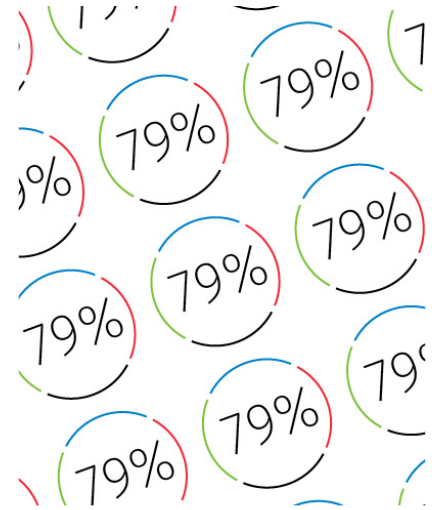
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