



EUROPEAN COMMISSION

Competition DG

Information, Communication and Media
Media

Brussels, May 2005

ISSUES PAPER

On the preliminary findings of the Sector Inquiry into New Media (3G)

This Issues Paper drafted by the services of DG Competition of the European Commission and the EFTA Surveillance Authority is meant to serve as a basis for discussion in view of a public presentation on the preliminary findings of the above-mentioned sector inquiry to be held in Brussels on 27 May 2005. It does not represent a formal position or a legal analysis of the Commission or the Authority. No inference should be drawn from this document as to the final conclusions of the Commission or the Authority, or the precise form or content of future actions to be considered by them.

BACKGROUND

1. The sector inquiry into the provision of sports content over third generation (3G) mobile communications networks (3G sector inquiry) was launched on 30 January 2004 on the basis of a Commission decision.¹ The EFTA Surveillance Authority (the Authority) launched a similar inquiry regarding the EEA EFTA States on 17 March 2004.² The Commission and the Authority have carried out the 3G sector inquiry in parallel, with simultaneous fact finding exercises and identical scope of the issues under scrutiny. Thus the 3G sector inquiry covers all the countries in the EEA – the 25 EU Member States and the 3 EEA EFTA States Iceland, Liechtenstein and Norway.³
2. The preliminary findings of the 3G sector inquiry come in a year critical for the further take-up and development of 3G services. The choice of the 3G sector, and the focus on access to sports content, reflect the value of the sector inquiry tool for addressing anti-

¹ See Commission press release of 30.1.2004, IP/04/134

<http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/04/134&format=HTML&aged=1&language=EN&guiLanguage=en>

² See Authority's press release of 17.3.2004, PR/04/05 at

<http://www.eftasurv.int/information/pressreleases/2004pr/dbaFile4920.html>

³ This Issues Paper represents a shortened non-confidential Summary of the Assessment Report of the Sector Inquiry responses. The services of the European Commission and of the Authority were assisted in the development of the questionnaires and in the analysis by Oxera, an economics consultancy based in Oxford, the UK.

competitive behaviour that might impair the development of this key emerging market. It is also in line with the consistent Commission policy of keeping the markets for premium media content open. The sale and distribution of sports rights for 3G, similar to the neighbouring broadcasting markets, is characterised by a limited number of often dominant actors, which trade a few highly valuable rights. The Commission and the Authority wish to ensure that the development of the 3G sector is not hampered in the EEA, and in particular curb any anti-competitive behaviour of powerful established players in neighbouring markets.

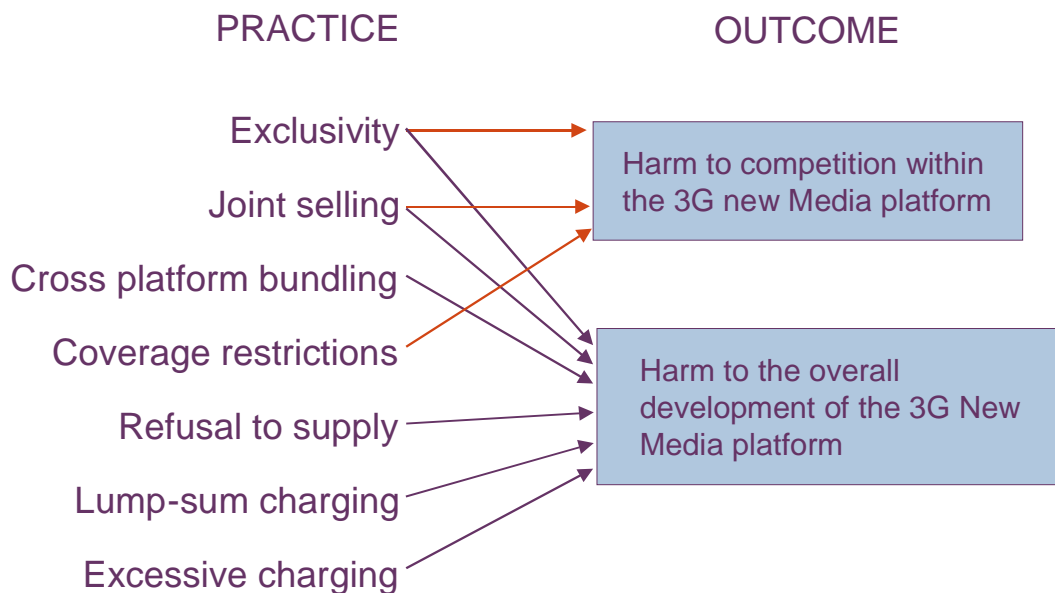
3. The inquiry was carried out in two distinct phases, so as to maximize the quality and relevance of the information collected. In a first phase, a limited number (70) of the major and/or most advanced market players (for instance mobile operators closest to 3G market launch) were addressed, for each stage of the supply chain, namely (i) rights owners and intermediaries (e.g., content aggregators and agencies); (ii) TV operators and (iii) mobile operators.
4. This formed the basis for the Commission and the Authority to draft two distinct sets of questionnaires for the second phase of information collection. The first set was aimed at the market players already addressed in the first phase and which sought to gather further in-depth data on key points, for example, exploring the motivations for behaviour that was observed in the responses to the first round of questionnaires. The second set of questionnaires, addressed to most remaining main players in the market (more than 200 addressees), comprehensively dealt with potential competition concerns at the different stages of the rights value chain. It can be said that the data collection exercise through the two-phase questionnaire process has been a success. Most market players have provided very extensive and meaningful information.
5. This Issues Paper has been drafted to serve as a basis for the public discussion to be held in Brussels on 27 May 2005. Comments on the issues raised in this paper, and in particular on issues relating to the market definition and the competition concerns put forward, are welcome during the meeting. Further comments can be submitted until 1 July 2005 to comp-sector-inquiry-3g@cec.eu.int, with a copy to competition@eftasurv.int. The Commission and the Authority will comprehensively review the comments before completing their assessment.

ANALYSIS FRAMEWORK

6. The sector inquiry targeted a number of commercial practices in relation to licensing of sports rights, as they could potentially give rise to competition restrictions. They are the following :
 - refusal to supply sports content for mobile distribution;
 - exclusivity;
 - joint selling;
 - cross-platform bundling of rights;
 - restrictions on coverage faced by the mobile operators;
 - pricing of mobile rights.
7. Two scenarios of undesirable market outcomes from a competition policy perspective can arise as a result of those practises :

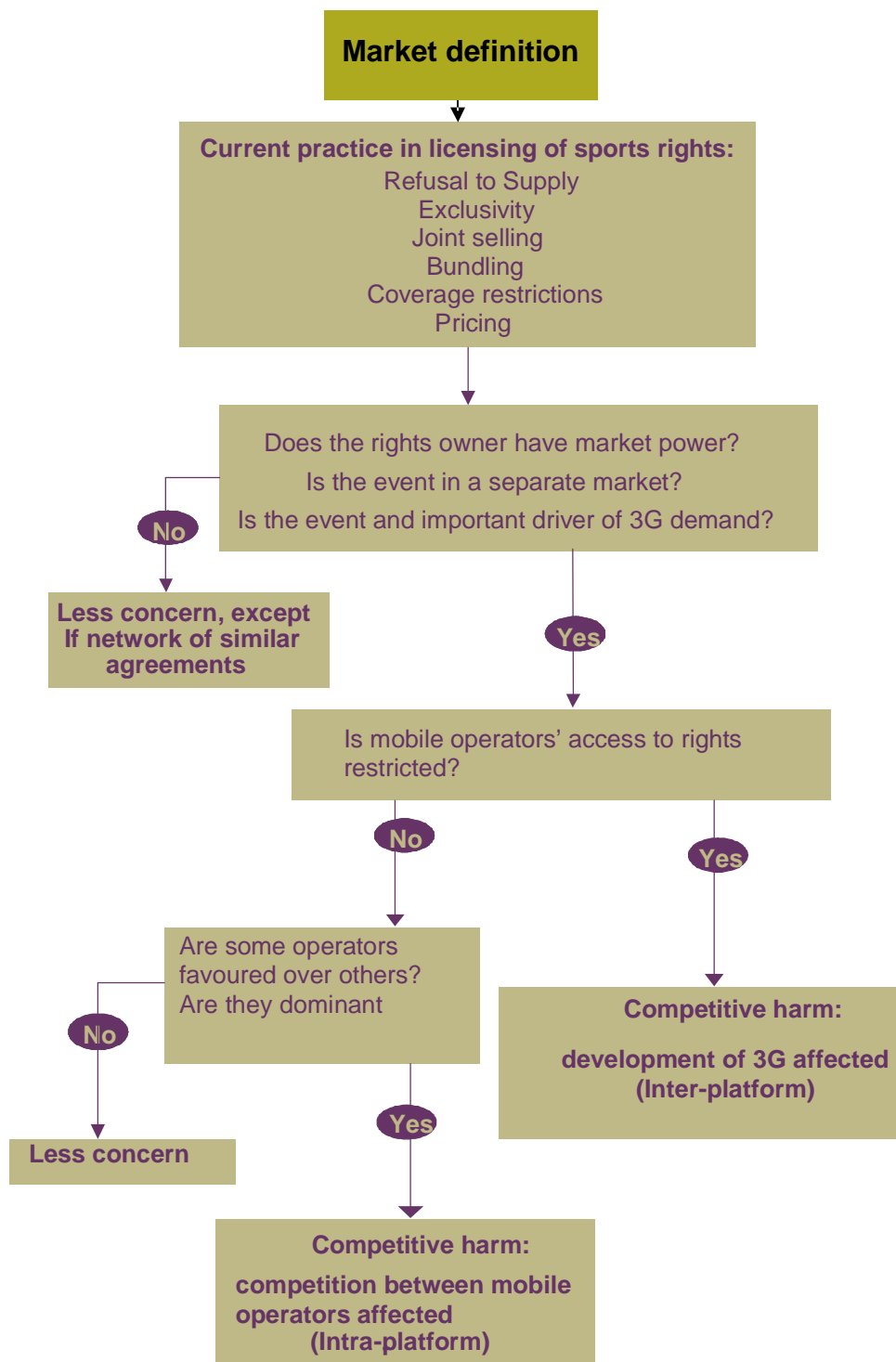
- *Scenario 1* - a situation in which all 3G operators find it difficult to obtain competitive access to 3G sports rights, and hence cannot develop an attractive sports content offering. This may hinder the development of 3G as a whole.
- *Scenario 2* - a situation in which only one or a few mobile operators obtain a strong market position that will be reinforced as 3G develops further, thus making it increasingly difficult for other mobile operators to enter the market or compete successfully. This situation can be described as a lack of development of competition within the 3G New Media platform.

8. The analysis of the data collected in the 3G sector inquiry shows that both these scenarios are not just hypothetical risks. It is important to draw an explicit distinction between the two scenarios, as they may arise through different means and may therefore also require different policy and/or enforcement actions. For example, the *inter-platform* concerns typically arise due to the licensing arrangements between rights owners and broadcasters, with the effect of limiting access to these rights for mobile operators (some instances are set out further below in this paper). *Intra-platform* concerns are more likely to arise from licensing arrangements between rights owners and individual mobile operators.
9. The potentially harmful commercial practises mentioned above would risk impacting competition mainly in the following way :



10. In the context of the analysis, a simplified framework⁴ has been elaborated to assess the actual and potential negative impact on competition of those commercial practises (please see the chart below):

⁴ This has been used in the assessment as a simplified methodological tool. Actual cases will have to be considered according to their particular characteristics.



11. This framework, as visually represented above, has served as a first basis of analysis.

MARKET DEFINITION

12. The question whether certain business practices infringe the competition provisions of the EC Treaty and the EEA Agreement can only be answered after the relevant market is defined. The sector inquiry has been a useful tool in analysing the relevant markets by gathering information on the characteristics and use of 3G sports rights.

Significance of sports rights for 3G networks in particular in relation to other 3G content

13. Access to sports content is an important factor for the mobile operators, not least due to the high profile that premium sports events hold, and their potential to be used as a strategic marketing tool. There seems to be an identifiable demand for 3G sports content that is distinct from the demand for other content provided via mobile networks.
14. The results of the sector inquiry tend to indicate that coverage of sports events over mobile networks can be considered to be in a separate market to that of other content distributed over those networks due to the branding power of sports and their ability to attract targeted subscribers.
15. The attractiveness of sports content for mobile transmission and the level of competition between the different sports vary according to the type of sport/sporting event and it also varies across countries. The sports that stand out as most important to mobile operators across the EEA are football (including national and international tournaments and events), the Olympics, and Formula 1. Other sports exhibit strong cross-border regional support within the EEA or have the character of national sports.⁵
16. It cannot be excluded that some sports or sporting events constitute separate relevant markets of their own, given their very particular public appeal, and the lack of substitutability with other events. The question whether certain sports or sporting events constitute a separate market requires assessment on a case-by-case basis.
17. The analysis has focused on the sports which are most attractive for 3G mobile transmission, at either EEA or national level, as access to the rights for such sports may be a source of market power. Market power can be held either at rights holder level or at the level of purchasers of the rights.

Substitutability between TV broadcasts, live or deferred, and transmission over mobile networks.

18. The scope for analysis of demand substitutability between different types of TV broadcasting and mobile transmission using price data was restricted by the limited period for which price data was available.⁶ The analysis therefore focused mainly on consumer behaviour data collected by the market players, and product characteristics and its intended use.⁷
19. In the sector inquiry, most respondents did not consider viewing live action on TV and via mobile transmission, including via 3G phones, as substitutes. The vast majority of respondents agreed that consumers of mobile sports services buy or would buy those services in addition to viewing sports on TV channels. Only one fifth considered that

⁵ For example rallying in Finland and cricket in the UK.

⁶ See Commission notice on the definition of the relevant market for the purposes of Community competition law, paragraph 15, OJ C 372 on 9/12/1997, and Notice on the definition of the relevant market for the purpose of competition law within the EEA, OJ L 200, 16.7.1998, p. 48 and EEA Supplement to the OJ No 28, 16.7.1998.

⁷ Ibid, paragraph 36

consumers watching mobile sports content would be less likely to view live content on TV, and one quarter estimated that consumers of 3G sports services would reduce spending on sports viewed on pay-TV channels. The sector inquiry found that TV operators tend to perceive or argue that a greater competitive threat to TV exists from the development of mobile sports services than seems to be the perception of the other market participants.

20. Respondents considered that mobile services exhibit several key demand characteristics that differentiate the mobile content services from the service provided by TV operators:
 - screen size;
 - quality of images and sound;
 - comfort of viewing and ability to watch in a group;
 - mobility of viewing via 3G;
 - cost of usage;
 - battery/power capacity;
 - ability to personalise the viewing experience.
21. Content delivered via mobile can be accessed in situations where consumers may not be able to watch TV, most significantly when on the move. Mobile sports content consumers will also resort to the services in a different social context to that in which TV services are consumed, as stressed by a number of respondents.
22. Overall, the data provided by market participants, as well as the differences in service characteristics and patterns of usage between TV and 3G content services, seem sufficient at this stage to conclude that there is in fact limited scope for substitution. TV and 3G content services therefore appear to be in separate markets.

COMPETITION CONCERNS

23. The sector inquiry highlighted the following business practices that could give rise to competition concerns.

Lack of access to sports content for mobile operators

24. For most countries in the EEA for which definitive information was provided, there are many examples of sports for which the rights have been sold. However, there are notable examples of sports for which the content has not been provided to mobile operators.⁸
25. Given the importance that the mobile operators have placed on access to content for some of these events, the fact that such content has not reached the market is a matter of concern. The lack of availability of content for major events could constrain the development of the 3G mobile sector as a whole. Although the sector inquiry found few instances where rights owners blocked access directly by refusing to enter into negotiations, concerns were raised about two main types of behaviour (further discussed below) leading to more indirect forms of access refusal:

⁸ In certain cases further analysis is needed. For example, when mobile operators have opted not to purchase content rights themselves but to rely on third party provision. This may have the effect that their mobile operators' incentives to market content services, may be limited.

- the imposition of excessive terms of sale or overly restrictive conditions on the rights;
- refusal to sub-license rights acquired by TV operators when the mobile rights and the TV rights were purchased together in a bundle.

Exclusivity

26. Exclusive access to premium content can, if the content is a sufficiently strong driver of demand, contribute to operators obtaining or protecting positions of significant market power in the retail markets. Exclusivity is more likely to be of concern if it relates to a premium sport, if the mobile operator already possesses a position of single firm dominance, if the exclusive contract is for a long duration (e.g., of more than three years) or if exclusivity over a premium event gives an advantage when purchasing the rights to other events.
27. The evidence gathered in the sector inquiry does not establish general patterns of exclusion via exclusivity. Of particular note is the evidence that smaller operators, and even new entrants, have been able to purchase exclusive content to premium events in a number of countries — even in countries where other operators may possess significant market power. There are however situations where the market leader has secured wide-ranging exclusivity which may raise competition issues.

Cross-platform bundling of rights

28. There are a large number of sports and events for which mobile rights are sold separately for different transmission platforms – TV, mobile networks, and the Internet. This serves to indicate, in addition to the assessment in the context of the market definition, that on the basis of current technology, it is possible to identify with sufficient clarity the scope of rights available for each platform. The technical limitations involved in live broadcast over mobile networks further confirm that the distinction between mobile rights and Internet rights seems currently justified.
29. Bundling of rights across platforms therefore represents a restriction which is likely to prevent mobile operators from purchasing the bundled rights, as the value of the TV rights is likely to be several times more than the value of the mobile rights,
30. The purchasers of bundled rights are generally TV operators. Acquiring mobile rights may enable them to operate in a gatekeeper role, determining which of the mobile operators—if any—are able to sub-licence the rights, and on what terms, or in case 3G rights are withheld, it may prevent the development of the mobile platform as a whole.

The effects of collective selling

31. The sector inquiry has sought to identify whether, in the context of 3G, there is a relationship between the coverage available to consumers for those events where the rights are collectively sold, and those for which the rights are sold individually by the clubs.
32. The great majority of sport rights that are co-owned by sports clubs and organisers of sporting events or competitions are sold collectively. Examples have been identified where collective selling has been associated with concerns raised by the mobile

operators. Other factors, such as a degree of vertical integration in the supply chain, appear to have played an additional role in those cases where concerns have arisen.

Pricing concerns

33. The analysis explored whether there were examples of pricing practices that could distort competition between mobile operators and cause competitive harm to 3G and other distribution platforms.
34. When rights are sold on a fixed rate (lump sum) basis, this could have the effect of favouring the larger operators, as they have a larger installed base of customers over which to spread the costs. This therefore makes the purchase of the rights relatively less risky for the larger (and potentially dominant) players, conversely making it relatively more risky for the smaller operators. However, the analysis does not show that complaints about excessive pricing always arise from situations where only the largest operator has been able to purchase the rights.
35. In addition, rights owners could seek excessive prices with a view to limiting the supply of 3G sports content to the market in order to protect the interests of companies in neighbouring markets such as broadcasting. The sector inquiry found that concerns were raised by mobile operators with regard to these practices.

Coverage restrictions

36. Coverage of 3G sport content can be restricted with regard to length (e.g. only highlights or short clips) and with regard to timing (embargoes leading to only deferred transmission for instance).
37. The sector inquiry found that some limited restrictions with regard to the length of transmission might not always raise difficulties given existing technical limitations. However, the justification for timing restrictions seem to be less convincing, especially when the restrictions are linked to the TV broadcasting of the event. As there is little evidence of direct substitution between mobile sports services and TV sports services, the licensing of mobile rights may be expected to have only a very limited effect on the value of TV rights. The very substantial restrictions on coverage observed in relation to many events therefore do not seem to be proportionate on that basis.
