

**CASE COMP/C2/38788 – SECTOR INQUIRY INTO THE PROVISION OF
SPORT CONTENT OVER 3G NETWORKS**

**COMMENTS BY FORMULA ONE ADMINISTRATION LIMITED
TO THE COMMISSION'S ISSUE PAPER ON THE PRELIMINARY FINDINGS
OF THE SECTOR INQUIRY INTO NEW MEDIA (3G)**

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**COMP/C2/38.788 - Sector inquiry into the provision
of sports content over third generation networks**

This paper comments on the Issues Paper on the Preliminary Findings of the Sector Inquiry into New Media published by the Commission on 18 May 2005 (the “**Issues Paper**”). Formula One Administration Limited welcomes the opportunity to comment on the Issues Paper and commends the Commission’s efforts to engage interested parties including in particular sports rights holders on how the development of new media services might be impacted by access to sports content.

Formula One Administration Limited submits this paper on behalf of itself and various related entities (including Formula One Management Limited) that are involved in the commercialisation of FIA Formula One World Championship (the “**Championship**”) (collectively “**FOA**”).

1. Analysis Framework (¶¶ 6-11)

FOA does not agree that sports content is essential for the development of 3G as a whole.

1.1 FOA welcomes proposals aimed at developing the third generation (3G) market; however, FOA believes that the Commission overvalues the importance of sports content in the growth of 3G services. FOA does not believe that sports content, in itself, is integral to the development of 3G products or services as a whole.

1.2 Indeed, to the extent that a sports event occurs on an irregular or intermittent basis, the importance of sports rights to the success of a 3G service is even more dubious. FOA would not expect a consumer, particularly in such circumstance, to enter into a 3G mobile subscription contract for the primary reason that he/she could obtain access to sports content.

1.2.1 For instance, while the Olympics and the World Cup might be regarded as “premium” sporting events, the Commission should be mindful that this does not necessarily mean that consumer demand for access to those events on 3G mobile is particularly strong. In fact, due to infrequency of the events -- both of which take place every 4 years -- they are unlikely to drive consumers to subscribe to 3G mobile purely on the basis of such events.

1.2.2 *[CONFIDENTIAL]*

1.2.3 [CONFIDENTIAL]¹

1.3 Many types of content and services can be expected to contribute to the rapid take-up of 3G technology and services. Information services, multimedia messaging services (MMS), email, Internet access, shopping, games, betting, banking/finance as well as video/TV services are all important 3G applications. Indeed, according to certain press reports and industry reports, sport does not feature as one of the main types of content that consumers desire from 3G mobile.

1.3.1 At p.9 of the Nokia White Paper, Nokia cites a study by the HPI Research Group which found that *“interest in games is high in age groups from 15-24 years, but decrease significantly after that, which may explain why gaming didn’t make it to the top ten list of mobile entertainment features: sending SMS messages; local traffic and weather information, use as a camera; getting latest news headlines; sending photos to friends; use as a video camera; getting info for movies; listening to radio; requesting specific songs.”*² Viewing or accessing sports content is not listed.

1.3.2 The Economist also reports that *“at the moment, most optimism surrounds the prospects for music downloads to mobile phones (the most advanced models of which can now double as portable music players). ... Motorola, the world’s second-largest handset-maker, has just done a deal with Apple, whose iTunes Music Store dominates the market for legal music downloads. And Nokia has just done a similar deal with Loudeye, another online music store.”*³

1.3.3 If, as believed by some industry commentators, the greatest latent demand for 3G services will come from the business market, the importance of sports content in 3G take-up is even less.⁴

1.4 [CONFIDENTIAL]⁵

1.5 In addition, it is generally accepted that there is no single “killer” application for 3G. For example, and as cited at p.5 of the Nokia White Paper, IDC forecasts that *“not one,*

¹ [CONFIDENTIAL]

² Available at http://www.nokia.com/downloads/solutions/mobile_software/mobileterminals_net.pdf#search='nokia%20white%20paper%20mobile%20terminal%20software'

³ The Economist, “Vision, meet reality – Mobile 3G telecoms”, 4 September 2004.

⁴ For example, at p.9 of Lucent’s 2003 paper on driving the 3G business (available at http://www.lucent.com/livelink/090094038004607c_Newsletter.pdf), Lucent states that it believes “3G launch strategies must focus on the enterprise market” and explains “[f]irst there is a real pent-up demand. And second, there is an actual end user pool that doesn’t need educating. They know they need high speed data on the move and they know how to use the applications. ... So we don’t need to convince end users about the value of the product.”

⁵ [CONFIDENTIAL]

but multiple applications will attract the attention of mobile subscribers.” Indeed, this is demonstrated by the actual service offerings available from various UK mobile operators.

- 1.5.1 The mobile service provider 3, offers UK consumers three service packages: “**Sports**” which offers access to Barclays Premiership goals from 5.15pm on Saturdays, access to Sky Sports content, Test and NatWest Cricket series, Rugby Union and Rugby League, and Formula 1; “**Video Value**” which offers video mini-movies, video clips of Barclays Premiership goals, comedy, showbiz, rent games and all video clips from Sky News and Sky Sports; and “**Video Essentials**” which gives access to videos and text stories in comedy, sport, football, movies and showbiz, location services, news, finance, weather, horoscopes and travel.⁶
- 1.5.2 Similarly, Vodafone UK’s 3G package includes video access to music, entertainment, news and weather information, sport and games.⁷
- 1.5.3 T-Mobile also offers a variety of 3G content including news, sports, music and games.⁸
- 1.6 The factors set forth in paragraphs 1.1 to 1.5 above demonstrate that to attract consumers to 3G technology, it is more important to offer a wide selection of content regardless of whether sports content is included. In other words, while sports content is frequently identified by the Commission as having the ability to turn a consumer who is uninterested in 3G technology to a 3G mobile subscriber, it is in fact of more importance for a mobile operator to be able to offer a range of information/entertainment services which may or may not include sports content.
- 1.7 FOA believes that, in general, it is of more importance to ensure that mobile network operators and mobile handset manufacturers make further advances in 3G technology than it is to ensure access to sports rights content.
 - 1.7.1 Requiring most immediate attention perhaps is the need to increase 3G coverage in many Member States. As The Sunday Times reports the current status of 3G coverage is poor: *“Go to any of the operators’ websites, however, and you’ll see maps showing scant coverage, along with forecasts that some areas will have to wait for years before 3G services arrive. Although a phone reverts to GSM when out of range of 3G, if you’ve bought into the latest technology for its whizzy new services, then you’ll be*

⁶ <http://www.three.co.uk/explore/howmuch/addons/payMonthlyindex05.omp>

⁷ <http://www.vodafone-i.co.uk/live/>

⁸ <http://www.t-zones.co.uk/en/index.html>

*disappointed. Put simply, you're driving a Porsche, but often end up in the slow lane with the workaday but reliable Ford Focuses.”*⁹

- 1.7.2 Indeed, as identified by the Commission, it is only in four Member States -- Luxembourg, Slovenia, Sweden and the UK -- that more than 80% of population have 3G coverage, while the average coverage of the remaining Member States is around 40%.¹⁰ However, Vodafone, which is a leading mobile operator in the European market, has commented that 3G coverage in the UK is actually at about 65%, which is mainly in the more urban areas.¹¹
- 1.7.3 Commentators also point to the need for advancements in technology to permit better quality, faster streaming and downloading of video/audio/data to the mobile handset, and to increase battery life for 3G mobile handsets, all of which currently make extended viewing impossible.¹² At least one consumer association has described 3G technology as currently “unreliable”. It explains that “[v]ideo calls are sometimes dropped because you go outside a 3G area, but they also seem to drop for no apparent reason. In terms of quality, the new services are mixed. Video calls are rropy and the picture is blocky. Sound quality isn't good and the video is often out of sync.”¹³
- 1.7.4 Integration of 3G enhancements and broadcasting technologies such as DVB-H might further be required to provide real-time streaming of TV and video. In Europe, only Telia and Orange have started trials with DVB-H.¹⁴
- 1.8 As paragraphs 1.7.1-1.7.4 highlight, ensuring access to and availability of attractive content is of little importance in an environment where 3G coverage is limited or the quality of audio/visual services are poor.
- 1.9 Finally, not only are further advancements vital to ensure that 3G content is genuinely accessible, they are necessary to entice existing 2G or 2.5G mobile subscribers to upgrade to 3G technology. As some industry commentators express, without advancements in 3G technology there is little or no incentive for consumers to purchase a 3G mobile handset: “Frankly, you might be better off on an older network, where

⁹ The Sunday Times “Who wants to be a 3G guinea pig?” 19 June 2005 available at <http://www.timesonline.co.uk/printFriendly/0,,1-535-1659855,00.html>.

¹⁰ At slide 10 entitled “3G Population Coverage”, Presentation by Peter Rodford, Overview of the situation in the 3G sector at the Public Presentation on the sector inquiry on new media, Friday 27 May 2005.

¹¹ As quoted in The Sunday Times “Who wants to be a 3G guinea pig?” 19 June 2005.

¹² The Sunday Times “Who wants to be a 3G guinea pig?” 19 June 2005: “[T]here is a growing suspicion that ... too many corners were cut in the rush to bring mobile multimedia onto the market, resulting in poor reception and handsets that are complicated to operate, oversized and short on battery life.”

¹³ Which? as quoted in The Sunday Times “Who wants to be a 3G guinea pig?” 19 June 2005.

¹⁴ Wireless Watch “3G TV: too little, too soon” 27 May 2005 available at http://www.theregister.co.uk/2005/05/27/3g_tv.

GSM technology has driven mobile phones with increasing reliability and ubiquity for more than a decade; although designed for voice, it also handles e-mail and internet access.”¹⁵ This view is supported by at least one consumer association which recommends that “... for the time being, people are generally best off sticking with their 2G phones.”¹⁶

- 1.10 Mobile operators’ recognition of the current limitations or failings of 3G technology is evidenced by the fact that they have sought to encourage consumers to subscribe to 3G services by offering cheaper phone calls. Vodafone, for example, charges £40 per month for its Anytime 350 package which runs on GSM technology and includes 350 minutes of calls to any network, regardless of the time of day. On Vodafone’s 3G tariff, the same buys 500 minutes and includes 50 minutes of video calls and 100 free text messages.¹⁷ If 3G technology had reached a stage of development such as to provide quality services, mobile operators would not be incentivised to offer lower tariffs.
- 1.11 To summarise, while FOA commends the Commission’s efforts to ensure that the development of the 3G industry is not stifled, FOA believes that regulating access to sports content or any other type of content is premature given the current nascent state of 3G technology. Indeed, the Commission is at risk of “putting the cart before the horse” by focusing on sports rights rather than on encouraging more competition among providers at the technology level.

An evaluation of market power is absent from the Commission’s analytical framework.

- 1.12 The Commission’s analytical framework would be incomplete without issuing guidance on when an undertaking would be regarded as having market power (whether at rights holder level or purchaser level) for purposes of evaluating whether a licensing agreement/practice tends to raise significant competition concerns.

2. Content substitutability (¶¶ 13-17)

Sporting events do not constitute separate markets.

- 2.1 The Commission considers that sports content for mobile transmission is a separate market to that of other content distributed over mobile networks due to the branding of sports and its ability to attract targeted subscribers. In addition, the Issues Paper suggests that the Commission is minded to consider 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.*”

¹⁵ The Sunday Times “Who wants to be a 3G guinea pig?” 19 June 2005.

¹⁶ The Sunday Times “Who wants to be a 3G guinea pig?” 19 June 2005.

¹⁷ The Sunday Times “Who wants to be a 3G guinea pig?” 19 June 2005.

- 2.2 FOA believes that the Commission's examination on content substitutability as reflected in the Issues Paper is generally lacking in economic evidence and economic rigour. In particular, FOA does not believe that the Commission is in a position to conclude that sports content or a particular sporting event has the particular ability to attract mobile subscribers without first conducting a thorough investigation of supply and demand, of cross elasticity among various entertainment offerings and of the views of consumers. The anecdotal type evidence apparently generated by the Commission's inquiry and the relatively narrow, often self-selecting set of respondents is not an adequate proxy for a thorough, economically robust analysis. Indeed, in merger cases, the use of consumer survey evidence in assessing market definition has been prevalent and regularly features as the determinative factor.¹⁸
- 2.3 While it may be difficult for the Commission to gather the direct views of consumers about competing content, it should be possible for the Commission to obtain such consumer preference information from marketing studies that 3G companies have prepared for use in their own decision-making process as to pricing of products and/or marketing actions. As the Market Definition Notice recognises, "*[c]onsumer surveys on usage patterns and attitudes, data from consumer's purchasing patterns, ... and more generally, market research studies*" are useful to take into account to establish whether an economically significant proportion of consumers consider two products as substitutable.¹⁹
- 2.4 Moreover, FOA does not agree that the transmission of sports content over 3G networks comprises a separate market, nor that the transmission of any particular sporting event over 3G networks constitutes a separate market. FOA believes that there is strong substitutability between different sports rights, and between sports rights and other entertainment rights (e.g., movies), since a mobile operator which loses one set of 3G content rights may feasibly replace it with another (not necessarily of the same genre) to maintain the overall value of its portfolio.
- 2.5 This substitutability is demonstrated by the fact that 3G mobile operators' pricing plans do not make a distinction between particular sporting events, sports, movies, news or other forms of entertainment. Neither Vodafone's nor T-Mobile's 3G pricing plans make a distinction between video access to sports, news or entertainment. Vodafone's 3G price plan specifies separate charges for calls, access to video calls, video access to content (without distinction to the type of content) and text messages.²⁰ T-Mobile UK's price plan is based on whether a homepage is viewed, chat room is used or image is

¹⁸ See e.g., Case IV/M.430, Procter & Gamble/VP Schickedanz (II), where Commission's conclusions as to market definition were based largely on consumer survey evidence. See also, Case T-30/89 Hilti v. Commission, where the CFI explained that account should be taken of survey evidence to assess consumers' preparedness to shift demand in response to a change in price.

¹⁹ Commission Notice on the definition of relevant market for the purposes of Community competition law ("**Market Definition Notice**") OJ C 372, 09/12/1997 ¶41.

²⁰ <http://shop.vodafone.co.uk/index.cfm?fuseaction=home.view3GPricePlans>

- accessed, again without distinguishing between different types of content.²¹ There is no additional cost to access sports content in particular under either of the 3G operators' price plans.
- 2.6 In addition, while 3 offers a 3G sports service, mobile subscribers are charged at the same price as the "Video Value" service which offers video mini-movies, video clips of Barclays Premiership goals, comedy, showbiz, rent games and all video clips from Sky News and Sky Sports.²² Such inability to charge higher rates for sports content than other content shows that sports content does not have the "*particular*" ability to generate subscriber interest or branding for 3G such as to indicate a separate relevant product market.
- 2.7 A review of 3G mobile operators' marketing materials is also supportive of the inability of sports content to generate particular subscriber interest. None of the leading UK 3G mobile operators, for instance, display sports as their centrepiece in their marketing effort. This is even more evident with football services, which despite being identified by the Commission as the sport that most stimulates 3G interest, have not been the focus of 3G mobile operators' marketing material. Instead, such content/services are marketed together with other types of content/services available to 3G subscribers.²³
- 2.8 The fact that 3G mobile subscribers do not attach special or "must-have" value to sports content or to any particular sporting event is further supported by Vodafone's statement at the 3G Public Presentation, where it explained that spend on sports content rights comprises less than 1% of the overall costs of acquiring and retaining a 3G subscriber, while spend on sports content rights is almost twice the spend on acquiring a pay-TV subscriber. Also in absolute terms, spend on pay-TV sports content is over 40 times that of 3G sports content.²⁴ Such spending patterns must reflect the fact that there is no particular demand from mobile subscribers for sports or sporting events.
- 2.9 The Commission's reliance on previous decisions regarding TV broadcasting rights of football is misplaced. In *UEFA Champions League*, the Commission essentially found that football content over TV constituted a separate relevant product market because it "*regularly attract[s] high audience numbers, specific audiences [and] provide[s] a certain brand image, which cannot be achieved by means of other content.*"²⁵ In addition, while the Commission's investigation found "*no clear empirical evidence on*

²¹ http://www.t-zones.co.uk/en/Getting_started/help_with_tzones/costs.html

²² <http://www.three.co.uk/explore/howmuch/addons/payMonthlyindex05.omp>

²³ See e.g., 3's homepage (found at <http://www.three.co.uk/index.omp>); Vodafone's 3G global launch press release (found at http://www.vodafone.com/article_with_thumbnail/0,3038,CATEGORY_ID%253D200%2526LANGUAGE_ID%253D0%2526CONTENT_ID%253D249634,00.html?); T-Mobile's UK homepage (found at <http://www.t-zones.co.uk/>).

²⁴ At slide 3 entitled "Spend on premium sports content in perspective", Presentation by Richard Feasey, Vodafone Group at the Public Presentation on the sector inquiry on new media, Friday 27 May 2005.

²⁵ Case COMP/C.2-37.398, ¶ 58.

which to base market definition” for 3G rights of football, it was assumed that the “*particular*” ability of football to generate subscriber interest or branding in pay-TV and free-air TV would also exist for 3G media.²⁶ However, based on the empirical information on product offerings, pricing, and operators’ marketing and spending patterns -- as detailed in paragraph 1.5, paragraphs 2.5-2.6, and paragraphs 2.7-2.8, respectively -- there is substantial evidence readily available in the public domain to refute the Commission’s assumption.

- 2.10 Sports content or a particular sporting event has not been able to attract high subscriber numbers as reflected by the fact that 3G operators have to offer and market a wide selection of content in one service to entice consumers. It is also clear that 3G operators are not charging for access to sports content or a particular sporting event at a “premium”. Moreover, 3G operators’ extremely limited amount of spending on sports content reflects the fact that there is no particular demand from mobile subscribers for sports or particular sporting events.

3. Platform substitutability (¶¶ 18-22)

There is currently limited platform substitutability but the Commission should be mindful of convergence.

- 3.1 The Commission considers that TV and 3G content services appear to be in separate markets.
- 3.2 FOA agrees generally with the Commission’s analysis that based on current demand-side considerations TV and 3G content services, there is today limited competition between 3G and other platforms such as free-to-air or Pay TV. However, given the expected convergence between services broadcast on TV and transmitted via 3G networks, the level of demand substitutability between TV and 3G content services might be expected to change in the future. FOA would encourage the Commission therefore to acknowledge that market definition may be dynamic in this area or, at least, to acknowledge that it may be appropriate for market definition to be periodically re-assessed. As expressed by Dr. Ungerer, “*regulation should not separate sectors and technologies in a rigid manner but will have to depend more and more on a dynamic assessment of actual audience and market power.*”²⁷ (Emphasis in the original).

²⁶ Case COMP/C.2-37.398, ¶¶ 82-81.

²⁷ Media in Europe: Media and EU Competition Law, Herbert Ungerer, Speech at Conference on Media in Poland by the Polish Confederation of Private Employers (13 February 2002).

4. Competition concerns (¶¶ 23-77)

Monopsony power of mobile operators provides a competitive restraint on content owners' commercial activities.

- 4.1 FOA believes that the Issues Paper has failed to recognise that mobile operators exert significant countervailing buyer power (and in some instances monopsony power) and that any attempt by sports rights holders to extract supra-competitive royalties or licence fees, or obtain excessive terms and conditions is likely to be frustrated by that monopsony or buyer-side market power.
- 4.2 As identified by the Commission, most national markets feature 3-4 mobile operators with 3G licences.²⁸ In many jurisdictions, however, there are fewer than three mobile operators which provide 3G services. Given the limited number of mobile operators in each national market, mobile operators -- as gatekeepers of 3G networks -- can be expected to exercise significant purchasing power over content owners. As explained by Advocate-General Lenz in *AKZO*, “*with demand side concentrated in a few buyers, a supplier (even with a large share of the market) is often unable to act independently in relation to its customers.*”²⁹
- 4.3 The purchasing power of mobile operators is a reflection of their significant (and, often, dominant) market positions in national mobile telephony markets. Indeed, the Commission ignores evidence of market power that mobile operators possess and which has been demonstrated in respect of pricing in the downstream retail markets. Indeed, this pricing power has been the subject of recent investigations by national competition authorities and national regulatory authorities.³⁰ For example, Vodafone Ireland was found by the Irish competition authority to have been overcharging customers in Ireland for access to WAP, roaming and other services.³¹ Vodafone was also found by the

²⁸ At slide 9 entitled “3G Licences”, Presentation by Peter Rodford, Overview of the situation in the 3G sector at the Public Presentation on the sector inquiry on new media, Friday 27 May 2005.

²⁹ Case C-62/86, *AKZO v. Commission* ¶ 123.

³⁰ The pricing power of mobile operators on wholesale mobile markets has also regularly been the subject of competition investigation by national competition authorities, national regulatory authorities and the Commission. The following investigations provide recent examples. In 2005, the European Commission ended its investigation into KPN Mobile's discriminatory prices for mobile call termination after KPN agreed not to discriminate against fixed line operator. (See, MCI WorldCom MCI/Mobile Termination Rates case, IP/02/483). In 2004, the Finnish regulator, Finnish Communications and Regulatory Authority (FICORA), imposed a number of remedies on the two largest mobile operators, including cost-based interconnection, non-discrimination, and accounting separation as a result of its findings that the operators' call termination charges were well above reasonable cost. (See, FICORA Press Release of 16.9.2004.) Similarly in 2000, the French regulator, Autorité de Régulation des Télécommunications (ART), ordered Orange to reduce its mobile call termination rate by 20%. (See, ART Press Release of 19.11.2001.) In 1998, the UK regulator, Ofcom, and, the UK competition appellate body, the Competition Commission capped and reduced the call termination charges of four mobile operators on the grounds that call termination prices for fixed calls were substantially higher than on-net and off-net mobile calls and as a result had a restrictive and damaging effect on fixed operators and consumers. (See, Competition Commission, Vodafone, O2, Orange and T-Mobile, December 2002.)

³¹ Press Release of the Commission for Communications Regulation (ComReg), 5 November 2004.

Netherlands competition authority (NMa) to have colluded with T-Mobile, Orange, KPN and Telfort to reduce dealer bonuses on the sale of mobile telephone subscriptions.³²

4.4 Moreover, the value attached to sports content or other forms of “premium” content does not afford a rights holder the ability to act independently of mobile operators’ demands. As described in paragraphs 2.5-2.6 above, a mobile operator has access to a variety of 3G content from which to obtain “premium” revenues in lieu of sports content. A mobile operator is not reliant on one type of content but instead may feasibly replace it with another (not necessarily of the same genre) to maintain the overall value of its 3G service. The fact that mobile operators, which have launched 3G services, make no price distinctions in terms of content must reflect that there is no particular or greater value attached to sports content from the perspective of a mobile operator or mobile subscriber. It follows that a sports rights holder has no particular or greater bargaining power than other content owners and has less bargaining power than mobile operators.

4.5 *[CONFIDENTIAL]*

4.6 The above facts demonstrate, at a minimum, that mobile operators are not particularly reliant on sports content and are likely to exercise its strong purchasing power to negotiate lower fees.

5. Lack of access to sports content (¶¶ 24-25)

Even without disputing the Commission’s finding that there is a lack of access to sports content, such issue is not a matter to be remedied under competition law

5.1 According to the Issues Paper, “*there are notable examples of sports for which rights have not been sold to mobile operators.*” The Commission explains that “[g]iven the importance that 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.”

5.2 Foremost, FOA believes that the fact that a particular sports content has not yet been licensed for 3G distribution does not imply that there has been a violation of EC competition law. It is more likely to be a reflection of the commercial interest (or more precisely, disinterest) of mobile operators to offer such content in Europe. *[CONFIDENTIAL]* The apparent lack of importance that mobile operators attach to access to sports content should therefore merit questioning by the Commission.

5.3 FOA believes that the Commission should not consider the fact that a content owner has not licensed its rights to a 3G mobile operator to be suspect. For example, it is not unreasonable for a content owner to withhold access to its content until it is satisfied that 3G technology has reached a stage of development where it can transmit the

³² Annual Report 2002 of the Netherlands Competition Authority (NMa), page 39.

content at an adequate level of quality or service. Neither would it be unreasonable for a content owner to withhold access to its content until it is satisfied that there is enough consumer interest for content over 3G media before developing 3G content or determining how best to employ 3G media for maximum exploitation. FOA believes there is a real risk that offering content over the 3G platform, prematurely, exposes a content owner to the devaluation of its brand and, rather than encouraging consumers to subscribe to 3G services, could undermine or damage the “image” of 3G services such as to discourage consumers for an otherwise unwarranted, extended period. Indeed, the Commission should be mindful that in their haste to sell 3G product, handset manufacturers are now suffering consumer backlash from offering ill-conceived, premature designs. As Nokia has commented: “*the poor image of 3G phones stems from ‘terrible design’, as companies rushed to be the first with a 3G handset on sale.*”³³

- 5.4 As a matter of EC competition law, it is widely accepted that a company (even a dominant firm) has no general duty to deal with a particular customer and that it is only in exceptional circumstances that a company may be compelled to contract. As made clear by the Court of First Instance, in *Bayer*:

*“[U]nder Article 8[2], refusal to supply, even where it is total, is prohibited only if it constitutes an abuse. The case-law of the Court of Justice indirectly recognizes the importance of safeguarding free enterprise when applying the competition rules of the Treaty where it expressly acknowledges that even an undertaking in a dominant position may, in certain cases, refuse to sell or change its supply or delivery policy without falling under the prohibition laid down in Article 8[2].”*³⁴

- 5.5 While the ECJ has held that refusal by a dominant firm to license intellectual property may violate Art. 82(b) EC,³⁵ this finding will only be appropriate in extremely limited circumstances. Even on the basis that a sports content owner is dominant -- which should not be presumed on the basis that it owns the media right -- because a sports content owner is not generally present on the downstream market, a duty to license under Art. 82(b) EC cannot apply. Art. 82(b) EC deals with foreclosure, i.e., excluding a dominant firm’s competitors from the market in which the anticompetitive effects of the refusal arise. If a dominant firm is not active in such downstream market, the essential facility doctrine under Art. 82(b) EC cannot be applicable.

- 5.6 Moreover, even if the Commission considered that Art. 82(b) EC was applicable, the conditions of the essential facility doctrine are unlikely to be met for at least two reasons.

³³ The Sunday Times “Who wants to be a 3G guinea pig?” 19 June 2005.

³⁴ Case T-41/96 Bayer AG v Commission [2000] ¶ 180.

³⁵ See C-418/01 IMS Health GmbH & Co v NDC Health GmbH & Co (2004); Case 238/87, Volvo v. Veng, [1988] and Case 53/87, CICRA v. Renault, [1988]; Joined Cases C-241/91P Radio Telfis Eiremann (RTE) and Independent Television Publications Ltd (ITP) v Commission [1995]; and Case T-504/93 Tiercé Ladbroke SA v. Commission [1997].

- 5.6.1 First, one of the key legal conditions for imposing a duty to license is that the refusal would entail the “*elimination or substantial reduction of competition to the detriment of consumers in both the short and the long term.*” This condition is the corollary of the condition that the dominant firm’s input is indispensable: if the input is not indispensable, then a refusal to supply is unlikely to have substantial effects on competition. The fact that mobile operators have launched 3G services and that they are aggressively competing to offer consumers attractive content demonstrates, on the one hand, that sports content is not indispensable to do business in the 3G mobile market and, on the other, that lack of access has eliminated or substantially reduced competition. The same holds true as to any particular sporting event. Because numerous sporting events are already available on 3G, the inability to license a further sporting event cannot credibly be argued to be of vital importance in the development of 3G services.
- 5.6.2 Second, a refusal to license would only give rise to a breach of Art. 82 EC where there is no legitimate, objective business justification. In the case of licensing sports rights content to a new platform, there are likely to be legitimate business reasons to justify a decision not to license sports content. As Director-General Lowe has expressed “[a lack] of supply may in some instances be based on particular factual circumstances that have then to be considered on a case by case basis.”³⁶ For example, it is legitimate to refuse to deal with a potential licensee if it is unable to demonstrate that it meets necessary quality or branding criteria. Without ensuring that a 3G operator is able to provide quality 3G services in terms of both production and transmission, the brand image of a particular sport or sporting event would be greatly harmed.
- 5.6.3 In addition, if an operator is precluded from obtaining a licence for sports content because a lawful, exclusive contract has been made with a first licensee, the refusal to deal with further potential licensees would also be lawful.

Content owners are not in a position to impose excessive terms.

- 5.7 The Commission explains that “*the imposition of excessive terms of sale or overly restrictive conditions on the rights*” also raises competition concerns.
- 5.8 As explained in section 4 above, FOA believes that mobile operators have significant countervailing buying power or monopsony power, which in any given geographic market exceeds the potential power of a single sports rights holder. It follows that a rights holder would not be able to impose excessive terms of sale or overly restrictive conditions unilaterally.

³⁶ At p.8 of Keynote speech by Philip Lowe at the Public Presentation on the sector inquiry on new media, Friday 27 May 2005.

6. Exclusivity (¶¶ 26-27)

The Commission should acknowledge that there are procompetitive effects of granting exclusive rights.

- 6.1 The Commission considers that exclusivity is more likely to be of concern “*if it relates to 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.*”
- 6.2 FOA would encourage the Commission to be mindful that there are generally several procompetitive effects of granting exclusive rights.
- 6.2.1 Exclusivity encourages investment into improving the quality of a broadcaster’s or mobile operator’s coverage, production and marketing of a sporting event since it is protected from rivals free riding on its investment in the development of the service. As acknowledged by the Commission, “[*exclusivity*] *guarantees the value of a programme, and is particularly important in the case of sports.*”³⁷
- 6.2.2 The benefits of such investment can be expected to be passed on to consumers. As explained above, exclusivity might be expected to encourage operators to invest in improving the quality of their coverage and production of the sports event thereby giving the viewer better and regular coverage of an event.

7. Cross-platform bundling (¶¶ 28-30)

Offering cross-platform bundling should not be considered as *per se* restrictive of competition: it is important to consider the efficiencies in each case.

- 7.1 The Commission takes the position that bundling of rights across platforms “*may prevent the development of the mobile platform as a whole*”.
- 7.2 FOA does not agree that offering cross-platform bundled rights is *per se* restrictive of competition. For instance, no competition concerns should arise if the purchaser of the bundled right has, itself, exploited the 3G rights or if it sublicenses the 3G rights to another service provider for exploitation.
- 7.3 FOA also believes that it is important to consider the efficiencies which might result from bundling rights, in particular where it would allow the licensee to exploit the rights more efficiently. For instance, TV operators may be in a better position than mobile

³⁷ Orientation Document On Broadcasting Of Sports Events And Competition Law, Competition Policy Newsletter 1998, No 2, available at http://europa.eu.int/comm/competition/speeches/text/sp1998_037_en.html.

operators to integrate 3G enhancements and broadcasting technologies such as DVB-H to offer real-time streaming of TV and video.

8. Collective selling (¶¶ 31-32)

The Commission should acknowledge the procompetitive effects of collective selling.

8.1 The Commission identifies collective selling arrangements as potentially raising competition concerns. FOA invites the Commission also to identify the widely-accepted procompetitive benefits of collective selling.

8.2 While FOA does not practice in collective selling, it observes that there may be significant procompetitive effects of sports rights holders collectively selling their rights. As the Commission identified in *UEFA Champions League*, collective selling arrangements can improve production or distribution and/or promote technical or economic progress. FOA would welcome the Commission to reiterate that by allowing sports rights holders to create a single point of sale they are able, *inter alia*, to achieve significant transaction efficiencies, produce a quality branded product, provide broadcasters a uniform package for the duration of the event, guarantee sponsors media exposure for the entire period thereby permitting them to structure their advertising budgets efficiently, which together stimulates the development of the sport and provides viewers greater and better coverage of the sport.³⁸

9. Pricing concerns (¶¶ 33-35)

Concerns on lump sum payments are misconceived.

9.1 The Commission explains that when rights are sold on a fixed rate (lump sum) basis, this could have the effect of favouring larger operators, as they have a larger installed base of customers over which to spread acquisition costs.

9.2 FOA does not agree with the Commission's view. FOA does not believe that a particular mode of payment (whether lump sum or revenue sharing) by its nature, could be restrictive of competition.

9.3 FOA strongly believes that the Commission should exercise extreme caution in trying to regulate pricing and that this is particularly important in 3G and other developing industries. Since 3G is an emerging technology, parties must have maximum flexibility to negotiate a licence fee structure that offers both parties commercial incentives to innovate and disseminate content over the 3G platform.

9.4 Indeed, in the case of technology markets where dissemination of intellectual property rights has an even greater impact on downstream competition and technological innovation in general, the Commission has not identified lump sum payments (or

³⁸ Case COMP/C.2-37.398, ¶¶ 139-142 and ¶ 168.

royalties based on a percentage of selling price or fixed amounts for each sold product) as raising competition concerns. In fact, the Commission has expressly provided that “parties to a licence agreement are normally free to determine the royalty payable by the licensee and its mode of payment without being caught by Article 81(1).”³⁹

- 9.5 The issue of whether a particular payment obligation is restrictive of competition requires an examination of whether appreciable foreclosure effects result on a case-by-case basis. What qualifies as an “appreciable” foreclosure effect may vary from case to case, but it should at least mean that effective competition is absent from the market. The fact that smaller players do not have the advantage of “deeper pockets” does not necessarily indicate that the market is not competitive, particularly if the larger players are efficient rivals and are reasonably competitive.
- 9.6 Further, FOA does not believe that lump sum payments, by their nature, raise more anticompetitive risk than revenue sharing. In fact, in FOA’s view, lump sum payments may be expected to offer several procompetitive benefits.
- 9.6.1 Lump sum payments could be expected to encourage investment by content service providers which in turn are likely to facilitate rapid dissemination and distribution of the Championship by enabling the owner to capture a larger percentage of its subscriber revenues and encouraging faster additions of incremental subscribers.
- 9.6.2 In particular as it relates to the Championship, lump sum payments could be expected to provide the teams participating in the Championship with financial certainty. For instance, by selling TV rights on a lump sum basis FOA has been able to provide an assured amount of TV revenue to be divided with participating teams which is not dependant on the advertising revenue resulting from an individual broadcast.
- 9.6.3 Lump sum payments would allow FOA to avoid closely monitoring the marketing and strategic decisions of the 3G operator to ensure revenues are maximised and/or not diverted. Lump sum payments would also allow FOA to avoid involvement in the burdensome task of auditing revenue to determine the revenues due to it. This task should not be overestimated. Assume a hypothetical mobile user downloads a sports clip. The user could be charged access to the clip and the time taken to download the clip onto the mobile handset. Thus not only is it necessary for a content owner to record the number of clips accessed but it is also necessary to audit mobile phone bills in order to account for the actual value of the clip. This becomes more complicated when subscribers are given “free” minutes as part of the mobile subscription package. In other words, lump sum payments have significant efficiencies.

³⁹ Commission Notice 2004/C 101/02, Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, ¶ 156.

- 9.7 Conversely, in FOA's view, while revenue sharing schemes may be procompetitive, they could also raise similar as well as additional concerns as lump sum payments.
- 9.7.1 Revenue sharing schemes do not necessarily ensure market entry by operators with a smaller customer base or less financial backing. All things being equal, it would not be unreasonable for a content owner to grant rights to an operator which offers the higher percentage of revenue or a greater revenue base. A revenue sharing scheme in no way eliminates the risk that larger operators could be favoured over smaller operators.
- 9.7.2 There would be less incentive for a rights owner to licence if only revenue sharing partnerships were permissible. Revenue sharing schemes do not necessarily give a rights holder a fair share of the revenue or latent benefits that flow from the content to the operator. In particular, if as the Commission maintains that sports content is the key driver of 3G technology -- a position with which FOA disagrees -- mobile operators could be expected to obtain significant additional revenues from new subscribers purchasing 3G mobile handsets, making calls and "spending" minutes while downloading or viewing sports clips. In addition, if as the Commission believes there is a premium value attached to sports content, it should not be unreasonable for a sports content owner to be compensated for the goodwill value of its content since providing a co-branded 3G service would undoubtedly "transfer" goodwill to the mobile operator. Accordingly, a revenue sharing scheme based on revenues generated purely from a particular rights owner's content is unlikely to reflect the actual value obtained by the mobile operator as a consequence of having obtained a licence to such content.
- 9.7.3 Finally, it is distinctly possible that 3G operators price certain content or services at a loss-leading price to obtain subscribers. This would mean that a revenue sharing system which related to the licensed content would deprive the rights holder of fair economic value.
- (a) Although it could be possible to resolve this issue by requiring that the operator charge a minimum above-cost subscription price for the service, this could raise concerns over resale price maintenance and would unlikely be an effective solution.
- (b) While a revenue sharing scheme based on the entire service price/subscription of the 3G package could avoid this problem, it could also give rise to allegations that the rights holder improperly extended the scope of its intellectual property rights to obtain royalties on unprotected content.⁴⁰

⁴⁰ See e.g., Case 193/83 *Windsurfing International v. Commission*. See also, *United States v. Microsoft Corp.*, 346 U.S. App. D.C. 330 (D.C. Cir., 2001) ¶¶ 162-163 (price bundling).

Excessive pricing concerns are unwarranted: it is not possible for content owners to charge artificially high prices.

- 9.8 The Issues Paper explains that concerns were raised by mobile operators with regard to the ability of rights owners to seek excessive prices for 3G sports content.
- 9.9 As explained by some commentators and economists “[a] policy that could identify and punish deviations from the competitive benchmark without error would increase social welfare unambiguously. Unfortunately, it is unclear what the appropriate competitive benchmark is in most real-life circumstances and, particularly, in dynamic industries where investment and innovation play a paramount role.”⁴¹ Even if an appropriate benchmark could be determined, it would still remain unclear how to determine with precision whether prices are above, at, or below the competitive benchmark in practice. This is all the more difficult to determine in an emerging technology market.
- 9.10 It is against this general background that FOA believes that excessive pricing claims of mobile operators should be viewed by the Commission with great scepticism. Indeed, they, themselves, have been investigated by national competition authorities and the Commission for excessive pricing abuses as detailed in section 4 above. In addition, as also explained in section 4, content owners do not have sufficient market power to dictate excessive prices given that there are a limited number of mobile operators in each market and given that they have monopsony power in the mobile telephony markets.
- 9.11 In applying *United Brands*⁴², while it may be agreed that a price is “excessive” where it bears no relation to the value of the 3G sports content, most industry commentators would accept that it is difficult, if not impossible, to assess the fair value of 3G content given that the level of demand is difficult to estimate. Indeed, O2 Germany admitted, during the 3G Public Presentation, that it was difficult to assess the prospective value of 3G content rights.
- 9.12 In addition, since the 3G market is at a nascent stage of development there is no historical basis from which a “reasonable” value could be based. It is therefore difficult to understand on what basis mobile operators are able to claim that prices for 3G sports content are “excessive”.
- 9.13 Moreover, if, as the Commission believes, sports content is integral to 3G development, it would follow that its “premium” is reflected in the valuation of the 3G service. The Commission would have to accept, therefore, that if sports rights are a “must have” property, a “fair” price for sports content is likely to be relatively high or constitute a relatively large proportion of a revenue sharing scheme.

⁴¹ See Excessive Prices: Using Economics to Define Administrable Legal Rules, Evans and Padilla CEMFI Working Paper No. 0416 (September 2004).

⁴² Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission*.

9.14 FOA also respectfully requests the Commission to be mindful that ensuring “fair” content prices does not necessarily ensure “fair” retail prices for consumers. Only by regulating mobile operators’ retail prices are consumers assured of being charged reasonable or low prices. Indeed, as The Sunday Times points out, Vodafone currently charges £1.50 for downloading a track of music onto a mobile handset, which is twice as expensive as downloading the track onto a computer from iTunes and transferring it onto a mobile.⁴³

10. Coverage restrictions (¶¶ 36-37)

Intra-platform coverage restrictions are integral to differentiating sports rights.

- 10.1 The Commission takes the position that the justification for timing restrictions are “*less convincing*” than length restrictions. The Commission explains that 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.*”
- 10.2 Ensuring that there is high quality coverage of the Championship is imperative for FOA, the teams, its sponsors and advertisers. For this reason, FOA has consistently placed a very high premium on the quality of its television broadcasts. Its television broadcasting contracts are very detailed and contain a myriad of technical requirements designed to ensure that only the highest quality production and transmission reach the public.
- 10.3 From FOA’s experience with television rights, coverage restrictions ensure that the popularity of the Championship and the viewing audience’s experience are maximised. Coverage restrictions also ensure that necessary product quality criteria are satisfied. However, not only does FOA believe that coverage restrictions are an important aspect in maintaining its brand identity and a major factor in creating consumers’ perception of its quality, it also believes that it is necessary to ensure that its brand value is not reduced through overexposure. For example, timing and frequency provisions are designed to ensure that a TV broadcaster does not damage the brand’s premium image by showing regular repeats of Championship events.
- 10.4 For similar reasons, FOA is also keen to ensure that its high brand quality is maintained on the 3G platform and believes that coverage restrictions are an important aspect of maintaining such quality. Indeed, the importance of coverage restrictions to ensure technical quality is even greater in the context of 3G. FOA believes that current 3G technology is not adequate to provide video-clips on any basis other than periodic short clips. Dissemination of larger segments or a complete live, streamed race would result in the dissemination of a product that does not meet FOA’s high quality standard. The technology as it currently exists is simply inadequate for such purposes. As such, FOA

⁴³ The Sunday Times “Who wants to be a 3G guinea pig?” 19 June 2005.

firmly believes that timing and frequency restrictions are crucial to enable it to ensure only the highest quality produce reaches the marketplace.

- 10.5 In short, unrestricted dissemination over 3G or any other platform at the sake of inferior programming and/or transmission quality would not maintain the value of the Championship “brand”, which is crucial to the operation, continuance and growth of the business. FOA strongly maintains that its coverage, timing and frequency restrictions are and will continue to be narrowly tailored to achieve those procompetitive goals with the least amount of restriction necessary.

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