



EUROPEAN COMMISSION

Competition DG

Information, communication and multimedia
Media

Brussels, 21/09/2005

Concluding report on the Sector Inquiry into the provision of sports content over third generation mobile networks

Published in accordance with Article 17(1) of Regulation 1/2003

INTRODUCTION

1. The European Commission and the EFTA Surveillance Authority have now concluded the Sector Inquiry into the provision of sports content over third generation mobile networks (3G Sector Inquiry)¹.
2. The Sector Inquiry was initiated in the beginning of 2004². The aim of the Sector Inquiry was to allow the European Commission and the EFTA Surveillance Authority to develop a thorough sectoral knowledge, enabling them to identify problems and behaviours common to the various, largely national, retail markets of mobile services in a systematic manner.
3. In the course of 2004 questionnaires were sent out to the relevant actors in the sector and responses were received from 227 organisations in the EEA: Mobile operators (82); rights owners and sport rights intermediaries (88); and television operators (57).
4. The sector inquiry was carried out in two distinct stages. In a first stage, for each part of the value chain a limited number of the major players in the sector were addressed. In a second stage, on the basis of the analysis of the answers given, additional questionnaires were sent out to these major players with a view to obtain more in-depth data. In addition, other remaining players in the market were addressed to validate the information collected at the first stage.

¹ Under Article 12 of Regulation 17/62 EC, in force at the time when the Sector Inquiry was launched, the European Commission was empowered to initiate general inquiries into sectors of the economy about which it had concerns that competition was possibly restricted or distorted. Article 17 of Regulation 1/2003, which came into force on 01.05.2004, significantly promoted the role of Sector Inquiries in the application of competition law. Under EEA competition law, in particular Article 12 of Chapter II of Protocol 4 to the Surveillance and Court Agreement, similar powers are given to the EFTA Surveillance Authority, insofar as the issues relate to the EEA EFTA States Iceland, Liechtenstein and Norway.

² On 30.01.2004 the European Commission launched the Sector Inquiry. On 17.03.2004 The EFTA Surveillance Authority joined the Commission by launching a Sector Inquiry with the same scope and objectives in the EEA EFTA States. As a result, the Sector Inquiry covered all 28 countries in the EEA.

5. The data collection through the two-stage questionnaire process has been a success both in terms of quality and response rate. Most players have provided very extensive and meaningful information with regard to competitive constraints faced by different market players and prevailing commercial practices.
6. The European Commission and the EFTA Surveillance Authority analysed the responses³ with the assistance of a specialized consultancy⁴. In total a number of 50 case situations was analysed to assess anti-competitive risks in commercial practices. The Commission and the EFTA Surveillance Authority published an Issues Paper⁵ on the preliminary findings of the Sector Inquiry.
7. In a public discussion held in Brussels on the 27th of May 2005 the preliminary findings were presented to interested parties, which were given the possibility to make statements and to submit written comments during a four-week period. Comments were received from 22 organisations⁶. Meanwhile, the European Commission discussed the preliminary findings with National Competition Authorities in the framework of the European Competition Network⁷.
8. On the basis of the analysis of the responses given during the Sector Inquiry, the comments received from interested parties on the preliminary findings and the discussions with National Competition Authorities, the European Commission and the EFTA Surveillance Authority have come to the conclusions set out below.

RELEVANT MARKETS

9. A significant element of the Sector Inquiry has been to establish the scope of the relevant markets. The definition of markets is a tool that provides the European Commission, the EFTA Surveillance Authority and National Competition Authorities with a framework for competition analysis in order to facilitate the appraisal of market power when assessing commercial practices under Article 81 and Article 82 EC and Articles 53 and 54 of the EEA Agreement.
10. In emerging markets like new media, a qualitative appraisal of the patterns of demand and supply often plays a major role when identifying relevant markets. The Sector Inquiry relied on the appraisal of market players with regard to the substitutability between different audiovisual services that are currently or in the near to mid-term future available on the market. The Sector Inquiry sought the opinion of market participant about the competitive constraints between a number of

³ In the context of the analysis a simplified methodological tool has been elaborated to assess the actual and potential negative impact of commercial business practises on competition.

⁴ Oxera, an economics consultancy based in Oxford, the UK.

⁵ http://europa.eu.int/comm/competition/antitrust/others/sector_inquiries/new_media/3g/issuespaper.pdf

⁶ Non-confidential comments of respondents can be found at:
http://europa.eu.int/comm/competition/antitrust/others/sector_inquiries/new_media/3g/

⁷ Established in accordance with Regulation 1/2003 and the Commission Notice on Cooperation with the National Competition Authorities.

possibly substitutable services: (a) sports services transmitted over mobile platforms and sport services transmitted over non-mobile platforms (mainly TV); (b) sports services offered over mobile platforms using 3G technologies (3G sports services) and sports services offering using alternative mobile technologies; and (c) 3G sports services and 3G non-sports services.

Sports services offered over mobile platforms and non-mobile platforms (TV)

11. The Sector Inquiry gathered information on the views of market players with regard to the substitutability between services that can be provided over mobile platforms and TV.
12. The respondents to the questionnaires cited that the following characteristics distinguished TV from mobile services: screen size, quality of images and sound, comfort of viewing and ability to watch in a group, mobility of viewing, cost of usage, battery/power capacity, content currently available over 3G, and ability to personalise the viewing experience. Most market players agree that the differences limit the degree of substitution substantially.
13. Many TV operators perceive a potential threat to their business model of exclusivity as a result of the availability of new media rights. However, the majority of TV operators do not find the threat significant enough to make an analysis in their business plans on the impact of new media over the next three years. Considering that the majority of TV operators have not recognised the perceived detrimental economic effect in their business plans, the European Commission believes that the perceived competitive threat does not seem to be substantiated.

Conclusion

14. In view of the responses given to the questionnaires and the comments of interested parties, the European Commission and the EFTA Surveillance Authority conclude that currently the different demand characteristics suggest that there is insufficient substitution between mobile sports services and TV sports services for these to be considered as part of a single relevant market. Indeed, TV and mobile services are consumed in a very different manner, for technical, as well as for social reasons.

Mobile sports services offered through 3G technologies and mobile sports services offered through alternative technologies

15. In relation to technological developments that are foreseen, the Sector Inquiry also gathered information about whether in the next three years other mobile-related technologies may offer commercially viable alternatives to 3G technology⁸ for the provision of sports related services.

⁸ Much of the sports-related content can be, and is already, provided over 2G networks, in particular using the technological variants of 2.5G and 2.75G. According to the evidence provided by the respondents, 3G enables faster download and better quality, increasing the attractiveness of the services. Thus, the move to 3G seems to represent an evolution in the nature of services that can be provided via mobile phone networks and the relevant market incorporates both 2G and 3G sports services.

16. A number of respondents to the questionnaires cited developments in WLAN and DVB-H technologies, allowing respectively greater mobile access to the Internet and enabling TV broadcast to be transmitted on mobile handsets. However, none of the respondents to the questionnaires considered the latter technology to become viable on the market in the next three years.
17. The comments provided by interested parties on the preliminary findings underscore the rapid developments in media markets, and subsequent changes in consumption patterns. Whilst some operators stressed that the focus of the Sector Inquiry on 3G technology is no longer up-to-date due to the introduction of technologies like DVB-H that are also capable to deliver audiovisual content to mobile devices, others underlined the immaturity of 3G sports services and differences in the business models behind broadcasting technologies (either to mobile platforms or fixed platform) and point-to-point data services such as 3G.

Conclusion

18. With regard to the expected technological developments the European Commission and the EFTA Surveillance Authority believe that on the basis of the technologies⁹ and services, which are currently available on the market, the preliminary findings can be confirmed. Indeed, although market players are exploring new technologies, the commercialisation of other mobile content platforms is not foreseen in the near future and is still dependent on outcomes of pilot projects. This does not exclude that the competitive constraints between market players may change when new services are offered with similar product characteristics in terms of price and usage, regardless of the underlying technology, platform or provider. This warrants careful and continued market research on the accuracy of the market definition for each case situation.

3G sports-related services and non-sports related services

19. Contrary to most broadcasting services where a fixed package of programmes is transmitted in the same format to a general audience (point-to-multipoint), 3G services are typically “unpacked” to suit the needs of individual consumers (point-to-point). This means that 3G services allow for a more targeted form of content delivery than traditional media delivery systems, making it possible to identify narrow consumer markets.
20. Two-thirds of the respondents to the questionnaires (mobile operators, TV operators and rights owners) considered that non-sports content represents either no or limited competition for 3G sports services at retail level. This indicates that there may be an identifiable demand for sports content at the retail level that is distinct from the demand for other content provided via mobile networks.
21. The attractiveness of sports content for mobile transmission and the level of competition between the different sports vary according to the type of sport/sports event and it also varies across countries. The sports that stand out as most important

⁹ For example, although experiments take currently place in France with regard to DVB-H diffusion technology, pilot projects are only planned for June 2006 in the city of Paris and commercialisation is planned for the end of 2006-beginning of 2007.

to mobile operators across the EEA are football (including national and international tournaments and events), the Olympics, and Formula 1. Other sports that are cited by mobile operators as being important have more a cross-border regional or national character.

22. The comments received from interested parties on the preliminary findings stress that mobile operators give less value to sports content than pay TV-operators, reflected by the difference in price level between sport rights for mobile and television transmission. Indeed, the Sector Inquiry showed that mobile operators did not rank access to attractive sports content as the most important drivers of consumer demand¹⁰.
23. Nevertheless, mobile operators responded to the questionnaires that they expect that access to sports content is a significant demand driver for 3G services and a key branding element given its high-profile and relevance with regard to marketing. The responses in the Sector Inquiry point out the willingness of mobile operators to invest more in acquiring mobile sports rights than they could directly recuperate through subscription fees, as they consider the brand image of attractive sports to be so strong that the content can accelerate the consumer take-up of their 3G services.

Conclusion

24. On the basis of the responses given in the sector inquiry and the comments of interested parties, the European Commission and the EFTA Surveillance Authority believe that the coverage of sports events, especially those sports events that are expected to accelerate consumer take-up, over mobile networks may be in a separate market to that of other content distributed over those networks. However, considering that mobile sports content has only been introduced recently on the market, the European Commission will carefully assess the factual circumstances in each individual case situation to validate the findings of the Sector Inquiry. Likewise, the EFTA Surveillance Authority will closely monitor the development of 3G sports content services in the EFTA States to ensure a homogenous approach to defining the relevant markets in EEA competition law.

COMPETITION PRACTICES

25. The Sector Inquiry analysed the commercial practices and arrangements implemented in relation to the supply of sports content across the EEA, with particular regard to practices that could raise competition concerns.
26. The information gathered has enabled a detailed understanding of the prevalent commercial practices. The Sector Inquiry found that the variety in commercial practices across sports and across countries is considerable. In contrast with the consistency generally observed in the supply of premium sports content to TV operators, there does not seem to be a common view amongst rights owners or mobile operators about the optimal way to exploit mobile audiovisual rights.

¹⁰ Mobile operators considered the following services as more important drivers of demand: price of voice telephony, quality of mobile internet services and access to information and entertainment services.

27. Although the variety of practices limits the scope of generic conclusions that can be drawn, it enables the European Commission to distinguish between market outcomes where a particular form of behaviour has or has not been used, for example when comparing outcomes where rights are sold exclusively or non-exclusively.
28. The preliminary results highlighted a number of competition concerns that were identified in the Sector Inquiry (i) direct refusal of rights holders to grant access to 3G sports rights; (ii) foreclosure of competition between mobile operators through excessive length of exclusivity; (iii) cross-platform bundling resulting in warehousing of rights by operators in neighbouring markets, in particular TV operators; (iv) under-exploitation of rights by rights owners due to joint selling; (v) excessive pricing of rights and price structures biased towards large operators, and (vi) coverage restriction on the exploitation of 3G sport content with regard to length and timing.
29. Interested parties commented that the practices highlighted in the preliminary findings also have pro-competitive effects under certain circumstances. A number of them highlighted the financial buying power of telecom operators and argued that all operators, including TV operators offering content over mobile networks, should be treated in a non-discriminatory manner. The European Commission and the EFTA Surveillance Authority agree that when assessing the anti-competitive effects of commercial practices it needs to carefully take into consideration possible offsetting efficiency and pro-competitive effects of the practices, and the market power of the companies under scrutiny.

Competition concerns targeted with priority

30. Considering the rapid developments in the sector and the infancy of sports content services provided over mobile networks, the European Commission will focus on bottleneck problems, which restrict the availability of mobile sports content.
31. The European Commission and the EFTA Surveillance Authority will focus on four areas of competition concerns that have been found during the Sector Inquiry and which are most critical in restricting the availability of mobile sports content:

1. Cross-platform bundling

32. Cross-platform bundling refers to practices where a rights owner sells bundled audiovisual rights for various retail platforms to one or a few operators. Bundling of rights across platforms may represent a restriction which, due to the strong asymmetry of value between the TV rights and mobile rights, prevents operators that offer mobile services from purchasing meaningful rights. The purchasers of bundled rights are most frequently TV operators¹¹. When rights are not made available for exploitation over mobile networks, output is restricted and consumers have less choice in the way to view sports content.
33. The Sector Inquiry found a number of instances where sports rights for mobile transmission were bought by powerful operators, which subsequently have not

¹¹ Although in some recent cases bundled rights have also been sold to telecommunications operators.

exploited the acquired rights. A number of operators exploiting 3G services have underlined the restrictions in the quantity of rights available.

34. It has been argued that bundling of TV and 3G rights may provide benefits in terms of efficiency. However, these economic advantages should be strong enough to offset the negative competitive effects resulting from the asymmetry between TV and 3G rights.
35. TV operators raised the argument that 3G rights exploitation by other players than themselves would result in inefficient duplication of costs of producing a 3G signal. However, the standard process for the production of a 3G signal is not to replicate, but to use the TV signal. Rights holders conclude contracts with a particular broadcaster to produce the signal and to make it available to all other broadcasters. In such case, access to the signal is provided through coordination conducted at the rights holders' level, and such systems can be extended to include 3G services.
36. The argument has been raised also that bundling is necessitated by technological factors. This argument does not seem convincing, as there are a large number of sports and events for which mobile rights are sold separately for the different platforms. This indicates that on the basis of current technology, it is possible to identify with sufficient clarity the scope of rights available for each platform.
37. The European Commission considers that a number of the arguments raised by rights owners and TV operators in support of bundling have fairly limited effective implications. It appears that where bundling practise essentially results in output restrictions, such behaviour seems to be anti-competitive and to limit a varied offer of services at the consumer level through different distribution platforms.

Conclusion

38. In order to maximise consumer choice and enhance the development of new innovative services the European Commission and the EFTA Surveillance Authority favour an unbundled sale of rights to avoid the risk of output limitations.
39. The European Commission will target case situations where rights to premium sports remain under-exploited through the bundled sale of rights and subsequent warehousing of rights by powerful operators.

2. Overly restrictive conditions

40. Coverage refers to the length of the event that can be transmitted (full broadcast or only highlights) and to the timing of the coverage (live, or deferred).
41. The Sector Inquiry found evidence of serious restrictions on all 3G rights, in terms of transmission length and timing. In some cases the restrictions resulted from clauses included in broadcasting contracts, limiting third party access to 3G rights.
42. Content owners mentioned that they have limited the length of the coverage to highlights because of the technical restrictions faced by mobile networks or handsets, and because of concerns about the quality of the transmission of the events and the viewing experience. Although some mobile operators agree that due to technical restriction the length of clips is limited, others have underlined that the

length restrictions are often not related to technical limitations but to the determination of rights holders to maintain the value of TV rights.

43. One justification expressed by right owners for imposing restrictions on the timing of mobile content is to protect the value of the TV rights. For restrictions to be justified, it is necessary to show first that mobile rights do adversely affect the value of TV rights. 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 limited effect on the value of TV rights.
44. Considering that mobile operators have reported that the two most important factors for consumer take-up of 3G sports services are access to live/near-live key moments, timing restrictions with regard to premium events, might have a negative impact on the value of 3G rights and the take-up of 3G sports services by consumers.

Conclusion

45. As transmission technology may improve and as the substitution between 3G and TV content is limited, the European Commission and the EFTA Surveillance Authority will carefully assess in future cases where restrictions may reduce the incentives of mobile operators to invest in innovative technologies to overcome technical barriers.
46. The European Commission and the EFTA Surveillance Authority consider that timing embargoes on mobile rights in order to avoid alleged cannibalisation of the value of TV rights cannot be proportionate given the little substitution existing between TV services and mobile services. The European Commission will target individual case situations where serious time embargoes apply that limit the availability of 3G content.

3. Joint selling

47. The sector inquiry sought the opinion of market operators on joint selling. Rights owners are generally favourable to joint selling, and argue that it brings benefits in terms of revenue redistribution and efficiency in the production of content. Mobile operators report as positive points that joint selling leads to easier negotiations and access to a complete content offer.
48. However, mobile operators also voiced competitive concerns that joint selling result in less supply when all mobile rights to a sports event or competition remain unsold by the joint selling body.
49. The European Commission and the EFTA Surveillance Authority have taken note of comments by rights holders that joint selling can have pro-competitive effects under certain circumstances and does not necessarily lead to less mobile coverage being available to consumers. However, joint selling should not lead to situations where mobile rights are not exploited. The practice of joint selling may contribute in restricting output of 3G rights when individual rights owners cannot fully market their own rights even in situations where joint selling has proven to be unsuccessful.

Conclusion

50. The European Commission and the EFTA Surveillance Authority advocate a policy that guarantees that 3G rights are exploited to the maximum. The efficiency argument in favour of joint selling of 3G rights cannot be accepted where the selling body fails to find demand in the market for the 3G rights. When collective selling of 3G rights is unsuccessful, the rights should fall back to the individual rights owners to be exploited individually.

4. Exclusive access

51. Exclusive rights may be pro-competitive and they may drive the development of new technologies. The sector inquiry has not found cases of extensive foreclosure via exclusivity provisions.

52. The sector inquiry assessed the length of contracts between rights owners and 3G operators, which granted 3G operators the rights to distribute content for a certain sporting event over 3G network, either on an exclusive basis or a non-exclusive basis. It was found that exclusive contracts have the same duration as non-exclusive contracts. Both have an average duration between 2 and 3 years.

53. Anti-competitive effects could arise when exclusive access to premium content, provided that the content is a very strong driver of demand, contributes to 3G operators obtaining or protecting positions of market power.

Conclusion

54. In line with the European Commission policy in the broadcasting field, the European Commission and the EFTA Surveillance Authority will monitor the development of 3G markets and will advocate the application of appropriate remedies where exclusive access to premium content could give rise to anti-competitive effects.

FINAL REMARKS AND FOLLOW-UP ACTIONS

55. The Sector Inquiry has enabled the European Commission, the EFTA Surveillance Authority and National Competition Authorities to get a clearer view on the market developments with regard to mobile sports services and the prevailing commercial behaviours of the different market players active in the value chain of sports content for mobile platforms. It therefore will place the European Commission, the EFTA Surveillance Authority and the National Competition Authorities in a better position to ensure that critical sports content will not be held back by anticompetitive conduct during the forthcoming years of take up of the new mobile technologies.

56. The media market has a number of characteristics that may easily lead to competition concerns. Firstly, only a few powerful players are active on the different levels of the value chain for valuable audiovisual sport content, which want to protect their return on investment. Secondly, the rapid technological developments in the media sector and the limited market experience with new media content leads to insecurity, rightly or not, about future consumption patterns.

57. In order to maximise consumer choice, encourage innovation and foster competition, the European Commission advocates a competition policy that assures

that access to sports rights for distribution over mobile platforms is not unduly restricted through anti-competitive practices resulting in output limitations.

58. Therefore, in the spirit underlying Regulation 1/2003 market players are invited to address possible anti-competitive conduct and effects resulting from their business practices along the lines set out above. The European Commission (or where appropriate, the EFTA Surveillance Authority or National Competition Authorities) will take account of the findings of the Sector Inquiry set out above in future proceedings in this area.
59. The European Commission or where appropriate the EFTA Surveillance Authority will further review, together with the National Competition Authorities concerned, potentially harmful case situations identified during the Sector Inquiry. Procedures will be initiated in cases where behaviour is not adjusted to comply with the requirements of competition law. Information on these cases will be given on the occasion of the opening of any formal procedures and/or respective Decisions.