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July 7, 2005

Dear Sirs:

**International Olympic Committee ("IOC") Comments on the Preliminary Findings of the Sector Inquiry into New Media (3G)**

The IOC's comments on the European Commission's Issues Paper on the Preliminary Findings of the Sector Inquiry into New Media (3G) are set forth below.

As a preliminary matter, the IOC is keen to explore the opportunities offered by new media technologies, such as 3G mobile phones, in line with its long-standing tradition of seeking the widest possible dissemination of high quality broadcasts of the Olympic Games. Accordingly, the IOC shares the Commission's interest in avoiding any possible distortions in the development of this industry.

However, the IOC notes that distortions may arise not only from anti-competitive commercial practices, but also from unwarranted or disproportionate regulatory intervention. This latter risk is particularly acute in new and dynamic industries, such as 3G mobile telephony, where market mechanisms may not yet be fully understood and may be subject to rapid change.

In such dynamic markets, any general assumptions or findings about the competitive process should thus be subject to constant, careful, and unbiased review, as the Commission recognizes by labeling its findings as "preliminary" and describing the process as "ongoing".<sup>1</sup> The comments below raise a number of issues that, in the IOC's view, the Commission must consider in its ongoing assessment.

<sup>1</sup> Sector Inquiry New Media (3G), Public presentation of 27 May 2005, Keynote speech by Philip Lowe.

**I. The Sector Inquiry should expand its focus to desirable content for 3G mobile phone operators other than sports rights**

The Commission's sector inquiry aims to identify potential obstacles to the development of the 3G mobile phone industry, implying that the analytical process should start with a broad inquiry concerning the inputs needed for the development of 3G mobile phones and their competitive relevance. This is particularly significant because 3G mobile phones can be used for a broader range of applications than traditional media appliances, such as televisions or radios. As a result, third generation mobile phones likely have more options available to drive their development than traditional media.

Yet, the Commission has focused its inquiry narrowly on sports content. As the Issues Paper (the "Paper") explains at ¶ 2, "[t]he choice of the 3G sector, and the focus on access to sports content, reflect the value of the sector inquiry tool for addressing anti-competitive behaviour that might impair the development of this key emerging market". (emphasis added)

This formulation suggests that the Commission already had a predetermined opinion about the relevance of sports content *before* the start of the sector inquiry and thus engineered its inquiry with this opinion in mind. In the IOC's view, this narrow approach is unfortunately likely to undermine significantly the value of the Commission's sector inquiry.

The Paper states that sports content is an "*important factor*" for mobile operators because of its potential to be used as a "*strategic marketing tool*" (Issues Paper, ¶ 13). The Paper also claims that sports content distinguishes itself from other content "*due to the branding power of sports and their ability to attract targeted subscribers*".

Yet, these claims are unsubstantiated. The Paper suggests that they result from responses received to the Commission's inquiry. However, the Paper does not indicate the type of information sought from respondents nor does it engage in any specific discussion of such responses. It is clear, moreover, that no questions regarding the particular role of sports content for mobile phone operators were included in the questionnaires submitted to rightholders.<sup>2</sup>

The Paper's emphasis on "*branding*" and "*marketing tools*" places a further question mark over the narrow focus of the Commission's inquiry. Any discussion of "branding effects" must involve a comprehensive analysis of all branding opportunities available to mobile phone operators. Given the wide range of possible applications for 3G mobile phones and the variety of marketing strategies available, such an analysis would

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<sup>2</sup> The Commission's questionnaires merely asked rightholders to identify the sports most suited for transmission over 3G mobile networks (Question 1 of the Commission's first questionnaire addressed to rightholders).

necessarily have to extend far beyond sports content or even audiovisual content in general. It is questionable whether meaningful conclusions on branding and marketing effects can be reached in the absence of such a comprehensive analysis.

## **II. The Sector Inquiry should endeavor to apply EC competition rules in a coherent and consistent manner in line with established case law**

The Paper's reference to the branding power of sports content also fails to translate into a consistent theory of potential competitive harm. The Paper appears to suggest that any "*restriction of access*" to sports content with a branding potential amounts to a restriction of competition (graph in the Paper at ¶ 10). Yet, brand images can only arise from differentiation and hence exclusivity, because it permits the creation of a product that stands out from the offerings of competitors.

Thus, by suggesting that all mobile phone operators should have access to the same identical branding opportunities, the Paper undermines the very factor that it says is important to drive demand.

The Paper also fails to identify any limiting conditions or logical boundaries for its theory. Thought through to its ultimate consequences, the theory would imply that a vast array of long-standing and well-established commercial practices in the area of branding and promotion would be considered illegal. This absence of any clear limiting principles casts serious doubts on the theory's validity.

Indeed, the Paper's theory conflicts directly with the consistent case law of the Community Courts, holding that even dominant companies cannot be required to grant access to inputs (in particular intellectual property rights) that provide companies with a competitive advantage. Rather, such an obligation can only be contemplated, if at all, when an input is *indispensable* to enable a third party to compete on a market and withholding such input would risk eliminating *all* competition on that market. Of course, dictating *how* access should be granted, *e.g.*, on an exclusive or non-exclusive basis, would go beyond any decided case in EC competition law.

In light of these principles, the IOC questions whether the purpose of EC competition law is to provide companies with access to branding and marketing opportunities, as the Paper suggests. Even to the extent that branding opportunities might be considered to assist in driving demand, it is hard to see how any such opportunity could ever be said to be indispensable for competition within the meaning of the Community Courts' case-law.

### **III. The Sector Inquiry should take proper account of the value creation chain for sports programs**

In connection with the implementation of their license agreements, rightholders typically will provide broadcasters with a raw feed of video images of the event, which must undergo several processing steps before reaching viewers:

For example, broadcasters need to transmit the feed to their local territory, select and edit the video images of most relevance to the local audience, augment it with audio commentary, and broadcast it to their audience. 3G mobile phone companies would also need to modify the images to fit the significantly smaller screen of mobile phones and encode the content in a digital format suitable for mobile phone broadcasting.

All of these steps require significant resources and professional expertise. As a result, a crucial and preliminary step in an analysis of sports broadcasting via 3G mobile phones must be to enquire about general capability and willingness of 3G mobile phone operators to engage in these tasks. Yet, the Paper is silent on this issue.

This is of particular concern because the costs and effort required to create a high quality sports program for broadcasting on mobile phones provides an obvious incentive for mobile phone companies to cooperate with TV broadcasters in the production by the latter of ready-to-broadcast mobile phone programming. Such cooperation avoids the unnecessary duplication of costs and thus creates substantial efficiencies. It may therefore make good commercial sense to license audiovisual rights to a sports event on a platform neutral basis, providing the licensee with the opportunity and flexibility to exploit the rights via all possible technical platforms.

Yet, the Paper appears to disfavour such platform neutral licensing and corresponding sub-licensing of mobile phone rights, suggesting that this may limit the mobile operator's incentives to market content services and may result in the withholding of rights (fn. 8 and ¶¶ 28-30). However, these concerns are unsubstantiated and unwarranted.

In the IOC's experience, TV broadcasters have an interest in disseminating their branded programs through additional channels, such as 3G mobile phones, while 3G operators can benefit from the program brand of TV broadcasters. The IOC is confident that a model of platform neutral licensing including appropriate arrangements for 3G mobile phone transmission provides a sound and efficient basis for broadcasting sports events via 3G mobile phones.

#### **IV. The Sector Inquiry should focus more on the legitimate interests of rightholders**

Broadcasting and branding rights represent the principal revenue source for sports organizations for the financing of sporting events and the development of athletes. Rightholders have a legitimate interest in defining and shaping the policy for the commercialization of their rights. Yet, the Paper lacks any reference to the interests of rightholders in this connection.

Particularly worrisome in this respect is the Paper's suggestion that even a requirement to pay a fixed fee for sports rights, rather than a revenue share, could be viewed as unlawful (¶ 34). Clearly, determining payment terms forms part of the essential subject matter of intellectual property rights. Suggesting that a request to pay a fixed amount for an intellectual property right could be unlawful is entirely without precedent in EC competition law. The Paper suggests that paying a fixed fee may be risky for mobile phone operators, without explaining how this risk can be any different from the normal risks encountered in any market or what would justify shifting this risk to rightholders.

Similarly, the Paper's reference to possible "excessive" pricing (¶ 35) does not explain how the Commission would propose to distinguish between a price that reflects the value of the rights in question and a price that in its view would be "excessive". Of course, the value of a right may mean that financially weak or less efficient companies may not be able to afford the relevant rights. Yet, this cannot be sufficient to make the price of such rights unlawful under EC competition law.

#### **V. Conclusions and Summary**

As Director General Lowe stressed in his keynote speech on May 27, 2005, "*competition rules require no market outcome*". However, the Paper does appear to be directed at a very specific market outcome, namely to enforce the sale of sports rights according to a pre-ordained model that is not shaped by market forces, but dictated by regulatory intervention, including detailed price regulation.

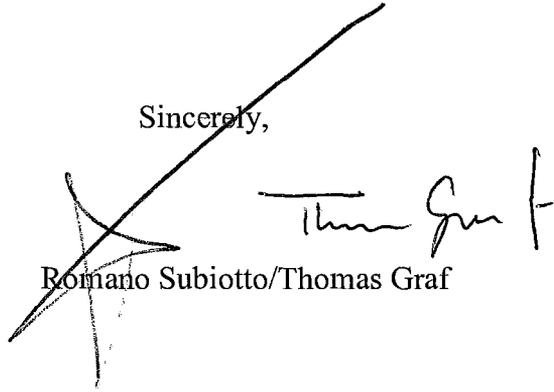
As has been seen, this approach suffers from a number of fundamental flaws:

- (i) It is inconsistent with the actual market mechanisms at issue in the present case.
- (ii) It conflicts with well established principles of EC competition law.
- (iii) It violates the legitimate interests and rights of other market participants.

The IOC would hope that the Commission will take the opportunity of its ongoing inquiry to subject the Paper's preliminary findings to critical review and to supplement them with a more comprehensive analysis of the 3G mobile phone industry.

Kind Regards,

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas Graf", is written over a large, diagonal, handwritten "X" mark. The signature is positioned to the right of the "X".

Romano Subiotto/Thomas Graf