

# European Union 3G Sports Rights Sector Enquiry Conclusions

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**The European Commission recently released the findings of its sector inquiry into the provision of sports content over third generation ('3G') mobile networks. The report drew significant conclusions that are of importance to all businesses involved in content deals for new media services.**

## Background

The rights to exploit sports content over mobile platforms have, from time to time, been bundled up and sold with rights in relation to other platforms as part of the package of rights acquired by television broadcasters. In light of the rapid advances in, and capability of, mobile devices, the Commission initiated an inquiry into the 3G sports rights sector at the start of 2004. Its reported aim was to allow the Commission and EFTA Surveillance Authority to develop knowledge of the 3G sector as regards the exploitation of sports content and to enable it to identify issues which might restrict or distort competition in the market for these rapidly-emerging new media rights.

In the course of 2004, the Commission received 227 responses to questionnaires it had sent to the various players in the sector, namely mobile operators, rights owners, agencies and broadcasters. Following publication of the preliminary findings, comments made by interested third parties and discussions with national competition authorities, the European Commission published its concluding report on 21 September 2005.

## Relevant Markets

In assessing whether commercial practices give rise to competition law concerns, competition authorities seek to establish the scope of the relevant markets. The Commission analysed the substitutability between different audiovisual services as set out below and came to the following instructive conclusions:

### *TV and mobile offerings are not part of the same market*

As regards sports services offered over mobile platforms and non-mobile platforms (i.e. TV) the Commission concluded that at present these are not substitutable services because, *'there is insufficient substitution between mobile sports services and TV sports services for these to be considered as part of a single relevant market.'* This is despite many broadcasters perceiving the availability of new media rights as a potential threat to their business model of exclusivity.

The degree of substitution is limited by the characteristics which distinguish TV from mobile services, namely 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. The Commission noted that in addition to the different demand characteristics, services over the two platforms are consumed in very different ways for technical, in addition to social, reasons.

### *Other findings*

As regards mobile sports services offered over platforms using 3G technologies as compared to through alternative technologies, the Commission concluded that *'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.'* It noted the developments in emerging mobile technologies, namely WLAN (which allows greater mobile access to the internet) and DVB-H (which enables TV broadcasts to be transmitted on mobile handsets) and the consequent need for continual review of this sector.

As regards 3G sports services and non-sports services, the Commission stated that *'the coverage of sports events over mobile networks may be in a separate market to that of other content distributed over those networks.'* However, this will depend upon the factual circumstances in each case and the Commission will continue to monitor the development of 3G sports content services.

### **Competition concerns**

The Commission observed that there are considerable discrepancies in the ways that mobile audiovisual rights are exploited and that accordingly generic conclusions about the commercial practices in this sector could not be drawn. Nonetheless, the report proceeds to highlight four commercial practices that the Commission deems to be of particular concern with regard to the maintenance of competition in this area.

#### *1. Cross-platform bundling*

This practice involves a rights owner selling bundled audiovisual rights for different platforms to one or a few operators (typically a broadcaster). Given the substantial difference in value between TV and mobile rights, such a practice may restrict mobile service operators from purchasing meaningful rights. The Commission identified instances where powerful broadcasters had acquired sports rights for mobile transmission but did not proceed to exploit those rights (so-called 'warehousing'). Output is accordingly restricted and consumers have less choice in the way they can view sports content.

The Commission did not accept the various arguments raised by TV operators in favour of bundling such rights together, namely increased efficiency of production and preventing an inefficient duplication of costs incurred in producing a 3G signal. It stated that it favours the unbundled sale of rights and will target situations where rights to premium sports remain under-exploited as a result of the bundling and warehousing of such rights by powerful operators.

#### *2. Overly restrictive conditions*

The inquiry identified restrictions on the coverage granted by 3G rights, in terms of both the length of the event that can be transmitted (full broadcast or highlights) and the timing of the transmission (either live or deferred). Whilst such limitations may in part be due to technical factors (though improvements in transmission technology over time will erode the effectiveness of such an argument), the restrictions in fact often stem from the determination of rights holders to maintain the value of TV rights.

In light of the Commission's finding that substitution between 3G and TV content is limited, it is not surprising that restrictions on 3G coverage to avoid the *'alleged cannibalisation of the value of TV rights'* will not be accepted. However, as the quality of 3G transmission continues to improve in an environment of ever-converging media, it will be interesting to see whether the validity of such an argument increases. Nonetheless, for the moment, the Commission will target instances where *'serious time embargoes'* obstruct the availability of 3G content.

#### *3. Joint Selling*

Rights owners and mobile operators cited various benefits of joint selling, namely the equitable redistribution of revenue among the constituent elements within sporting structures, efficiency in content production, easier negotiations and access to a complete content offer.

Whilst noting such arguments, the Commission stated that the practice should not result in situations where mobile rights fail to be exploited. Where the collective selling of 3G rights is unsuccessful, *'the rights should fall back to the individual rights owners to be exploited individually.'*

#### *4. Exclusive Access*

The Commission concluded that marketing rights on an exclusive basis may in fact be pro-competitive and may drive the development of new technology. It did not find the durations of exclusivity to be excessive, but will keep this issue under review.

## **Conclusion**

The Commission's sector inquiry has important consequences for the way that rights packages for the exploitation of sports content are structured. Of particular note is the Commission's stated intention to target cases where, as a result of the bundled sale and warehousing of rights and/or serious time embargoes on the availability of 3G content, premium sports content remains under-exploited on the 3G mobile platform. Rights owners/agencies and TV companies alike should take note of this development and appreciate that competition authorities view the provision of sports content over 3G mobile networks as being in a different market to the TV offering for competition law purposes.

Going forward, the Commission undertook to monitor the development of 3G markets and espouses '*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.*' It should be noted that the sector enquiry focussed on 3G rights only. It is possible to envision arguments to persuade the Commission that different conclusions may be reached when considering the likely introduction into the mobile entertainment market of true digital broadcast protocols such as DVB-H.

The Commission has not yet investigated the structuring of any specific rights following the results of its sector inquiry. However, the major players involved in this sector will undoubtedly be mindful of the competition authorities' scrutiny and keep a watchful eye on the application of the Commission's stated position.

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