

Agenda

Advancing economics in business

Watching 3G: sector inquiries by the European Commission

In June, the European Commission launched sector competition inquiries into financial services and energy. The first such inquiry since ‘modernisation’ relates to sports services over 3G mobile telephony networks. The methodology and preliminary results of that inquiry were recently made public, and contain some relevant lessons for future inquiries

The EU competition law ‘modernisation’ package that came into effect in May 2004 has promoted the role of sector inquiries as a tool for proactive competition policy. Under Regulation 1/2003, the European Commission may conduct inquiries into a particular sector of the economy when market circumstances or trends suggest that competition has been restricted or distorted. These inquiries are separate from investigations under Articles 81 and 82 of the EC Treaty that deal with specific agreements or conduct.¹ According to the Commission:

Sector inquiries are first of all an information-gathering exercise that provides the Commission with in-depth knowledge about markets and is therefore ‘upstream’ of proceedings in specific cases. The knowledge gained about the market can form the basis of specific enforcement initiatives at a later stage.²

Sector inquiries are rapidly becoming a feature of EU competition policy. On June 13th, the European Commission launched two such inquiries.

- *Financial services industry*—targeted in particular at retail banking and business insurance. In both of these areas, the concern of the Commission is that little cross-border integration has taken place within the EU, and that this might be due to certain anti-competitive practices (as well as legal and

regulatory barriers). This inquiry will complement the broader EU initiative to achieve international integration of the industry under the Financial Services Action Plan.

- *Gas and electricity markets*—addressing issues such as the functioning of wholesale markets, vertical integration, the reasons for the 2005 price increases, and the apparent lack of cross-border integration. Again, this inquiry is considered complementary to the ongoing EU liberalisation programme for gas and electricity.

In addition to these cases, Neelie Kroes, Commissioner for Competition, suggested in a speech to the European Parliament on June 21st that a sector inquiry into telecommunications may be launched in 2006.

This article discusses the first such sector inquiry since modernisation—ie, the inquiry into the provision of sports services over 3G mobile telephony networks. It is being undertaken jointly by the Commission and the European Free Trade Association (EFTA) Surveillance Authority and covers the 25 EU Member States, plus the three EFTA states of Norway, Iceland and Liechtenstein.³ Oxera assisted the Commission and the EFTA Surveillance Authority during this inquiry, and preliminary results were made public at a hearing in Brussels on May 27th 2005.

What to know about sector inquiries

- investigative powers granted to the European Commission under Article 17 of Regulation 1/2003 (modernisation)
- applicable to sectors where market circumstances or trends suggest that competition has been restricted or distorted
- a tool for proactive competition policy, and an ‘information-gathering exercise’ as a prelude to Article 81/82 infringement investigations

Ongoing and future inquiries

- 3G sports services: began May 2004
- energy and financial services: began June 2005
- possible future inquiries: telecommunications, 2006

Development of 3G sports services

3G networks allow for much larger bandwidth than their 2G counterparts, which means that improved data services—including Internet and other audiovisual downloads—are possible in addition to traditional voice and text services.

The launch of 3G services followed the much-publicised auctions of 3G licences across Europe in the late 1990s to early 2000s. The first commercial services were launched in 2003, with further operators launching new services at a rapid pace. Table 1 records the number of 3G licences that had been awarded by July 2004 in the 28 countries, and the number of operators offering commercial services up to May 2005. The uptake of 3G services is also moving at rapid pace—between June 2004 and January 2005, the number of 3G subscribers in the EU grew from 2.2m to 7.3m (although this still represents less than 2% of all mobile phone subscribers in Europe).⁴

It is generally expected that sports-related audiovisual content—eg, short video clips with highlights of a particular football or tennis match—will play a key role in the development of 3G services (together with other services such as video calling, games and music videos). The development of sports services over 3G networks in turn requires appropriate access to the relevant sports rights. The Commission's concern is that there are various commercial practices in the sale and purchase of sports rights that might have the effect of restricting such access at this early stage of development. These practices include joint selling, exclusivity, bundling, coverage restrictions and pricing.

This concern has in part been fuelled by the experience of sports services over TV networks in the past 5–10 years. In TV broadcasting, commercial practices, such as those listed above, have led to situations in which some broadcasters (eg, BSkyB in the UK) have developed strong market positions based on access to sports rights, and where competition has sometimes been hindered as a result. The Commission has intervened in various instances—particularly in relation to football rights—and has thus developed a number of 'ground rules' on what is and is not permitted when selling sports rights.⁵ The 3G inquiry is aimed at identifying any such competition problems at this early stage of development of the market.

Analytical framework to address competition concerns

The main information-gathering tool used by the Commission, the EFTA Surveillance Authority and Oxera during the 3G inquiry was a set of questionnaires sent to

Table 1 Service availability on 3G

| Country | No. of licences (as at July 2004) | No. of operators providing commercial services (as at May 2005) |
|--------------------|--------------------------------------|-----------------------------------------------------------------------|
| EU | | |
| Austria | 5 | 5 |
| Belgium | 3 | 3 |
| Cyprus | 2 | 0 |
| Czech Republic | 2 | 1 |
| Denmark | 4 | 1 |
| Estonia | 3 | 0 |
| Finland | 4 | 4 |
| France | 3 | 2 |
| Germany | 5 | 4 |
| Greece | 3 | 3 |
| Hungary | 0 | 0 |
| Ireland | 3 | 3 |
| Italy | 5 | 3 |
| Latvia | 2 | 2 |
| Lithuania | 0 | 0 |
| Luxembourg | 4 | 2 |
| Malta | 0 | 0 |
| Netherlands | 2 | 2 |
| Poland | 3 | 2 |
| Portugal | 3 | 3 |
| Slovakia | 2 | 0 |
| Slovenia | 1 | 1 |
| Spain | 4 | 2 |
| Sweden | 4 | 4 |
| UK | 5 | 5 |
| EFTA states | | |
| Iceland | 0 | 0 |
| Liechtenstein | 4 | 0 |
| Norway | 3 | 1 |

Source: European Commission (2005), 'Overview of the Situation in the 3G Sector', paper presented at the public presentation of the sector inquiry on new media (3G), May 27th 2005; and national regulatory authorities.

a broad sample of relevant market participants at all stages of the process. A total of 288 responses were received, from rights owners, content aggregators, TV broadcasters and mobile operators from across the 28 countries, generating a rich source of information on current practices and views in the industry.⁶ Such questionnaires are also being sent out—in even larger numbers—for the current financial services and energy inquiries.

In order to make the questionnaires an effective and efficient tool for information-gathering, it was important to draft the questions with an analytical framework in mind.

Therefore, at an early stage of the inquiry, an analytical framework was developed to examine the practices that may give rise to concerns about competition. This framework is summarised schematically in Figure 1. In essence, it considers the following factors, in line with some well-established competition policy principles (and with the basic approach to agreements and abusive practices under Articles 81 and 82 of the EC Treaty).

- Is there market power/dominance at the level of the rights owner? If yes, the potential for competition concern is greater. The answer will depend to a large extent on whether the sports event in question (eg, the national football league) is an important driver of demand for 3G operators and constitutes a separate relevant market.
- What are the anti-competitive effects of the practice: which operators are excluded and is competition significantly restricted? This determines the degree and type of potential harm to competition.
- Harm to competition can be classified into two categories. First, certain practices of rights owners and TV broadcasters may hinder the take-off or development of 3G sports services by putting mobile

operators at a disadvantage. Second, ‘intra-platform’ competitive harm may arise where one mobile operator is favoured over others. In the latter case, another important question is whether the mobile operator concerned has market power.

- Finally, if it is found that competition is hindered, are there any offsetting efficiency or competition benefits?

The questionnaires proved to be highly effective in shedding light on each of the above issues. They informed the Commission both on factual matters—who licenses what to whom, and under what terms and conditions—and on the underlying motivations behind the current practices. Many companies gave extensive views on why certain practices arise and what their effects on competition are.

Preliminary findings of the inquiry⁷

Market definition is usually the first step in determining the effect of the commercial practices of the different market participants. The preliminary findings of the Commission and the EFTA Surveillance Authority suggest that there is an identifiable demand for sports content provided by 3G operators that differs from the demand for other content provided by mobile networks. In addition, TV and 3G services appear to be complements rather than substitutes, and therefore are not considered to be competing in the same market. In particular, most respondents to the questionnaires agreed that consumers of mobile sports services buy those services in addition to viewing sports on TV. Among the characteristics that differentiate the demand for content over these two platforms are screen size, the quality of image and sound, the cost of usage, and the social context in which the services are consumed (eg, in groups or individually). However, this view of restricted substitutability between TV and mobile sports content is not shared by TV operators, which tend to perceive a greater degree of competition between their services and those provided by 3G operators. (This explains why they may have incentives to challenge 3G sports services.)

In terms of competition concerns, the preliminary findings of the inquiry are presented in Table 2. There are some indications that concerns might arise, particularly in relation to:

- some instances of exclusivity in the licensing;
- cross-platform bundling—ie, where the audiovisual rights to a certain sports event are sold in a bundle for both TV and mobile transmission;
- restrictions on coverage—eg, where mobile transmission is restricted to short clips or to a time after the TV broadcast.

Figure 1 Framework for assessing harm to competition

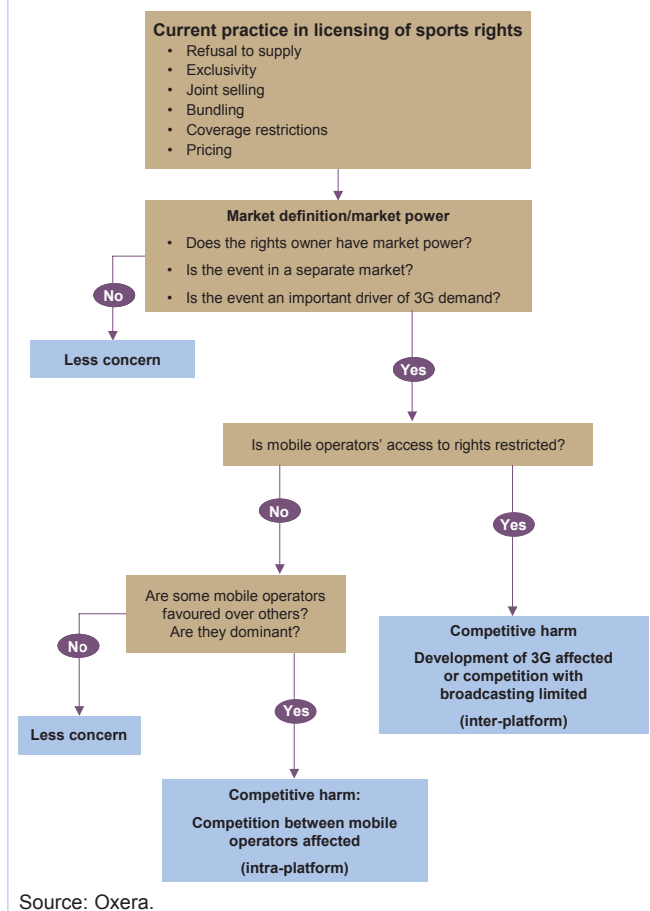


Table 2 Preliminary findings by the Commission and the EFTA Surveillance Authority

| Business practice | Findings relating to potential competition concern |
|--------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Access to sports content | In general, sports content has been made available to mobile operators but there are notable exceptions for some premium events |
| Exclusivity | No general patterns, with some premium sports rights sold exclusively, while others are sold non-exclusively. Although in some countries operators with a strong market position have secured exclusive access to content, smaller operators and even new entrants have also been able to purchase exclusive premium content. There are, however, situations where the market leader has secured wide-ranging exclusivity which may raise competition issues |
| Cross-platform bundling | The purchasers of bundled rights are generally TV operators, enabling them to operate in a gatekeeper role (ie, determining which, if any, of the mobile operators are able to sub-license the rights, and on what terms). There are a few cases in which 3G operators have not been sub-licensed the rights |
| Joint selling | The majority of sports rights are sold collectively. Examples have been identified where collective selling has been a concern for the mobile operators |
| Pricing of rights | It is not clear whether larger market players have been given advantages over smaller operators due to the way prices of rights are structured. Mobile operators expressed concerns about pricing intended to protect broadcasters |
| Restrictions on coverage | There are limited restrictions with regard to transmission length, but there are more examples of restrictions in the timing. The justifications for the latter were not found to be convincing, especially when the restrictions are linked to the time of the broadcasting of the event on TV |

Source: European Commission and EFTA Surveillance Authority.

Lessons for other sector inquiries

The 3G sports services inquiry is in many respects a test case for the new approach to sector inquiries as emphasised by the European Commission under the modernisation of EU competition policy. One lesson from this inquiry is that the market questionnaires proved to be an effective tool for gathering information on current practices and their potential rationale and effects on competition. The following factors contributed to this.

First, the questionnaires were based on a clear analytical framework for assessing competition concerns in relation to sports services over 3G networks. The development of such a framework was facilitated by the fact that the possible types of commercial practice and competition effects in the 3G sector that the inquiry sought to cover were reasonably clearly identifiable beforehand, and there was also some relevant case law in the broadcasting area.

In contrast, the financial services and energy inquiries that were launched recently seem to have a broader focus initially, and also involve a much larger number of market participants. This may make it more difficult to design a targeted and effective questionnaire.

Second, the questionnaires were limited to market participants, and did not involve final consumers, whose views and behaviour are normally assessed in competition investigations (including, for example, the market investigations under the UK Enterprise Act 2003).

This was largely for practical purposes, but in this instance did not significantly affect the robustness of the questionnaire results:

- because sports services over 3G networks form a very new market, there is not a great deal of consumer evidence at this stage; therefore, the information provided by companies gave a fairly accurate picture of what is happening in the market at present;
- because the questionnaire covered the whole of the supply chain, some companies (eg, the mobile operators) could respond as customers of other companies (eg, the rights owners).

In contrast, the financial services and energy markets covered by the new inquiries are generally mature. This means that substantial relevant evidence could probably be obtained on consumer views and behaviour, in addition to the market questionnaire. While this could make the analysis more robust or conclusive (eg, in relation to market definition), it would also increase the amount of information that would have to be analysed within the scope of the inquiry.

Therefore, while sector inquiries are potentially an important tool for competition policy in addition to Articles 81 and 82 and merger controls, there is a policy question as to whether the sector inquiries that have a very broad focus are the most cost-effective way of identifying and tackling competition problems.

¹ In this respect, sector inquiries are similar to the market investigations that the UK competition authorities can conduct under the Enterprise Act 2003, which are separate from the provisions for agreements and abuse of dominance under the UK Competition Act 1998.

² European Commission (2005), 'Financial Services Sector Competition Inquiry—Frequently Asked Questions', MEMO05/204, June 13th.

³ Under the agreement on the European Economic Area, the EFTA Surveillance Authority has competition powers similar to those of the Commission.

⁴ European Commission (2005), 'Overview of the Situation in the 3G Sector', paper presented at the public presentation of the sector inquiry on new media (3G), May 27th 2005.

⁵ See, for example, European Commission (2003), 'Joint Selling of the Commercial Rights of the UEFA Champions League', COMP/C.2-37.398, OJ, 8.11.2003; European Commission (2004), 'Notice Published Pursuant to Article 19(3) of Council Regulation No 17 Concerning Case COMP/C.2/38.173 and 38.453—Joint Selling of the Media Rights of the FA Premier League on an Exclusive Basis', OJ, 30.4.2004; and European Commission (2005), 'Competition: German Football League Commitments to Liberalise Joint Selling of Bundesliga Media Rights made Legally Binding by Commission Decision', press release, IP/05/62.

⁶ See Oxera (2005), 'Analytical Framework for the Sector Inquiry', paper presented at the public presentation of the sector inquiry on new media (3G), Brussels, May 27th.

⁷ This section draws on European Commission and the EFTA Surveillance Authority (2005), 'Issues Paper on the Preliminary Findings of the Sector Inquiry into the Provision of Sports Content over Third Generation Mobile Networks', paper presented at the public presentation of the sector inquiry on new media (3G), Brussels, May 27th.

If you have any questions regarding the issues raised in this article, please contact the editor, Derek Holt: tel +44 (0) 1865 253 000 or email d_holt@oxera.co.uk

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