



VODAFONE GROUP PLC SUPPLEMENTAL RESPONSE TO

Draft

COMMUNICATION FROM THE COMMISSION

Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements

Vodafone Group Plc has today, together with Deutsche Telekom and other similarly interested companies active in the field of mobile telecommunications, submitted a joint response to the Draft Communication from the Commission on the above-mentioned Guidelines ("Joint Response"). The purpose of this supplemental response document is to provide the Commission with Vodafone's additional and individual comments on the Guidelines ("Supplemental Response").

As noted in the Joint Response, Vodafone is among a growing number of information and communications technology companies that are deeply involved in the evolution of open standards environments through the activities of standards setting organisations. Standards in the telecommunications sector are essential to ensure interoperability and to reach efficiency gains through economies of scale - which ultimately benefit European consumers through a better user experience and decreasing prices.

Vodafone is a highly innovative company holding patent portfolios which include patents essential to various standards. Vodafone has been an active participant and contributor in the former ETSI IPR Review ad hoc group and the current ETSI IPR Special Committee, to develop the ETSI IPR policy to increase transparency and prevent misuse of the standardisation process.

Therefore, together with other similarly interested companies who are signatories to the Joint Response, Vodafone welcomes the new Guidelines on standardisation agreements provided by the Commission in chapter seven of the draft document SEC(2010) 528/2. As noted in the Joint Response, the Guidelines help to bring clarity in the context of the potential area of conflict between standardisation and IPR. Especially helpful are the paragraphs that provide guidance on: preventing patent hold-ups; the charging of unfair/unreasonable/abusive royalties; good faith disclosure of essential IPR; irrevocable commitments to license on FRAND terms; the undertakings necessary when IPR are transferred; and unilateral ex ante disclosures of the maximum terms that a company would charge if its technology were incorporated in a standard.

We also value the Commission's guidance on the relationship between IPR royalties and the economic value of the patents, that ex ante declarations of maximum royalties may provide a method for comparison and assessment of the economic value of the patents and that unilateral ex ante disclosures of the maximum terms would not give rise to competition concerns.

Nevertheless, we believe that in some cases, further clarification of Vodafone's individual position on the Guidelines would be beneficial. Specific paragraphs that we have identified for the purpose of this Supplemental Response are set out below:

- i. Paragraphs 276 to 286 of the draft Guidelines create a 'safe harbour' in respect of the activities of the standard setting organisations: if the standard setting organisation ("SSO") fulfils certain conditions it will fall outside Article 101(1). We would note that fulfilment of the conditions should mean that the SSO is required to ensure that its rules are effective in preventing patent hold up and other abuses; i.e. it is not enough for the SSO to have a policy in place it must also ensure it is effective through its enforcement rules.
- ii. At paragraphs 281 and 282 the Commission suggests a significant reform of existing SSO practices by requiring SSO participants to use "reasonable efforts" to identify IPR reading on a potential standard. The Commission is requested to clarify the meaning of "reasonable efforts" in this context. We believe it should not amount to a requirement to perform IPR searches. In addition in light of paragraph 282, which requires SSO policies procure an undertaking to license on FRAND terms, is the Commission suggesting that a default FRAND licensing position should be adopted by the SSO? Namely, that should it be established that reasonable steps (defined so as not to amount to a requirement to perform IPR searches) were not put in place by the IPR holder and its relevant IPR was not identified in a timely manner before adoption of a standard, the default position should be that the IPR holder is required to license its essential IPR on FRAND terms in any event. As explained below, we believe effective IPR policies need to include effective enforcement mechanisms. As such, clarity is needed on the nature of the desirable burden so that proportionate enforcement measures can be adopted.
- iii. At paragraphs 284 and 285 the Commission seeks to outline potential factors and methodologies which would be relevant in determining the meaning of a FRAND royalty rate. The Commission notes that various methods may be available to make this assessment and it does not purport to provide an exhaustive list of appropriate methodologies. The Commission also describes these methodologies in the context of determining whether there has been an abuse of market power under Article 102. We believe that prior to setting out the Article 102 analysis, the Commission should, given the subject-matter of the Guidelines, elaborate on the Article 101 legal analysis underpinning the need for a FRAND commitment (this is touched upon at paragraphs 277, 283 and 289 of the Guidelines).
- iv. As regards the meaning of FRAND, the Commission lists only two methods: (i) use of the ex ante royalty rate as a benchmark; and (ii) the use of expert assessment of the quality and centrality of a patent portfolio. We would note that the effectiveness of these measures will, in part, depend upon the emergence of a culture of unilateral disclosure in order for there to be sufficient data available for benchmarking purposes. In this regard it would assist if the additional rules in the Guidelines pertaining to the disclosure of the most restrictive licensing terms (see paragraph 287) were clearly specified as a condition for falling within the realms of the safe harbour, as well as constituting a potential FRAND benchmark.
- v. Although it is helpful that the Commission gives prominence to two potential methods for determining FRAND, it should go further, whilst stopping short of providing an exhaustive list, and provide guidance on another key issue: the need to guard against royalty stacking. This applies to SSOs and holders of essential IPR alike. For example SSOs should not allow the inclusion of options in standards (as opposed to optional features) as this facilitates patent stacking. As regards holders of essential IPR they should be obliged to unilaterally consider and declare what they in good faith believe (in light of the need to avoid royalty stacking): (a) the overall FRAND royalty rate for the standard should be; and (b) what their individual anticipated share should be. Again ex ante disclosure will assist in revealing the potential for

patent stacking and will create commercial context and competitive pressure on holders of potentially essential IPR.

- vi. Finally, as regards this point, it would also be beneficial for stakeholders if the Commission went further and spelt out the methodologies it considers inappropriate when assessing whether royalty fees are excessive and/or non-discriminatory. In addition, in relation to other restrictive licensing terms, it would be of further benefit for stakeholders if the Commission could clarify methodologies it felt appropriate and/or inappropriate regarding the unilateral publication of ex post licensing terms to assist in the evaluation of whether the licensing regimes adopted are non-discriminatory in practice.
- vii. As noted in the Joint Response, paragraph 286 is very important to maintain security and predictability in the standardisation eco-system. It is of utmost importance that a FRAND commitment given by a member to an SSO always follows the IPR if the IPR is transferred to a new owner. This has always been our understanding and – we believe – failure to do so would lead to a breach of Article 101. Any uncertainty on this matter would threaten the established elements of standardisation processes which are working well, and impose significant uncertainty on the implementers of the standards. We would welcome it if the Commission would express this more forcefully - for example using “must” instead of “should” in the following sentence “... there should also be a requirement on all IPR holders who provide such a commitment to take all necessary measures to ensure that any undertaking...”. A specific explanation of what is meant by “all necessary measures” could also prove useful, particularly when the selling company has made a general FRAND commitment but the IPR has not been specifically disclosed to a SSO.
- viii. In addition, the Commission should clarify that the FRAND commitment which is transferred remains unchanged as a result of the transfer, even if the new IPR holder reformulates the wording of the undertaking. Finally, it would also be useful to clarify that the former owner of an essential IPR who fails to take all necessary measures to ensure that its FRAND commitment travels with the essential IPR, should remain liable to honour the FRAND commitment and if it fails to do so face antitrust claims if the new IPR holder fails to license on FRAND terms.
- ix. It would also be beneficial if the Commission clarified what it believes should be the legal effect of a FRAND commitment and when this effect should arise. For example, should the existence of a FRAND declaration prevent the IPR holder from seeking injunctive relief? We believe it should. Notwithstanding any national rules which dictate the need for further aspects of the licence to be sufficiently certain before constituting a binding agreement which would prevent injunctive relief, the Commission should express its view as to what additional steps should be taken (and when they should be taken), in order to provide stakeholders with much-needed certainty as to the desired effect of a FRAND declaration.
- x. Thus, in light of the foregoing comments, it would be of considerable benefit if the Commission clarified, in respect of paragraph 282, to whom any FRAND undertaking to license to all third parties should be given. We would welcome an unequivocal statement that such FRAND undertaking be explicitly directed to the adoptor of any resultant standard or otherwise provided so as to be directly actionable as between the IPR holder and users of the resultant technology.

For the avoidance of doubt, the comments made above represent Vodafone’s individual views by way of supplement to the Joint Response.

Vodafone Group Plc