Introduction and Executive Summary

Vodafone Group Plc ("Vodafone") welcomes this opportunity to comment on the DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses ("the Discussion Paper"). Overall, Vodafone supports the central aim of the Discussion Paper to take a more analytical effects based approach to abuse of dominance founded on sound economic principles and believes that to provide useful guidance for business, the Discussion Paper must be turned into a formal paper in the form of Commission Guidelines ("the Guidelines") as soon as possible.

In particular, Vodafone would comment as follows:

• The Discussion Paper represents a very welcome first step in this area, but must be used to create definitive Commission Guidelines in the short term to provide useful guidance to European companies. A lack of clear guidance contributes to the chilling effect of uncertainty over the application of Article 82, especially as companies are now required to make their own assessments of compliance. Moreover, Vodafone urges the Commission to continue its work on similar guidelines in relation to exploitative and discriminatory abuses.

• The Guidelines should include clearer policy statements on cases that the Commission is likely or unlikely to pursue, useful "safe harbours" and examples of non-abusive behaviour while reducing, as much as possible, the imprecise and discretionary language contained in the Discussion Paper. Vodafone has considerable first-hand experience of National Regulatory Authorities, National Competition Authorities and National Courts, many of whom have far less experience in applying competition law than the Commission, applying Commission Guidelines in various contexts. All of these bodies will look to the Guidelines for clear statements on the application of Article 82. Too much discretionary language in these Guidelines will lead to inconsistent application, undermining the Commission's stated goal of improving legal certainty.

• Vodafone agrees that any abuse of dominance must entail actual or likely consumer harm and competition law should not be concerned with the protection of particular competitors. This requires any alleging party to clearly set out its competitive counterfactual against which the actual or likely harm may be assessed.

• The Guidelines must explicitly recognise the clear legal principle that in any case of an alleged abuse of dominance it is for the alleging party to prove its case, not the defendant company. In relation to the so called "defences" to Article 82, while the Commission may, in particular circumstances, place an evidential burden on a defendant company, it cannot and should not attempt to reverse the legal burden of proof which remains, at all times, on the alleging party.

• Vodafone believes that any Guidelines following the Discussion Paper should remove or significantly rework the section on dominance including, in particular, the discussion of collective dominance. Unlike the sections on abuse which provide a welcome framework for analysis, these sections provide little or no new guidance on the assessment of dominance, define dominance too broadly, place too much
emphasis on market shares and do not place enough emphasis on the possibility of 
competition from outside the defined market.

The Commission should issue Guidelines as soon as possible

The Discussion Paper notes, quite understandably, that as a discussion paper, it cannot 
create any legitimate interest nor provide guidance on current Commission enforcement 
policy. However, it is precisely such guidance which is needed by European companies as 
soon as possible. The various Commission Guidelines on the application of Article 81 have 
been welcomed by business, particularly within the new regime of self assessment. In 
respect of Article 82, Vodafone believes that the continuing lack of guidance on the boundary 
between vigorous competition and abusive conduct has a significant “chilling effect” on 
legitimate commercial behaviour.

Vodafone believes that overcoming this chilling effect plays a vital role in increasing 
European productivity, employment, research and development, and human capital, as 
highlighted in the re-launched Lisbon Strategy as key drivers to improve European 
competitiveness and increase European living standards. With this in mind, Vodafone urges 
the Commission to continue the important work begun by the Discussion Paper and publish 
Guidelines as soon as possible.

While Vodafone believes that the resultant Guidelines could be improved in a number of 
ways, particularly, through greater clarity and less discretionary language, it also fully 
accepts the Commission’s point at paragraph 3 of the Discussion Paper that a wide variety of 
practices may be abusive if carried out by a dominant firm and that any Guidelines could 
never be exhaustive in describing and analysing all possible abuses. Vodafone urges the 
Commission to continue its focus on producing workable Guidelines for European 
businesses and not to be diverted from this task by academically interesting, but ultimately 
unrealistic or irrelevant legal issues. It is against this backdrop that Vodafone offers its 
suggestions below for improvements to the current Discussion Paper.

Clearer policy statements, greater use of “safe harbours” and less discretionary 
language is needed to give more useful guidance to businesses, courts, NCAs and 
NRAs

Although it may be implicit, Vodafone believes that the Commission should explicitly state in 
the Guidelines that as the fundamental purpose of Article 82 is to protect consumer welfare, 
it will not take on cases where likely or actual consumer harm cannot be demonstrated.

This and other similar statements would make Guidelines far more useful to business. In 
particular, safe harbours and clearer examples of what the Commission considers to amount 
to abusive or non-abusive behaviour set out in an unequivocal way would all be very helpful. 
For instance, the Discussion Paper states at paragraph 66:

“If examination of a dominant company’s price schedule or rebate system according to these 
principles leads to the conclusion that an as efficient competitor can compete with the 
dominant company, the Commission will normally reach the conclusion that the dominant 
company’s price schedule or rebate system is not abusive (safe harbour).” (emphasis added)

Rather than leaving uncertainty regarding this condition, Vodafone suggests that the 
Commission should be able to set out clearly those circumstances under which this 
presumption will not be sustained. Similar presumptions and examples would be welcomed.

In particular, Vodafone would urge the Commission to include real examples of non-abusive 
behaviour as such examples would allow the Commission to include those facts which were 
considered important in reaching that decision. Descriptions of general safe harbour
principles which include no contextual information may well be set so low as to be of no real value to companies and may, in fact, be misleading as a result. See for instance the reference that companies with market shares below 25% are not likely to be in a dominant position discussed below.

Overall, Vodafone is concerned that the Discussion Paper is too imprecise or, in an effort to apply to all situations, leaves too much discretion in the manner in which it is applied. Vodafone is particularly concerned that such discretionary language will lead to different interpretations as Guidelines are applied by various national competition authorities, regulatory authorities and national courts. This problem is likely to become even greater in the future given the Commission’s clear intention to promote greater private enforcement of competition law in national courts, as evidenced by its current Green Paper on Damages Actions for Breach of Competition Law.

**Actual or likely consumer harm is necessary to establish an abuse of dominance**

Vodafone agrees with the clear statements in the Discussion Paper that “the essential objective of Article 82 when analysing exclusionary conduct is the protection of competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources.” (para. 54) and that “the central concern of Article 82 with regard to exclusionary abuses is thus foreclosure that hinders competition and thereby harms consumers.” (para. 56)

While Vodafone supports these sentiments, it believes that the Commission needs to be even clearer in the Guidelines that actual or likely consumer harm is required to establish an abuse of dominance. The Discussion Paper refers in places to presumed harm. For instance, para. 55 refers to “exclusionary conduct which produces actual or likely anticompetitive effects in the market and which can harm consumers in a direct or indirect way” (emphasis added). Actual or likely market effects are required to show an abuse of dominance. Therefore, a test of actual or likely consumer harm should be used and there is no good reason to apply a different test to these different elements of abuse of dominance.

Paragraph 60 of the Discussion Paper states: “Where a certain exclusionary conduct is clearly not competition on the merits, in particular conduct which clearly creates no efficiencies and which only raises obstacles to residual competition, such conduct is presumed to be an abuse.” Rather than applying subjective concepts such as “clearly not competition on the merits”, Vodafone believes that a test of actual or likely consumer harm is a clearer and should be preferred.

The application of such a test in the Guidelines would also clarify sections of the Discussion Paper which currently appear to overlook the central requirement for consumer harm and focus too narrowly on the impact on individual competitors. For instance, footnote 53 expands the concept of foreclosure to include “situations where a dominant company impairs the ability of a rival to compete in an effective way so that it becomes ‘marginalised.’” In Vodafone’s view, as vigorous competition by a dominant undertaking may well have this effect, this cannot be sufficient to amount to an abuse of dominance.

Applying an “actual or likely consumer harm” test also requires a clear statement of the competitive counterfactual against which the alleged abuse is being compared. It may not always be possible for an alleging party to point to actual harm which arises directly from the alleged dominance, although in many cases it will be, as this is broadly the approach taken in damages claims based on competition law. In any event, the alleging party should be able to articulate clearly the harm that is at least likely to have been caused. This would entail setting out clearly, again on a balance of probabilities, what the relevant market characteristics would have been absent the alleged abuse.
Notwithstanding the legal issue of burden of proof discussed below, Vodafone believes that there is a compelling public policy argument for such an approach. If, as noted in the Discussion Paper, the fundamental purpose of Article 82 is to protect consumer welfare, Vodafone submits that as a matter of policy, the Commission should concentrate its resources on cases where consumer harm is likely rather than merely a theoretical possibility. Vodafone would echo the sentiment expressed by Greg Werden, Senior Economic Counsel to the Department of Justice at a recent conference on the Discussion Paper. He said:

“A competition agency should allow for the possibility of error in assessing potentially exclusionary conduct. The inevitable “false positives” harm consumers by chilling any legitimate conduct that is sometimes mistakenly found to be exclusionary.”

At the very least, Vodafone would urge the Commission to address with greater clarity and precision the question of when competitive foreclosure, properly called, will actually occur. It seems clear that the Commission’s basic premise is that harm to consumers can be presumed if the infringing behaviour is both capable of foreclosing an “as efficient” competitor and the behaviour affects a sufficient proportion of the market to actually or be likely to foreclose such a competitor. Vodafone supports the Commission’s statement at paragraph 59 that:

“To establish such a market distorting foreclosure effect it is in general necessary not only to consider the nature or form of the conduct, but also the incidence, i.e. the extent to which the dominant company is applying it in the market, including the market coverage of the conduct or the selective foreclosure of customers to newcomers or residual competitors.”

Vodafone takes the reference to “nature and form of the conduct” to mean that the conduct is capable of foreclosing an as efficient competitor. However, after setting this principle, the Commission then creates considerable uncertainty over both the scope of the “as efficient competitor test” and the scope of market incidence required for such foreclosure.

First, the Commission states:

“Fourthly, it may some times be necessary in the consumers’ interest to also protect competitors that are not (yet) as efficient as the dominant company. Here too the assessment does not (only) compare cost and price of the dominant company but will apply the as efficient competitor test in its specific market context, for instance taking account of the economies of scale and scope, learning curve effects or first mover advantages that later entrants can not be expected to match even if they were able to achieve the same production volumes as the dominant company” (para. 67)

Given that Vodafone operates in a market characterised by economies of scale and scope with substantial fixed costs, it is concerned that the Commission does not define precisely when such an approach would be appropriate. Under the current proposal, every complainant company can be expected to allege that if it is not yet as efficient as a dominant undertaking, this is due to lacking the dominant company’s scale and scope. In Vodafone’s view, the Commission should set out clearly the circumstances and evidence of “consumers’ interest” which will be required to adopt a different test.

Second, the Commission is unclear about the necessary incidence of the alleged abuse to demonstrate an actual or likely foreclosure effect. In relation to single branding and rebates, the Discussion Paper refers to “a good part of its buyers” (para. 145) whereas the section on tying and bundling refers to “a sufficient part of the market” (para. 188) and suggests that a

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third of buyers may not meet this criteria (para. 198). Throughout, the Commission suggests that there may be other important factors which influence any analysis such as the particular importance of certain customers for entry or expansion. The Discussion Paper also states: “The Commission will also take into account whether there are economies of scale and scope, network effects or learning curve effects” (para. 145) without explaining exactly how these should impact the analysis. There is some discussion in paragraph 199 of the Discussion Paper regarding these issues, but further clarity would be very helpful.

The Commission cannot and should not attempt to reverse the burden of proof under Article 82

Article 82 is a unitary provision where the burden of proof is on the alleging party throughout. This is clear from Article 2 of Regulation 1/2003:

“In any national or Community proceedings for the application of Articles 81 and 82 of the Treaty, the burden of proving an infringement of Article 81(1) or of Article 82 of the Treaty shall rest on the party or the authority alleging the infringement. The undertaking or association of undertakings claiming the benefit of Article 81(3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled.”

The Discussion Paper states that:

“The burden of proof for such an objective justification or efficiency defence will be on the dominant company. It should be for the company invoking the benefit of a defence against a finding of an infringement to demonstrate to the required legal standard of proof that the conditions for applying such defence are satisfied” (para. 77).

Vodafone believes that this statement in the Discussion Paper is wrong as a matter of law. It is clear from the above, that there is no provision equivalent to Article 81(3) in Article 82 EC. As noted by AG Kokott in British Airways v Commission:

“It therefore needs to be examined first whether the rebates or bonuses granted by an undertaking in a dominant position can give rise to a foreclosure effect, i.e. whether they are capable of making it difficult or impossible for the competitors of the dominant undertaking to have access to the market and for the business partners of the dominant undertaking to choose between various sources of supply; secondly, it needs to be examined whether there is an objective economic justification for the rebates or bonuses granted.

Whilst, of course, objective economic justification becomes relevant only if the rebates or bonuses granted do give rise to a foreclosure effect, both steps in this examination are designed to distinguish abusive from lawful conduct and thus ensure that legitimate price competition does not fall foul of Article 82 EC.” (emphasis added)

That is to say, objective justification or efficiencies are not strictly “defences” of abusive conduct, but rather, if demonstrated, they distinguish lawful behaviour which is not prohibited under Article 82 in the first place.

Thus, while Vodafone is very pleased that the Commission is stressing the importance of efficiency and objective justification in evaluating competitive concerns of the dominant firm behaviour, Vodafone believes that an efficiency gains evaluation must always be part of the overall analysis of the abuse of a dominant position. Consequently, if a company puts forward evidence that its behaviour was objectively justified and/or led to pro-competitive efficiencies, the Commission must take this evidence into account when assessing the overall case without presuming when efficiencies are unlikely to be achieved or are unlikely to counterbalance negative effects. Of course, if the Commission considers that, having taken due account of the evidence put forward by the defendant company, it is more likely
than not that the behaviour in question constitutes an abuse of a dominant position (and, as discussed above, likely that this has resulted in consumer harm) it is free to take such a decision.

As regards objective necessity, in Paragraph 80 of the Discussion Paper, Vodafone strongly suggests that the Commission should consider more examples in order to provide companies with more certainty. The Discussion Paper states that the conduct “may escape the prohibition of Article 82” when it is objectively necessary for reasons of safety or health (“indispensable”, according to the Community Courts criteria) but also affirms that it is not for a dominant company to eliminate, on its own initiative, products it considers dangerous or inferior to its own products. Vodafone believes that although this proposition may be generally supported, it must be examined on a case-by-case basis and cannot be taken as authority that such a defence could never succeed. Competition law cannot require a dominant supplier to commit or facilitate an offence, particularly a criminal offence. Therefore, if an activity is actually illegal under national law, a dominant supplier must be entitled to refuse to supply a customer where the supplier knows that the customer will use the supplied product to carry on an illegal activity, particularly if any liability attaches to the supplier in such a case. Vodafone would welcome a clear statement from the Commission in any Guidelines as the current drafting makes it hard for companies to identify which kind of conduct can be considered objectively necessary and which may be regarded as aimed at eliminating competitors’ products.

As regards the meeting competition defence, the Commission states that it is only applicable in relation to behaviour which otherwise would constitute a pricing abuse. According to the Commission, therefore, companies can advance such a defence only if their conduct is aiming at defending their commercial and economic interests in the face of competitors’ action and are indispensable. Vodafone sees no reason why pricing and non-pricing abuses should be treated differently.

Finally, the Discussion Paper seems to suggest in paragraph 56 that in particular cases that present evidential difficulties, the standard of proof may, somehow, be lowered for an alleged breach of Article 82 EC:

“Where in a particular case it proves not possible to apply the more detailed principles and tests, for instance because of insufficient access to relevant data, the Commission will analyse the case using the general principles in view of the central concerns described above.”

Vodafone has no objection to this as a statement of the Commission’s approach in relation to cases where particular evidence is not available. However, this in no way lowers the standard of proof on the Commission to show that on the balance of probabilities, an abuse of a dominant position has occurred taking due account of all available evidence. The correct application of competition law is, in many cases, necessarily complex. This complexity cannot and does not reduce the evidential burden on the Commission.

The discussion of dominance should be omitted or needs to be substantially reworked to provide useful guidance to companies

While the Discussion Paper represents a valuable step forward in rationalising the Commission’s thinking in relation to abuse of dominance, the discussion of dominance itself amounts to little more than a factual exposition of existing case law, which while it may act as a useful summary, provides little useful guidance on the Commission’s approach to the analysis of dominance. Vodafone would urge the Commission to give greater clarity in this area.
Sole dominance

Vodafone agrees with the Commission’s statement that a dominant undertaking is one that is “capable of substantially increasing prices above the competitive level for a significant period of time” (para. 24). Vodafone does not agree however that the term “raising prices” can be used uncritically as “shorthand” according to the Discussion Paper to represent any other parameters of competition.

Despite this clear statement regarding the meaning of dominance, parts of the Discussion Paper still place too much reliance upon market shares. Vodafone believes that any Guidelines should clearly state that no presumption of dominance can be founded on market shares alone. In paragraph 29 of the Discussion Paper, the Commission identifies, correctly in Vodafone’s view, that market shares provide only “first indications of the market structure and of the competitive importance of various undertakings active on the market.” However, the Commission then appears to go further and endorse the positive presumption that high market shares indicate a dominant position (para. 31). Vodafone believes that this presumption is unhelpful and the Commission should revert to the position that high market shares, while a potentially helpful first indicator in any analysis, must be assessed in the full economic context of the relevant case. This is particularly true for markets in the communications sector. These markets are often characterised by fast technical developments and innovations which means that market shares can be extremely volatile.

The danger of relying too heavily on market shares without considering their market context is best demonstrated by the Commission’s statement that:

“In the case of lower market shares, dominance is more likely to be found in the market share range of 40% to 50% than below 40% although undertakings with market shares below 40% could be considered to be in a dominant position. However, undertakings with market shares of no more than 25% are not likely to enjoy a (single) dominant position on the market concerned” (para. 31)

Vodafone believes that this statement is actually unhelpful in clarifying the law on dominance. In an effort to cater for all possibilities, the Commission has set the thresholds described so low that the statement may actually mislead those who attempt to apply it, particularly if they do not have as much experience as the Commission in applying competition law principles. In fact, to Vodafone’s knowledge, the number of companies held to be dominant with market shares below 40% is limited to the case of British Airways v Commission which is currently under appeal, notwithstanding the reference in the Discussion Paper to Gottrup-Klim, where the ECJ found it unnecessary to determine if a dominant position was, in fact, held and where it concluded that certainly such market shares “cannot on their own constitute conclusive evidence of the existence of a dominant position.”

Another example of excessively discretionary language in the Discussion Paper which is potentially misleading arises in relation to barriers to expansion and entry. At paragraph 34, the Commission states:

“If the barriers to expansion faced by rivals and to entry faced by potential rivals are low, the fact that one undertaking has a high market share may not be indicative of dominance” (emphasis added).

While there may be differences of opinion in a particular case whether the barriers to expansion or entry are actually low, as a general proposition, it must follow that if barriers are in fact shown to be low, the undertaking in question cannot hold a dominant position as set out in paragraph 24 of the Discussion Paper.
Vodafone is also concerned that the Discussion Paper does not sufficiently address the issue of competitive constraints from outside the defined market even when, in reality, these undoubtedly exist. For instance, the Commission and national regulatory authorities have determined that the relevant market for voice call termination on mobile and fixed networks is network specific. That is, each network operator holds a 100% market share in the relevant market. While Vodafone disputes this market definition and the implication that it is dominant on the market, the important point here is that even on the Commission’s analysis of this market, it does not suggest that there is no competitive pressure on the network operator. Both it and Vodafone accept that there are a number of other competitive and commercial pressures on an operator’s voice call termination prices, they simply disagree on the impact of these pressures within the dominance analysis. Vodafone believes that any Guidelines should expressly acknowledge competitive pressures from outside the defined market even if the impact of those pressures on the analysis of dominance must be determined on a case-by-case basis.

Collective dominance

Vodafone has even greater concerns regarding the Commission’s discussion of collective dominance and considers that, given the unusual circumstances required and the consequent rarity of abuse of collective dominance cases, by seeking to set out general principles, this section is potentially misleading and should be deleted.

Notwithstanding Vodafone’s view that the section should be deleted, if it is retained, Vodafone believes that the Guidelines should explicitly recognize that the standard of proof of a collective dominant position under Article 82 should be more stringent than under the ECMR, given that historical data is available to the Commission in the \textit{ex post} assessment of an abusive conduct.

Moreover, any collective dominance analysis must include a clear statement on the competitive counter-factual. It must be demonstrated that absent the alleged collective dominant position, some other form of conduct would be likely to have occurred. This differentiates between cases of collective dominance and merely unilateral incentives to act in a particular way. The Commission should give undertakings clear rules they can rely upon in terms of what kind of conduct is abusive and what is regarded as legitimate competitive action in the market in which they interact. Oligopolistic parallel behaviours cannot be condemned as abusive simply because companies react rationally according to the particular conditions of the market in which they operate (see \textit{Woodpulp}).

Vodafone is also concerned with the section of the Discussion Paper concerning abuse of collective dominance. First, there is no clear explanation of the distinction between agreements or concerted practices under Article 81(1) EC and a finding of collective dominance. It appears to Vodafone that the examples given in paragraphs 74 and 75 of the Discussion Paper would only be possible in cases of an agreement or concerted practice between the companies in question.

In conclusion, Vodafone suggests that the Commission should remove the section on collective dominance in any Guidelines, given the very rare nature of abuse of collective dominance cases and given also the necessity to define and improve criteria that are more focused on the rational conduct of the undertakings. In Vodafone’s opinion, paragraphs 43 to 50 and paragraphs 74 to 76 should be taken out from any Guidelines, as it would be more appropriate that further developments of this concept are left to the case law.

\textbf{Vodafone Group Plc}  
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