

*Case No COMP/M.1795 -  
VODAFONE  
AIRTOUCH /  
MANNESMANN*

Only the English text is available and authentic.

**REGULATION (EEC) No 4064/89  
MERGER PROCEDURE**

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Article 6(1)(b) NON-OPPOSITION  
Date: 12/04/2000

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 12.04.2000

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EEC) No 4064/89 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

MERGER PROCEDURE  
ARTICLE 6(2) DECISION

PUBLIC VERSION

To the notifying parties

Dear Madam/Sir,

**Subject: Case No COMP/M. 1795 Vodafone Airtouch/Mannesmann**

Notification of 14.1.2000 pursuant to Article 4 of Council Regulation No 4064/89

1. On 14 January 2000, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) No 4064/89<sup>1</sup> as last amended by Regulation (EC) No 1310/97<sup>2</sup> by which Vodafone Airtouch Plc (“Vodafone Airtouch”), within the meaning of Article 3(1)(b) of the Regulation, acquires sole control over Mannesmann AG (“Mannesmann”).
2. On 22 February 2000, the Commission declared the notification incomplete, as the notifying party had not provided substantial information linked to a product market. Vodafone Airtouch completed the notification on 29 February 2000.
3. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of Council Regulation (EEC) No 4064/89 and does not raise serious doubts as to its compatibility with the common market and with the EEA Agreement.

**I. THE PARTIES**

4. Vodafone Airtouch Plc is an UK-based company involved in the operation of mobile telecommunication networks and the provision of related telecommunication services. The company’s principal business is the operation of the cellular radio networks of Vodafone Limited in the United Kingdom. Vodafone Airtouch has interest in

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<sup>1</sup> OJ L 395, 30.12.1989, p.1, corrigendum; OJ L 257, 21.9.1990, p.13.

<sup>2</sup> OJ L 189, 9.7.1990, p. 1, corrigendum; OJ L 40, 13.2.1998, p. 17.

companies in 24 countries worldwide including the US and is listed on the London and New York stock exchanges. At an EU-level, Vodafone Airtouch has interests in mobile telecommunication companies in 10 EU Member States. Vodafone Airtouch has majority interests in telecommunication companies in the United Kingdom, the Netherlands, Sweden, Portugal, and Greece and it has minority interest in telecommunication companies in Belgium, France, Germany, Italy and Spain. Vodafone Airtouch's ownership is as follows:

<b>European State</b>	<b>Company and ownership by Vodafone Airtouch</b>
Belgium	Belgacom Mobile (Proximus): Vodafone Airtouch 25%
France	SFR: Vodafone 20% (Mannesmann/Orange 12%)
Germany	Mannesmann Mobilfunk (D2): Vodafone 29.777% + 5% (Mannesmann 70.226%)
Greece	Panafon: Vodafone Airtouch 55%
Italy	Omnitel: Vodafone Airtouch 21.62% through Pronto Italia (Mannesmann 55.17%, )
The Netherlands	Libertel: Vodafone Airtouch 70%
Portugal	Telecel: Vodafone Airtouch 50.9%
Spain	Airtel: Vodafone Airtouch 21.70%
Sweden	Europolitan: Vodafone Airtouch 71.10%
United Kingdom	Vodafone Limited: Vodafone Airtouch 100%

5. Mannesmann AG (“Mannesmann”) is a German-based engineering and telecommunications company. Its’ core activities in the telecommunications sector relate to mobile and fixed line telephony. It has interests in joint ventures in France, and Austria and owns businesses in Germany, Italy, the United Kingdom and the USA. Orange’s core activity is the operation of the Orange mobile telephony network in the United Kingdom and the sale and marketing of Orange services in the United Kingdom and elsewhere. Moreover, Orange has interests in joint ventures in Austria, Belgium and Switzerland and acts as a service provider for mobile telephony in France and Germany. On 21 December 1999, the Commission approved Mannesmann’s acquisition of Orange Plc (“Orange”) subject to the condition that Mannesmann sells Orange’s stake in Connect Austria<sup>3</sup>. Mannesmann’s ownership is as follows:

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<sup>3</sup> Case COMP/M.1760 Mannesmann/Orange

European State	Company and ownership by Mannesmann/Orange
Austria	tele.ring: Mannesmann (control) [Connect Austria: Orange 17.45]
Belgium	KPN Orange: Mannesmann/Orange 50%,
France	SFR: Mannesmann/Orange 12% (Vodafone 20%)
Germany	Mannesmann Mobilfunk (D2): Mannesmann 70.226% (Vodafone 29.777% + 5%)
Italy	Omnitel: Mannesmann 55.17%, Vodafone Airtouch 21.62% through Pronto Italia
Switzerland	Orange Communications SA: Mannesmann/Orange 42.5%
United Kingdom	Orange Plc: 100%

## II. THE OPERATION AND THE CONCENTRATION

6. The operation involves the acquisition of sole control over Mannesmann by Vodafone Airtouch by way of public bid announced on 20.12.1999. The formal offer was accepted by 98,62% of Mannesmann's shareholders at the closing date on 27 March 2000. The transaction is to be effected by means of an all share offer of Vodafone Airtouch ordinary shares in exchange for Mannesmann shares. The notified operation will therefore result in the acquisition of sole control in the meaning of article 3(1)(b) of the Merger Regulation.

## III. COMMUNITY DIMENSION

7. The combined aggregate worldwide turnover of the undertakings concerned exceeds EUR 5 000 million (Vodafone Airtouch: Euro 4 943 million, Mannesmann: Euro 20 858 million). The aggregate Community wide turnover of each party exceeds Euro 250 million (Vodafone Airtouch: Euro 4 436 million, Mannesmann: Euro 15 175 million). They do not achieve more than two-thirds of their turnover in one and the same Member State. The operation has therefore a Community dimension.

## IV. THE RELEVANT MARKETS

### A. RELEVANT PRODUCT MARKETS

#### *Mobile telecommunication services*

8. The notifying party argues that the relevant product markets is the market for mobile telecommunication services encompassing both GSM 900 and DCS 1800 and possibly also analogue services. Vodafone Airtouch submits that it is inappropriate to subdivide the mobile telecommunication services market between mobile network operation and the distribution of mobile telecommunication services. The notifying party also submits that a further segmentation according to business customers and

private individuals is inappropriate because business people routinely place and receive personal calls on their mobile phones, and individuals also subscribe personally to mobile service but utilise their phones for business. Moreover, the pre-paid services include no records of customer of origin. The notifying party also claims that it is impossible to segment the market further based on customer usage, e.g. low or high volume usage, as the tariff differentiation does not reflect separate and definable market segments.

9. In its previous decisions (e.g. Cases IV/M.1430 – Vodafone/Airtouch and COMP/M.1669 – Deutsche Telecom/One2One), the Commission based its assessment on a market for mobile telecommunication services encompassing both GSM 900 and GSM 1800 and possibly also analogue platforms, although the exact product market was left open in both cases. This has been confirmed by the Commission's market investigation in the present case.
10. The Commission has so far left open the question whether a further segmentation of the mobile telecommunication services market into a market for network operator/service provider is appropriate<sup>4</sup>.
11. The results of the market investigation indicate that the product market for mobile telecommunication services should encompass both GSM 900 and GSM 1800 and possibly also analogue platforms and that a further segmentation into network operator/ service provider and/or into business/residential customers is premature. However, this issue can be left open also in this case since it does not affect the final conclusion.

*The provision of seamless pan-European mobile telecommunication services to internationally mobile customers*

12. Third parties have argued that there is an emerging market for seamless pan-European services to internationally mobile customers, in particular corporate customers.
13. These new services, which cannot be provided today over the existing GSM networks, will be possible, inter alia due to the technologic developments such as GPRS<sup>5</sup>, EDGE<sup>6</sup> and CAMEL<sup>7</sup> which are technologies that allow a significant

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<sup>4</sup> cf. Case COMP/M.1760 Mannesmann/Orange.

<sup>5</sup> General Packet Radio Service (GPRS) technology is developed for GSM networks to allow enhanced rates of data transfer. GPRS make use of free radio capacity left by circuit switched traffic. Basic GPRS capable terminals begin to be available in commercial quantities from start of 2001.

<sup>6</sup> EDGE (an abbreviation for Enhanced Data GSM Environment or Enhanced Data Rates for Global Evolution), which is currently being standardised within the European Telecommunications Standards Institute (ETSI), represents the final evolution of data communications within the GSM standard (second generation +). EDGE will enable data throughput speeds of up to 384 kbit/s using existing GSM infrastructure. This is the same data speed being offered in the first phase of third generation deployment. EDGE could offer an alternative route for GSM operators who will not have third generation licenses. With EDGE technology, operators will be able to offer multimedia services.

improvement with regard to the amount of information/data transfer and to the possibility of networks in other to interface intelligently and the ensuing possibilities for integration of existing GSM networks.

14. These new services essentially include pan-European offering of Internet mobile services and wireless location services for mobile users. These services are heavily dependent on the ability of the network operator to precisely locate its customers. They combine customer location with content. There are essentially four types of wireless location services:
  - (1) “trigger services” that are automatically initiated when users enter a pre-determined area, for example advertising services.
  - (2) “location-based services” that include local based billing which is specifically attractive to corporate customers. This allows the operator to identify and process where the user is across those countries where it has a network. This will allow the operator to offer a “home zone” rate to their customer when these are at any of the corporate customer’s business sites.
  - (3) “third party tracking services” that include applications whereby information regarding the location of a third party is required. Examples include fleet management, asset tracking and people finding, and
  - (4) “end user assistance services” that provide users with a “safety net”. Examples include roadside assistance and emergency services.
15. In addition to that, the combination of these technologies and network integration will make it possible for those companies to implement these technological developments within a single integrated network, i.e. the merged entity, to offer services such as Corporate LAN (Local Area Network) access, video services, mobile Internet access, mobile e-commerce and unified messaging/media conversion to their subscribers.
16. Corporate LAN access is considered to be a major attraction for corporate customers since it will enable them to *e.g.* access the company database while travelling or visiting clients premises. Corporate users would also be able to access data files, send and receive e-mail and use their business information systems from a mobile terminal. The increasing data rates offered also make video services a reality. This opens up a new range of service opportunities including mobile video telephony. Third parties expect that these new services will be offered by the merged entity shortly after the merged entity’s network has been integrated, which is foreseen to take 6 months.

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<sup>7</sup> Customised Application of Mobile Enhanced Logic (CAMEL) is GSM feature name for including IN (Intelligent Network) functions into a GSM system. CAMEL is used when roaming between networks, allowing the home network to monitor and control calls made by its subscribers. Possible applications include pre-paid roaming services, fraud control, special numbers (e.g. 123 for voicemail works everywhere) and closed user groups (office extension numbers works everywhere). CAMEL has been standardised in three phases, the first of which is starting to be deployed now.

17. The above listed services will to a substantial degree be accessed through Internet access and mobile portals and allow users easy access to the data that they want in a form that they want (e.g. via a WAP<sup>8</sup> gateway). There is an increasing demand for systems that can take in messages in all these different formats and then convert them into a format that is appropriate for the users current terminal e.g. converting a fax into a text SMS message, converting an e-mail into voice and saving it as a voicemail message for a voice handset. Handsets to provide some of these new services have been developed by suppliers and are available today. New handsets able to support the full range of services mentioned above will, according to third parties, be available to customers within the next year. Basic GPRS capable terminals begin to be available in commercial quantities from 2001. Without an integrated network, an operator cannot provide these services outside its own country (because it cannot locate precisely its customer as soon as he has left the country) unless this operator has been able to enter into special roaming agreements based on the CAMEL technology<sup>9</sup> with other operators to provide the advanced services.
18. The market investigation has shown that internationally mobile customers, in particular large corporations with substantial amounts of European cross-border business have a greater demand for these advanced services than other types of subscribers. New technologies and larger networks will allow operators to better address internationally mobile customers' demands. However, it cannot be excluded that also small- and medium-sized enterprises and some private customers would demand these services. The market investigation has also revealed that these customers do not see regional and national offerings as substitutable to the pan-European services as illustrated by the fact that in their public tenders these corporate customers ask for pan-European services only. Consequently, these pan-European offerings do not seem constrained by mobile operators offering national or purely regional solutions.
19. Firstly, the specific demand of these corporate customers is due to the international scope of their business with sites across Europe, to the fact that their employees travel on a frequent basis, and to their advanced service requirements. They also need to be able to reach their executives wherever they are in the most efficient and cost-effective manner.
20. Secondly, internationally mobile customers demand that these services are provided seamlessly at least on a pan-European basis. Seamlessness on a pan-European basis would mean that when the roaming customer moves from one country to another he/she will see no difference in the service i.e. will be able to use all of the functions and facilities of the home network, such as short code dialling to access the mailbox. These customers seek a one-stop-shopping and billing for their common services

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<sup>8</sup> Wireless Application Protocol (WAP) is designed to provide users of mobile terminals access to the Internet. WAP integrates telephony services with microbrowsing and enables interactive Internet access from the mobile handset. Typical applications include over-the-air e-commerce transactions, online banking, information provisioning and messaging.

<sup>9</sup> The last phase of CAMEL will only become available after 2002.

functionality, seamless pan-European hosting of corporate e-mail and network services. The merged entity will be able to provide the above described services on a seamless basis because the merged entity has the integrated network that such services require.

21. The market investigation has shown that a number of mobile operators have been approached by corporations for the provision of pan-European seamless mobile telephony services and that no provider of either national, regional or global services are today able to provide the pan-European seamless services sought. The investigation confirmed as well that internationally mobile customers and larger business customers would prefer a pan-European or global seamless mobile telephony service to a patchwork of national services. In addition, the investigation has shown that these mobile services would be bought separately and not as a package of mobile and fixed solutions. Therefore, in the light of the above it can be concluded that there is a distinct market for the provision of advanced seamless pan-European mobile telecommunication services.

*Mobile handsets and mobile telephony network equipment*

22. It has been alleged by third parties that the current transaction will have effects on the markets for mobile telephony handsets (terminals) and mobile telephony network equipment. Vodafone Airtouch has alleged that both these are two distinct markets for mobile handsets and mobile telephony network equipment. This has also been confirmed by the Commission's investigation. In the light of these findings it can be concluded that there is a distinct market for mobile handsets and a distinct market for mobile telephony network equipment.

**B. RELEVANT GEOGRAPHIC MARKET**

*Mobile telephony services*

23. The notifying party submits that the mobile telecommunications services market is national. This is in line with Commission's earlier decisions (e.g. Case M.1430 – *Vodafone/Airtouch*). The Commission's investigation has confirmed this position.

*The provision of advanced mobile telecommunication services to internationally mobile customers*

24. The Commission's investigation has shown that there is a distinct demand for advanced seamless pan-European services from internationally mobile customers, particular MNCs and large corporations, which is distinct from the demand for national mobile telecommunications services for smaller companies and private users due to the international scope of the large corporations businesses (cross-border international) and their international customer base. A number of respondents have indicated that this market is at least pan-European. However, for the purposes of the current transaction the scope of the relevant geographic market can be left open since the assessment of the transaction would be the same regardless of whether the market is considered as pan-European or not.

*Mobile telephony handsets and network equipment*



25. Vodafone Airtouch has submitted that the markets for mobile telephony handsets and network equipment are global in scope. The results from the Commission's market investigation indicate that the majority of respondents find that the geographic markets for mobile telephony network equipment and related equipment are global. However, for the purposes of this case the relevant geographic market can be left open.

## V. COMPETITIVE ASSESSMENT

### *United Kingdom market for mobile telecommunication services*

26. With the transaction, Vodafone Airtouch will acquire sole control of Mannesmann. Mannesmann is active in the United Kingdom through its stake in Orange Plc<sup>10</sup>. Vodafone Airtouch is present in the United Kingdom mobile telecommunications market through its 100% shareholding in Vodafone Limited.
27. There are currently four licensed mobile telecommunications operators in the United Kingdom. The merged entity would have sole control of two of the four operators with a combined market share of 53.6% (Vodafone 33.2% and Orange 20.4%) of the market. The only other large player in the market is BT Cellnet, with an estimated market share of 27%. The fourth UK operator, One2One, has an estimated market share of 17.4%.
28. Market entry is, as in other Member States, regulated at the national level. This necessarily restricts entry to the market, since all operators must first gain a licence from the national regulator. The national regulator's ability to award new licences is in itself restricted by the limited amount of available frequencies.
29. The lack of available spectrum for additional GSM 900 and GSM 1800 mobile licenses in the UK acts as a barrier to new entry in this market and no new licenses are envisaged to be granted to any new GSM operator.
30. By acquiring the third operator (Orange) in the United Kingdom, Vodafone will hold a market share of 53,6% in this market. The new entity will be twice as large as the second operator, BT Cellnet will. In the light of the above, it can be concluded that the proposed concentration raises serious doubts as to its compatibility with the common market in relation to the above national market for mobile telecommunications services.

### *The Belgian market for mobile telecommunication*

31. The Belgian mobile telephony market is an affected market as Vodafone Airtouch has a presence in the Belgian mobile telecommunication market via its 25% shareholding in and joint control over Belgacom Mobile (Proximus) including a veto right over certain commercial decisions including the approval or amendment of the Annual Budget or the Five Years Strategic Plan. Mannesmann is present in Belgium via its

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<sup>10</sup> Comp/M.1760 – Mannesmann/Orange.

subsidiary Orange, who has a 50% shareholding in KPN Orange. Mannesmann has joint control of KPN Orange due to its 50% shareholding and veto right over strategic commercial decisions. Consequently, due to Vodafone Airtouch's and Mannesmann's veto rights in their respective subsidiaries, these subsidiaries can be prevented from competing effectively.

32. According to the notifying party, KPN Orange has an estimated market share of 2,3%, Proximus about 65% and Mobistar 32,7% in the Belgian market based on number of subscribers. The merged entity would have a market share of nearly 70% of the Belgian telecommunication market, i.e. a market share more than twice as big as that of the next and only competitor. In the light of the above, it can be concluded that the proposed concentration raises serious doubts as to its compatibility with the common market in relation to the above national market for mobile telecommunications services.

*The provision of seamless pan-European mobile telecommunication services to internationally mobile customers*

#### Introduction

33. The merged entity will hold controlling interests in mobile telephony operators in eight Member States (Austria, Germany, Greece, Italy, The Netherlands, Portugal, Sweden and the United Kingdom) and hold joint control of mobile operators in three (Belgium, France, and Spain) with a subscriber base exceeding 40 million<sup>11</sup>. The merged entity's largest competitors are Telecom Italia, Deutsche Telekom, British Telecom and France Télécom.
34. Telecom Italia, has a combined estimated subscriber base from its subsidiaries in Italy, Austria, Greece and Spain, of about 22 million subscribers. Deutsche Telekom, including its subsidiaries in Austria, Germany, Italy and the United Kingdom, has about 15 million subscribers. BT, including its subsidiaries in Germany, Ireland, Italy, the Netherlands, Spain, Sweden and the United Kingdom, has about 12 million subscribers. France Télécom, through its subsidiaries in Belgium, Denmark, France, Italy and the Netherlands, has about 11 million subscribers.<sup>12</sup> Of these operators only France Télécom has majority interests in more four operators (Belgium, Denmark, France and the Netherlands).
35. The merged entity's market share of European mobile telephony subscribers is estimated to be more than 30%. The second and third operators, Telecom Italia and Deutsche Telekom have a market share of about 15 % and 10% respectively. British Telecom and France Télécom have a market share each of about 8%. However, none

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<sup>11</sup> As of 1 December 1999 based on the combined Vodafone/Mannesmann excluding the subscribers of Orange and its overlapping interests in the United Kingdom and Belgium. Source: 1999 FT Mobile Communications.

<sup>12</sup> As of 1 December 1999. Source: 1999 FT Mobile Communications estimated on minority and majority interests held in associated mobile operators conveying EC joint or sole control in these operators.

of these operators can match the geographic footprint of the merged entity and they only have sole control over between 2-4 of their respective operations.

The provision of seamless pan-European mobile telephony services

36. During the course of the Commission's investigation third parties argued that the merged entity will be in a unique position with its sole control over eight operators and joint control over three additional ones across the common market to build an integrated network which will enable the quick implementation of the necessary technology to provide advanced seamless services on a large scale. Third parties do not deny that it will be possible for competitors to develop and offer the same services. However, they claim that this would be only possible on a national scale or in a very limited number of Member States compared to the merged entity's geographic coverage.
37. Vodafone Airtouch submits that it does not believe that a single interconnected pan-European network is likely to develop imminently. However, this is contrary to Vodafone Airtouch's own Offer Document of 23 December 1999, in which it is stated that the merged entity will be able to provide a global platform by mid-2000 that will provide messaging services, location-based content and mobile e-commerce in a uniform manner on a global basis<sup>13</sup>.
38. Moreover, Vodafone Airtouch claims that if an interconnected network did develop it would not give rise to competition concerns, both because there will be scope for a number of such networks to develop, and because there will be other routes for operators to ensure that they can remain competitive in serving their own and other operators' subscribers when they roam abroad, including the current types of international roaming agreements and the implementation of technologies such as CAMEL. In any event, Vodafone considers that other operators will be in a position to provide "seamless" services on the same scope in the near future. However, this contrast with the statement by Mr Chris Gent, Vodafone Airtouch's CEO, in the 6 March 2000 edition of Fortune that "[the merged entity will have] an *unrivalled* power to sell seamless pan-European services with pan-European rates" (emphasis added).
39. Third parties have claimed that CAMEL will not allow the efficient provision of all new Internet based services. In any event, CAMEL is to be introduced in three phases and the last phase is not scheduled to be introduced until 2002 at the earliest. In addition, according to third parties the merged entity would not have to introduce such technologies. It would be able to develop an integrated network through its own proprietary solutions by replacing their current HLR (Home Location Register) software. It is expected that the merged entity would be able to replace their HLR in the near future (before the end of the year). This is also supported by Vodafone Airtouch's own statements contained in the offer document cited above.

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<sup>13</sup> Vodafone Airtouch, *Offer for Mannesmann AG – Vodafone Airtouch and Mannesmann Better Together*, 23 December 1999, p. 10.

40. The Commission's investigation has also shown that with the difficulties involved in agreeing on the modification on the existing network configuration, centralised management solutions and cost and profit allocation will make it exceedingly difficult, if not highly unlikely, for third parties to replicate, by agreement, the merged entity's network in the near future. Third parties have estimated that between 30-60 new contracts (depending of the numbers of markets where a given operator has sole control over mobile operators) that will have to be entered into among competing network operators to replicate the new entity's network. Indeed, as shown by the significant number of failures over the past years in building similar solutions in related markets within the framework of joint ventures or strategic alliances the contractual co-ordinated introduction of these technologies will be, if achieved at all, much more difficult and time consuming for the merged entity's competitors than the corresponding introduction of these or similar technologies by the parties. Third parties estimate that it is likely to take on average 3-5 years for the merged entity's competitor to be able to replicate, if at all, the footprint of the merged entity's integrated network by purely contractual means. In contrast, the number of new contracts that the merged entity will have to conclude with other mobile operators will be limited as the merged entity is present in all Member States except Denmark, Finland, Ireland and Luxembourg.
41. Alternatively third parties could try to achieve the same result, *i.e.* an integrated pan-European network, by means of mergers and acquisitions. However, the market investigation has revealed that in order to replicate the network of the new entity a significant number of transactions is needed. Most of them would involve more than one incumbent PTT. Thus, in addition to the uncertainty as to the replication of the merged entity's network by means of the right combination of mergers and acquisitions, this process would be, in all likelihood, extremely time consuming and fraught with regulatory delays given, inter alia, the need for regulatory approval and in many instances the need for important divestments due to anti-competitive overlaps.
42. Thus, following the merger, the main difference between the possibilities opened to the merged entity and those of other mobile operators is that the merged entity via its integrated network will be able to provide advanced telecommunication services to all customers on a seamless pan-European basis, at least in those Member States where it is currently operating. The merged entity would have the possibility to provide the advanced services in at least those eight Member States where it has sole control. It is also likely that it will be able to provide these services in those three Member States where it has joint control, given that their partners in these joint ventures would have an incentive to modify their networks to allow them access to a large single seamless network which would benefit their own subscribers.
43. Other mobile operators cannot offer similar services because of the segmentation of the existing networks and the difficulties in integrated them into a seamless integrated network. In the absence of integration, this segmentation means that these networks will not, inter alia, be able to locate the customers and consequently the new technologically advanced services will not be offered. In addition, suppliers of fixed services would not be able to constrain the commercial behaviour of the merged

entity given that the customers are demanding a seamless pan-European offer which no other competitors, including PTTs can, in the short to medium term, offer.

Increased ability and incentive to eliminate actual and potential competition from third parties

44. Following the merger the pre-merger market position of the parties will be significantly strengthened as a result of the increased ability and incentive of the new entity to eliminate actual and/or potential competition. Through its structural integration of mobile networks across Europe into an integrated network the merged entity will be the only mobile operator able to meet in the short to medium term (three to five years according to third parties) the demand for advanced pan-European services given its ability to overcome the technical and commercial barriers to create a truly pan-European integrated network.
45. The merged entity would be the only mobile operator able to capture future growth through new customers, because new customers would be attracted by the services offered by Vodafone Airtouch/Mannesmann on its own network. Given their inability to replicate the new entity's network, competitors will have, at best, i.e. if they are allowed access to Vodafone's network at all, significant costs and performance/quality disadvantages given its dependency on Vodafone Airtouch/Mannesmann for instance on roaming agreements in order to offer "equivalent" pan-European mobile services. This situation is likely to entrench the merged entity into a dominant position on the emerging pan-European market for internationally mobile customers for the foreseeable future because customers of other operators would generally prefer the merged entity to other mobile operators given its unrivalled possibility to provide advanced seamless services across Europe.
46. Third parties would thus need to have access to the merged entity's network to be able to locate its own customers to provide its advanced services to its subscribers also when they are in Vodafone/Mannesmann's home network. The merged entity will therefore have the possibility either to refuse access to the its network or to allow access on terms and conditions which will make third party offerings unattractive or simply not competitive.
47. In addition, the merged entity will through its unrivalled large customer base (about 43 million in Europe, and about 9.2 million in the US) and its unrivalled position to provide seamless pan-European services be in a unique bargaining power vis-à-vis handset manufacturers to negotiate design functionalities which will not be available to competing operators. Such customised handsets will be more and more important with the introduction of advanced services. Customised handsets/terminals would enable the merged entity to make it more difficult for roamers from competing mobile operators to take advantage of the advanced pan-European services available over Vodafone's network.
48. The notified concentration could thus lead to the creation of a dominant position on the market for the provision of seamless pan-European mobile telecommunication services, and it consequently raises serious doubts as to its compatibility with the common market.

*The mobile handset market and mobile network equipment market*

49. It has been alleged by some third parties that the merged entity may become dominant in the markets for the acquisition of mobile handsets and network equipment
50. Vodafone Airtouch contests these allegations. Firstly, Vodafone Airtouch argues that the market for the provision of mobile handsets is global. Secondly, it states that it purchases less than [between 5% and 15%] of the total quantity of handsets purchased/sold worldwide. On a European-wide basis, Vodafone Airtouch estimates that its total purchases following the merger will be around [between 10% and 20%] of total sales in Western Europe. In addition, Vodafone Airtouch indicates that it sources its handsets requirements from a large number of different suppliers. According to Vodafone Airtouch its own handsets purchasing requirements for the year 2000 will be as follows: Nokia [between 25% and 35%], Siemens [between 10% and 20%], Mitsubishi [between 5% and 15%], Motorola [between 5% and 15%], Ericsson [between 5% and 15%], Sagem [between 5% and 15%], Philips [between 5% and 15%], Panasonic [between 5% and 15%] and others [between 5% and 15%].
51. As regards mobile network equipment, Vodafone Airtouch claims that its purchases from Ericsson, Nokia, SUN, Siemens and Hewlett Packard represent less than [between 1% and 10%] of each suppliers total annual revenue on a world-wide basis. Vodafone Airtouch argues that in this market manufacturers have significant countervailing power because once a mobile operator has decided to build a network based on the equipment of a particular manufacturer it is essentially committed to that manufacturer for the future development of that network.
52. The Commission's market investigation has revealed that suppliers in general believe that the merged entity would face strong competition from other mobile operators and consequently will not enjoy a dominant purchasing power. The advantages of the merged entity seem to be limited to the possibility of obtaining higher rebates in connection to the purchase of larger quantities of handset.
53. The Commission's market investigation have indicated that the merged entity will be a strong buyer in the market for mobile handsets and mobile network equipment, but that there remains a number of strong, large and powerful buyers in the market. It therefore appears that merged entity would not achieve the necessary buying power to become dominant on the market for the purchasing of handsets and equipment.
54. In the light of the above it can be concluded that the notified transaction does not lead to the creation or strengthening of a dominant position in the global markets for mobile handset and mobile network equipment as a result of which effective competition would be significantly impeded in those markets. Even if the markets were to be defined as pan-European in scope, the Commission's investigation confirm that the conclusion would be the same.

## **VI. UNDERTAKINGS**

55. In order to remove the concerns raised by the operation, Vodafone Airtouch submitted undertakings in the form of a proposal to modify the operation in

accordance with the terms of Article 6(2) of the ECMR. These undertakings are attached as an annex to this decision.

56. The *de-merger of Orange* aims at removing the competitive overlaps in the United Kingdom and Belgian market. The de-merger relates to the all shareholdings in Orange held by Mannesmann or any member of its group or the entire share capital of any subsidiary or future holding group of Mannesmann or the Divestor through which such participations are held. The de-merger will take place as soon as possible and in any event by [...]or such a later date as may be agreed by the Commission (“Final date”). An independent Trustee will shortly after the Commission’s decision be appointed to monitor the viability and saleability of the divestment assets in accordance with the undertaking, and to exercise Vodafone Airtouch voting rights in respect of Mannesmann’s shares so far as such voting affects Orange and to monitor that the rights whether direct or indirect which Vodafone Airtouch has as a shareholder in Orange are exercised on an independent arm’s lengths basis until completion of the sale. Vodafone Airtouch has agreed not to dispose of any of Orange’s licences, customers, database, key personnel, intellectual property or other assets necessary to enable Orange to operate as a going concern until the final date. Vodafone Airtouch will not pass onto Orange any confidential information relating to Vodafone Airtouch or any members of its group, and the Trustee shall not pass onto Vodafone Airtouch any confidential information relating to Orange, except for information that will be required to honour Orange’s regulatory reporting obligations or is required for the purposes of the disposal of the divestment assets. The Trustee is to provide written progress reports.
57. A large majority of respondents to the market test is in favour of a de-merger of Orange under the current terms and conditions. Given that the de-merger will eliminate the competitive overlaps in the United Kingdom and Belgian markets for mobile telephony services, the undertaking appears to be sufficient to eliminate the serious doubts.
58. In order to respond to the Commission’s serious doubts regarding the market for the provision of advanced mobile telecommunication services to internationally mobile customers, Vodafone Airtouch has submitted undertakings aiming at enabling third party non-discriminatory access to the merged entity’s integrated network so as to provide advanced mobile services to their customers. These undertakings cover exclusive roaming agreements, third parties’ access to roaming arrangements, third parties’ access to wholesale arrangements, standards and SIM-cards and a set of implementing measures aimed at ensuring their effectiveness. In particular, Vodafone Airtouch has proposed to set up a fast track dispute resolution procedure in order to solve disagreements between the merged entity’s group and third parties on third parties’ access to roaming arrangements, third parties’ access to wholesale arrangements, standards and SIM-cards.
59. The provision of a roaming tariff and/or wholesale services will be made on a non-discriminatory basis between operators of the merged entity’s group and other mobile operators. The non-discrimination principle will apply to both pricing and quality of the service.

60. These undertakings appear sufficient to remove the competition concerns linked to the inability of third parties to provide competitive seamless pan-European mobile services during the period prior to the building of alternative infrastructure and in particular of UMTS network infrastructure. Indeed, following the implementation of these undertakings, third parties will be in a position to offer competing advanced pan-European mobile services thus preventing the emergence of a dominant position on the provision of these services. The undertakings will thus have a structural effect on the market<sup>14</sup> in that they will make it possible to preserve a competitive structure of supply. The possibility to offer these services in competition with Vodafone will, in turn, also create the incentives for third parties to develop competing networks. Given the fact that the rolling out of UMTS networks will in all likelihood not take place before the end of the year 2002 these access undertakings are applicable for a period of three years from the date of the Commission's decision.

## **VII. CONCLUSION**

61. For the above reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and the EEA Agreement. This decision is adopted in application of Article 6(2) of Council Regulation (EEC) No 4064/89 subject to the condition of full compliance with the undertakings set out in the Annex to this decision.

For the Commission,

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<sup>14</sup> Judgement of 25 March 1999, in Case T-102/96, Gencor Ltd./Commission.



## **NON-CONFIDENTIAL VERSION**

### **FINAL**

#### **Divestment Undertaking**

In accordance with Article 6(2) of Regulation 4064/89 as amended, Vodafone AirTouch Plc hereby offers the following commitments (together referred to hereinafter as the "Undertaking") with respect to the above-referenced notification.

The following expressions have the following meanings:

"Additional Functions" means the additional functions set out in Clause 9 of this Undertaking

"Best Endeavours" means the use of all rights and entitlements to meet the relevant obligation.

"Commission" means the European Commission

"Control Date" means the date when the existing or newly appointed Management Board of Mannesmann are able to confirm to the Trustee that they are in a position in the name of Mannesmann to take all steps and measures and make and accept all declarations required to implement the demerger as set out in this Undertaking

"Demerger Assets" means the assets listed in Clause 1 of this Undertaking

"Divestor's Group" means the Divestor, its subsidiaries from time to time (for the avoidance of doubt, including Mannesmann but excluding Orange) and its future holding companies

"Divestor" means Vodafone AirTouch Plc

"Fast Track Procedure" means the dispute resolution procedure in Clause 25 of this Undertaking

"Final Date" means [            ] or such later date as may be agreed by the Commission and in accordance with and subject to the provisions of this Undertaking

"Mandate" means a mandate agreement entered into between the Divestor and the Trustee immediately upon the Trustee's appointment and whose terms shall have previously been agreed with the Commission

"Mannesmann" means Mannesmann Aktiengesellschaft

"Orange" means Orange plc and all subsidiary undertakings of Orange plc (including, for the avoidance of doubt, Connect Austria) as a going concern including but not limited to all its licences, customers, database, key personnel, intellectual property or other assets, existing at the date of the approval of this concentration, except those subsidiary undertakings, licences, customers, database, key personnel, intellectual property or other assets which prior to the Final Date Orange plc divests or acquires in the ordinary course of business independently of any influence from the Divestor

"Wholesale Services" means the wholesale services described in Clause 22 of this Undertaking

In order to achieve clearance of the merger, the Divestor agrees that it will procure the demerger of Orange on the terms and conditions set out below.

**I. Assets to be demerged**

**1** The Demerger Assets will consist of the following:

- (a) all shareholdings in Orange held by Mannesmann or any member of its group; or
- (b) the entire share capital of any subsidiary or future holding company of Mannesmann or the Divestor through which such participations are held.

**2** The Divestor will cause all steps to be taken to ensure that the benefits and burdens of all contracts relating to the Demerger Assets will be transferred, assumed or assigned.

**II. Timing**

**3** Without prejudice to the powers of the Trustee and/or the Commission under paragraphs IV.7 to 9 below, the Divestor will procure the disposal of the Demerger Assets as soon as practicable and in any event by the Final Date.

**62.** If the Demerger Assets are to be disposed by means of a sale, it is understood that the terms of a sale will be subject to all requisite regulatory and other approvals and the identity of the Purchaser will be subject to the prior approval of the Commission.

**4** The Divestor agrees that until the Final Date the Demerger Assets shall be managed in the ordinary course of business, and in such a manner as to maintain their viability and saleability. The Divestor agrees not to dispose of or to agree to dispose of any of Orange's licences, customers, database, key personnel, intellectual property or other assets necessary to enable Orange to operate as a going concern until the Final Date.

**III. Implementation**

**5** Immediately after the date of approval of this concentration the Divestor shall appoint, or cause the appointment of, a Trustee in accordance with the provisions of paragraph III.5 below to exercise the functions set out in paragraphs 7 and 9 below. The Trustee shall be an investment bank, bank or accountancy firm of international standing.

- (a) The Divestor shall propose to the Commission, within four working days of the Commission's decision, the names of at least two institutions, independent from the Divestor, either of whom the Divestor considers appropriate to be appointed as Trustee, and any relevant material amendments that the Divestor requires to be made to the Trustee's mandate in order for the Trustee to be able to enter into it.

- (b) The Commission shall have the discretion to approve or reject one or both of the names submitted. If only one name is approved, the Divestor shall appoint or cause the institution concerned to be appointed as Trustee on the terms suggested. If more than one name is approved, the Divestor shall be free to choose the Trustee to be appointed from among the names approved.
- (c) If all the names submitted are rejected, the Divestor will submit the names of at least two further such institutions (the "further names") within four working days of being informed of the rejection. If only one further name is approved by the Commission, the Divestor shall appoint or cause the institution concerned to be appointed as Trustee. If more than one further name is approved, the Divestor shall be free to choose the Trustee to be appointed from among the names approved.
- (d) If all further names are rejected by the Commission, the Commission shall nominate a suitable Trustee which the Divestor will appoint or cause to be appointed.

**6** As soon as the Commission has given approval to one or more names submitted, or nominated a Trustee to be appointed, the Divestor shall appoint or cause the Trustee concerned to be appointed as soon as possible and in any event within four working days thereafter.

#### **IV. Trustee's Functions**

**7** Immediately upon the Trustee's appointment the Divestor shall enter into a Mandate.

**7.1** Throughout the duration of the Trustee's appointment the Trustee shall execute the functions set out below:

**7.1.1** to monitor the satisfactory discharge by the Divestor of its obligations entered into in the Undertaking; and

**7.1.2** to provide written reports (the "Trustee Reports") to the Commission on progress with the discharge of the Trustee's duties under the Mandate, identifying any respects in which the Trustee has been unable to discharge these duties. Such reports should be provided at regular monthly intervals, commencing one month after the date of his appointment, or at such other times or time periods as the Commission may specify and are notified to the Divestor.

**7.2** Prior to the Control Date, the Trustee shall exercise the functions set out below, and he shall be granted full power and authority to be the Divestor's true and lawful attorney in this connection:

**7.2.1** to exercise the voting rights of the members of the Divestor's Group so far as such voting directly affects Orange; and

**7.2.2** to monitor that the rights whether direct or indirect which any member of the Divestor's Group has as a shareholder in Orange are executed on an independent arms' length basis.

- 7.3** On and after the Control Date, the Trustee shall exercise the functions set out below and he shall be granted full power and authority to be the Divestor's and any other relevant party's true and lawful attorney in this connection:
- 7.3.1** to monitor the disposal of the Demerger Assets in accordance with the Undertaking;
  - 7.3.2** to monitor and advise the Commission as to whether the arrangements for divestment will properly provide for the disposal of the Demerger Assets as provided for in the Undertaking;
  - 7.3.3** to exercise the rights of the members of the Divestor's Group in relation to the determination, the appointment and the removal of Members of Orange's Board of Directors;
  - 7.3.4** to use its Best Endeavours to procure that on or immediately after the Control Date each representative (if any) of any member of the Divestor's Group which is a member of any Orange board, committee or group will resign as soon as practicable from that Orange board, committee or group;
  - 7.3.5** to exercise himself the voting rights of the members of the Divestor's Group to the extent that they relate to decisions to be taken which directly affect Orange until divestment and in the name of the Divestor or a member of the Divestor's Group, always subject to the duties and obligations of the Divestor or members of its group imposed by law;
  - 7.3.6** to oversee that the Demerger Assets are disposed of by the Final Date;
  - 7.3.7** without prejudice to Clause 12, to collect any confidential information relating to Orange held in any form by Mannesmann and use its Best Endeavours to ensure that it is not passed to or used by the Divestor or any member of the Divestor's Group; and
  - 7.3.8** without prejudice to Clause 12, to arrange that any confidential information relating to the Divestor's interest in Orange and Orange itself, which Orange would otherwise have sent to any member of the Divestor's Group is sent direct to the Trustee and shall not be sent to the member of the Divestor's group. For the avoidance of doubt, this shall include information relating to Orange currently in Mannesmann's possession or control, or acquired by it prior to the Control Date.
- 8** The Trustee's functions as set out above shall not be extended or varied in any way by the Divestor, save with the express written consent of the Commission. Any instruction or request to the Trustee from the Divestor or any other member of the Divestor's Group which conflicts with the Trustee's functions as set out above will be considered null and void.
- 9** After [ ] have elapsed from the date of the approval of the concentration by the Commission or such longer period as has been agreed with the Commission, the Trustee's mandate shall be extended and deemed to be extended in order to enable him to carry out, at the Trustee's discretion, the Additional Functions set out hereunder, and he shall be granted full power and authority to be the Divestor's and any other relevant party's true and lawful attorney in this connection.

63. In the event of conflict with the discharge of any of the functions as set out above, and the Additional Functions referred to below, the Trustee shall give priority to the discharge of these Additional Functions.

64. The Additional Functions are as follows:

- (a) only if the Trustee decides that it is necessary in order to achieve compliance with the Undertaking within the time limits set down, to submit to the Commission a proposal for a sale or any other means of disposal under control of the Trustee. The Commission will, as soon as reasonably practicable approve the proposal or indicate any changes that it may require;
- (b) in the Trustee's Reports, or as soon as negotiations are entered into with a potential purchaser, to provide to the Commission sufficient information to enable it to decide on the suitability of such purchaser;
- (c) to submit to the Commission for approval, with a legal opinion if considered by the Trustee as necessary, within due time to ensure compliance with the Undertaking, an agreement for sale of the Demerger Assets to a suitable purchaser, or an appropriate plan or documentation for another form of disposal; the agreement for sale, if any, to be unconditional and legally binding on both the Purchaser and the Divestor and irrevocable except for any requisite regulatory approval and other approvals and the approval required from the Commission; and
- (d) as far as permitted by law and in particular applicable company law, to direct the carrying out of all such steps as may be required to transfer the legal title.

**10** In the event that the Divestor is not a direct shareholder of Orange, the Divestor shall procure that the direct shareholder and any other relevant third party grants full power and authority to the Trustee to be the true and lawful attorney of such shareholder or any other relevant party in connection with all the functions set out above.

## **V. Confidential Information**

### **11**

**11.1** Subject to Clauses 11.3 and 11.4, the Divestor shall procure that the Trustee undertakes not to disclose any confidential information relating to Orange to the Divestor or to any member of the Divestor's group, except for information that is required for the purposes of the disposal of the Demerger Assets.

**11.2** The Divestor undertakes that it will not, and that it will procure that members of the Divestor's Group, will not use any confidential information relating to Orange (whether such information has come into possession of the Divestor or any member of the Divestor's Group prior to, at or after the date of this Undertaking), save that it may use any information

obtained pursuant to Clauses 11.3 and 11.4 solely for the purpose for which that information was provided to it.

- 11.3** If the Divestor requires any confidential information relating to Orange for the purpose of the Divestor's regulatory reporting obligations, the Trustee will supply that information either to the Divestor's legal advisers on condition that the information is not communicated to the Divestor or to any member of the Divestor's Group, or directly to the person entitled to receive it pursuant to the regulatory obligation, without passing the information to the Divestor or to any member of its group. If this is not practicable, then the Trustee will apply to the European Commission for directions and will act in accordance with those directions.
- 11.4** If the Divestor requires any confidential information relating to Orange for the purpose of the disposal of the Demerger Assets, the Trustee will supply that information directly to the Divestor's legal accounting or banking advisers on condition that the information is not communicated to the Divestor or to any member of the Divestor's group. If this is not practicable, then the Trustee will apply to the European Commission for directions and will act in accordance with those directions.
- 12** The Divestor shall not pass to Orange any confidential information relating to the Divestor or any members of the Divestor's Group, except for information that will be required to honour Orange's regulatory reporting obligations, or is required for the purposes of the disposal of the Demerger Assets.
- 13** Until the Final Date the Divestor shall ensure that no officer or employee of any member of the Divestor's Group, or former officer or employee of the Divestor's Group, who has left the employment of the Divestor's Group less than twelve months prior to the date of this Undertaking, is involved in the management of Orange, and that no officer or employee of Orange, or former officer or employee of Orange, who has left the employment of Orange less than twelve months prior to the date of this Undertaking, is involved in the management of the Divestor or any member of the Divestor's Group.

## **VI. Miscellaneous**

- 14** The Trustee will provide the Divestor with all reasonable assistance and the Divestor will procure that all relevant third parties provide such assistance required to ensure compliance with the Undertaking. The Divestor will provide or cause to be provided to the Trustee all such assistance and information, including copies of all relevant documents accessible by the Divestor or another member of the Divestor's Group, as he may require in carrying out his mandate, and to pay reasonable remuneration for his services as agreed in a mandate.
- 15** If the Divestor should announce that the proposed concentration has been irrevocably abandoned or if, prior to the Final Date, the Divestor after the implementation of the concentration ceases to hold any direct or indirect interest in the share capital of Orange, the Mandate and the Undertaking shall be deemed to be discharged, and the Trustee's appointment shall be deemed to be terminated.
- 16** Except as provided in this Undertaking, the Trustee's and all other relevant third parties' powers of attorney and appointment shall be irrevocable.
- 17** The obligations entered into in this Undertaking are conditional upon clearance by the Commission of the proposed concentration on or before 12 April 2000.

## **VII. Auctions, additional funding and refinancing**

- 18.1** Subject to the conditions set out in Clause 18.2, the Divestor shall make available to Orange on or after the Control Date in tranches of a minimum of Euro 1 billion up to a maximum of 4 tranches of Euro 1 billion as soon as reasonably practicable after demand by the Trustee financing required by Orange for the following purposes:
- 18.1.1** to refinance Orange's existing or future borrowings or other financial indebtedness;
  - 18.1.2** to finance bids made by Orange in connection with auctions for third generation mobile spectrum within the European Union; and
  - 18.1.3** for general corporate purposes (including to finance the operations of and investments by Orange).
- 18.2** The conditions described in Clause 18.1 are that the Trustee considers that:
- 18.2.1** Orange has used its Best Endeavours to raise financing for the purpose required in the capital and syndicated loan markets for a period of at least three weeks, and has not been able to obtain such financing on terms equivalent (or no worse to Orange than) either to those which Orange has obtained for financing in those markets in the previous twelve months or to those which are market standard arm's length terms at that time;
  - 18.2.2** the financing and financial support required does not exceed the levels set out in the business plan of Orange as at the date of this Undertaking (as amended by the Board of Orange);
  - 18.2.3** the financing and financial support are for purposes permitted under, and do not breach, the Orange Articles of Association;
  - 18.2.4** with respect to any refinancing of Orange's debt existing up to and including the Final Date Orange has used its Best Endeavours to obtain lender consent to waive potential or other financing defaults arising as a result of a change of control or other matters and to keep that financing in place (but without prejudice to Orange's contractual obligations); and
  - 18.2.5** the Divestor has funds available to it under its own banking or other financing arrangements which it is able to make available to Orange without breach of any law or agreement binding on the Divestor.
- 18.3** All financing which the Divestor offers to make available to Orange shall be on terms (except as to price) no worse to Orange than
- 18.3.1** (in the case of the refinancing of existing borrowings) those which applied to those borrowings; and
  - 18.3.2** (in any other case) arm's length market standard terms for facilities of the type required by Orange and in any case may include a requirement for repayment and cancellation in full by Orange within sixty days of a change in control of Orange occasioned by its demerger or sale pursuant to this Undertaking.
- 18.4** The interest rate applicable to any amounts lent by the Divestor to Orange may comprise:
- 18.4.1** the cost to the Divestor of raising the funds which it lends to Orange; and
  - 18.4.2** a rate equivalent to the higher of the margin applicable under Orange's existing banking facilities and the arm's length market rate which would apply to a borrowing

of the relevant type by Orange in the banking market (as reasonably determined by the Divestor).

**18.5** The Trustee shall not disclose to any member of the Divestor's Group any information deemed to be confidential under the rules of an auction or tender for third generation mobile spectrum within the European Union, including confidential information as defined in Clause 6.5.5 of the UK Wireless Telegraphy (Third Generation Licences) Notice 1999, including any information as to the purpose for which finance will be used.

**18.6** For the purposes of including such amounts in the financial statements of the Divestor, the Divestor is entitled after three months of any finance being made available or, in the case of the third generation mobile spectrum auction, once the results of the auction or tender have been announced, to be informed of the total amount of any liabilities or potential liabilities in connection with the aforementioned financing commitments and the purpose for which it has been used.

**65. VIII. SEPARATION OF ACCOUNTING**

**19** The Divestor, Mannesmann and each of their respective EEA mobile operating subsidiaries (except Orange) shall keep separate accounts pursuant to the principles set out in Annex 4 to this Undertaking which shall be provided on a confidential basis to the arbitration tribunal referred to in Clause 25 for the purposes of any Fast Track Procedure under that Clause and for no other purpose.

**66. IX. EXCLUSIVE ROAMING AGREEMENTS**

**20** None of the members of the Divestor's Group shall enter into roaming agreements on an exclusive basis or arrangements with an equivalent effect with the Divestor or Mannesmann or with any subsidiary of either Mannesmann or the Divestor, with any operations in which the Divestor, Mannesmann, or any of their subsidiaries have an economic interest from time to time or with any third party operator without the prior consent of the Commission.

The Merging Parties shall use their Best Endeavours to ensure that any mobile telecommunications operator in which any of the Merging Parties has an economic interest from time to time shall not enter into exclusive roaming agreements or arrangements with an equivalent effect with any third party operator without the prior consent of the Commission.

**67. X. THIRD PARTY ACCESS TO ROAMING ARRANGEMENTS**

**21** Subject to the provisions set out in Clause 22 below in relation to network capacity and technical feasibility from the date of approval of this concentration the members of the Divestor's Group shall make available to third party operators upon the launch of any pan-European retail offer any single underlying Inter-Operator Roaming Tariff offered by any of them upon commercial terms as set out in Annex 1 to this Undertaking and shall use their Best Endeavours to make such tariff or tariffs available on the same terms (both regarding price and quality of service) where any of the members of the Divestor's Group has an economic interest from time to time in a mobile telecommunications operator. Economic interest means any influence falling short of sole control under the Merger Control



Regulation. The terms of this Clause 21 will be subject to the provisions of Clause 30 below.

**68. XI. THIRD PARTY ACCESS TO WHOLESALE ARRANGEMENTS**

**22** The members of the Divestor's Group shall make available to interconnecting third parties wholesale services, which shall include but not be limited to standard interconnection relationships, access to location information available to other operators, access to internet portals and such technical information, software and related information as is required by the operator in order for such services to be provided to it, on commercial terms as set out in Annex 2 unless the members of the Divestor's Group can establish pursuant to the Fast Track Dispute Resolution set out in Clause 25 that there is no adequate network capacity to meet total demand, or that there are no technical means to do so. The criteria upon which this exception can be based and verified are defined in Annex 3. The terms of this Clause 22 will be subject to the provisions of Clause 30 below.

**69. XII. NON-DISCRIMINATION PRINCIPLE**

**23** The provision of a roaming tariff and/or wholesale services pursuant to Clauses 21 and/or 22 will be made on a non-discriminatory basis between operators of the members of the Divestor's Group and third party mobile telecommunications operators. The non-discrimination principle will apply to both pricing and quality of the service(s). The non-discrimination principle will be applied in a way that the members of the Divestor's Group will not be able to engage in margin squeezing practices against third party operators, as determined in accordance with the principles set out in Annex 4. For that purpose:

- (i) the Inter-Operator Tariff charged between entities controlled by the members of the Divestor's Group will be published;
- (ii) the technical characteristics of the service(s) will be published/made available or, if they constitute business secrets, will be filed with the Commission and all API's used between mobile operators of the members of the Divestor's Group will be applicable under the same conditions to third party operators;
- (iii) the Inter-Operator Tariff will be determined on the basis of the accounting principles defined in Annex 4; and
- (iv) in order to ensure continued compliance with the non-discrimination principle in relation to the quality of the services provided to third party operators, the members of the Divestor's Group will comply with the rules set forth in Annex 5.

At all times in its dealings with third parties the Merging Parties shall observe the standard of behaviour of an independent operator acting in its own economic interest and not taking into account downstream activities.

**70. XIII. FAST TRACK DISPUTE RESOLUTION**

**24** In the event that:

- (i) any member of the Divestor's Group rejects a request under Clause 21 or under Clause 22 to make available wholesale services; or

- (ii) a third party operator disputes the non discriminatory nature of the terms offered by the members of the Divestor's Group or any of the mobile telecommunications operators in which any one of the members of the Divestor's Group has an interest pursuant to a request under Clause 21 or 22; or
- (iii) a third party operator disputes the manner in which Standards are made available under Clause 26; or
- (iv) a requesting party disputes the manner in which SIM cards are made available under Clause 27;

the Fast Track Procedure in Clause 25 will apply.

- 25** Any third party operator who wishes to avail itself of the Fast Track Procedure must (a "requesting party") notify the members of the Divestor's Group in writing specifying the decision challenged and nominating an arbitrator.

The members of the Divestor's Group shall within two weeks of receiving a notification in writing from a requesting party nominate its arbitrator and provide to the requesting party in writing detailed reasons for its challenged decision(s). Such reasons will be justified by the data and information on network capacity, technical feasibility, accounting and technical quality which the members of the Divestor's Group are required to keep pursuant to this Undertaking. The arbitrators nominated by the Divestor and the requesting party shall, within one week from the nomination of the former, agree to appoint a third arbitrator. The arbitrators shall be instructed to establish an arbitration tribunal and to make a decision within one month of the appointment of the third arbitrator as to the compliance by the members of the Divestor's Group with their obligations under this Undertaking.

Any of the arbitrators will be entitled to request any relevant information from the members of the Divestor's Group or the requesting party. If the information required to be kept by the members of the Divestor's Group pursuant to this Undertaking is not available, the arbitrators shall decide in favour of the requesting party having taken account of the significance of the information which is unavailable.

The burden of proof in any dispute under the Fast Track Procedure set out in this Clause is as follows: i) the requesting party must produce evidence of a prima facie case, and ii) if the requesting party produces evidence of a prima facie case, the arbitrator must find in favour of the requesting party unless the Divestor's Group can produce evidence to the contrary.

The arbitrators shall be instructed not to disclose confidential information. Throughout this Undertaking the standard attributed to confidential information and business secrets are those as set out in accordance with European Community competition law. The arbitration shall be in English and shall be conducted in accordance with the rules of the London Court of Arbitration and the rules of the London Court of Arbitration will be amended accordingly.

**71. XIV. STANDARDS**

- 26** The members of the Divestor's Group shall use their Best Endeavours to make available where technically possible to third parties any standards required for inter-operability and interconnection of networks developed by the Divestor, Mannesmann or any of their respective subsidiaries other than those developed through any standards body, including bodies such as ETSI (the "Standards"). Each of the members of the Divestor's Group shall provide such third parties with such technical information (including any relevant changes

to technical specifications from time to time) as it has which they require in order to utilise the Standards. Such information shall be provided on a non-discriminatory and timely basis in a manner which does not discriminate against roaming customers when or before any retail offer of related services is launched subject to the receipt of a non-disclosure agreement by the third party (if requested).

Each of the members of the Divestor's Group shall use their Best Endeavours to make any standards available to third parties required for inter operability and interconnection of networks developed by any mobile telecommunications operator in which any one of the members of the Divestor's Group has an economic interest from time to time. Each of the members of the Divestor's Group shall use their Best Endeavours to provide such third parties with such technical information (including any relevant changes to technical specifications from time to time) as may be available which they require in order to utilise the standards required for inter operability and interconnection of networks developed by any mobile telecommunications operator in which any one of the members of the Divestor's Group has an economic interest . Such information shall be provided on a non-discriminatory and timely basis upon any retail offer of related services subject to the receipt of a non-disclosure agreement by the third party (if requested).

## **72. XV. SIM CARDS**

- 27** The members of the Divestor's Group shall provide SIM cards upon request, on a timely basis, which enable subscribers to override preferred roaming arrangements. The functional steps to be carried out by an end user to override preferred roaming agreements using such SIM cards shall be equivalent to the best standards for such functionality as existing in the market from time to time.

Each of the members of the Divestor's Group shall use their Best Endeavours to ensure that any mobile telecommunications operator in which any of the members of the Divestor's Group has an economic interest from time to time will provide SIM cards which enable subscribers to override preferred roaming arrangements. The functional steps to be carried out by an end user to override preferred roaming agreements using such SIM cards shall be equivalent to the best standards for such functionality as existing in the market from time to time

The Divestor, Mannesmann and each of their respective subsidiaries shall not enter into any agreement or arrangement with any handset manufacturer under which that handset manufacturer agrees to supply a handset to any of them on an exclusive basis which incorporates a technical function related to the basic operation of the handset which is not available to other operators from that or any other handset manufacturer and which has the effect of locking its subscribers into its network by offering those subscribers a technical function which they cannot obtain in similar form from handsets which are available to third party operators. For the avoidance of doubt and without prejudice to Clause 28 of this Undertaking this provision shall not apply to SIM locking, preferred roaming, to valued added services or to services based on the IPR of the Divestor, Mannesmann, or any of their respective subsidiaries which are not directly related to the functionality of the relevant network.

## **XVI IMPLEMENTATION**

**28** The Divestor shall report to the Commission any matters which the Commission reasonably requests in order to determine whether the Divestor has complied with this Undertaking. The members of the Divestor's Group shall submit a standard framework agreement for (i) third party roaming access and (ii) the provision of wholesale services, (the "Standard Agreements") as outlined in Clauses 21 and 22 above respectively, (complying with the principles set out in Annexes 1 and 2 and including *inter alia* terms and conditions of access, requirements for the requesting party, obligations of the members of the Divestor's Group, procedures for the delivery of services, pricing, product and performance specifications, terms of payment and non-discrimination provisions) to the Commission for approval within four Working Weeks (working weeks which shall not take into account public holidays in the UK, Belgium and Germany) of the Commission's decision. The members of the Divestor's Group will provide to the Commission a non confidential version of the standard agreements within the above mentioned four Working Week period so that the Commission can consult third parties immediately on the draft Standard Agreements (the "Draft Standard Agreements"). The Commission will communicate to the members of the Divestor's Group its comments within two Working Weeks of receipt of the Draft Standard Agreements by the Commission. The members of the Divestor's Group will submit non confidential revised Standard Agreements (the "Revised Standard Agreements") to the Commission within one Working Week of the date of receipt of comments from the Commission on the Draft Standard Agreements, so that the Commission can consult third parties on the Revised Standard Agreements immediately. The Commission will communicate its comments to the members of the Divestor's Group within one Working Week of the date of the receipt of the Revised Standard Agreements. The members of the Divestor's Group will communicate a final proposal for Standard Agreements (the "Final Standard Agreements") within one Working Week of the date of receipt of comments from the Commission on the Revised Standard Agreements.

As soon as it is approved by the Commission, the Standard Agreements shall be made available by the members of the Divestor's Group to any third party operator upon request.

**73. XVII. REPORTING**

**29** The members of the Divestor's Group shall every 3 months (or otherwise within 28 days of the Commission's request in writing) report in writing to the Commission on the compliance with all of the Undertakings set out.

**74. XVIII. GOVERNING LAW AND PROVISIONS**

**30** This Undertaking is governed by, and shall be construed in accordance with, German law and, more precisely, European Community law. For the avoidance of doubt, European Community law shall prevail in any conflict between German law and European Community law in respect of all of these Undertakings.

**75. XIX. AMENDMENT OF THE UNDERTAKING**

**31** The Divestor reserves its rights under Community law to request the Commission to review the whole or any part of Sections VIII to XV of this Undertaking in the event that the Divestor can demonstrate to the Commission's satisfaction that market conditions have altered such

that other mobile telecommunications operators could provide a similar service to that provided for in one of the above Undertakings in Clauses 21, 22 and 27 by the Divestor. In the event that the Divestor can demonstrate such a possibility the Undertaking shall be amended in respect of the particular service(s) for which the Divestor has satisfied the Commission. For the assessment of a request by the Divestor under this Clause, the Commission will seek the views of interested third parties.

**XX. DURATION**

- 32** The Clauses 19 to 31 are applicable for a period of three years from the date of the Commission decision.

**Signed on behalf of Vodafone AirTouch Plc**

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# Annex 1

## TERMS AND CONDITIONS OF ROAMING TARIFFS

Any Inter-Operator Roaming Tariff offered by any one of the members of the Divestor's Group must be made available to any other licensed telecommunications operator on equivalent terms and conditions.

Each individual tariff within the bundle of roaming tariffs should be the same as the lowest tariff offered amongst any two parts of the members of the Divestor's Group or to any other third party. Bilateral arrangements will be accepted such that there can be a requirement for a reciprocal lowering of roaming tariffs by the third party. The range of Inter-Operator Tariff including discounts which are available for third party operators should be made accessible for all other interested operators. This could be made available on a secure website e.g. the GSM Association Inter-Operator Tariff database.

In order to ensure that the members of the Divestor's Group do not engage in a price squeeze or other anti competitive practice(s), the members of the Divestor's Group must be able to demonstrate that they are allowing reasonable margins both at the inter-operator and at the retail level, i.e. the margins for other operators at each of the specified levels must be such that a reasonably efficient competing operator could make a reasonable return either by offering similar Inter-Operator Tariffs, or by adding on a retail margin to the Inter-Operator Tariffs.

When required under the terms of the Fast Track Procedure, the members of the Divestor's Group must be able to demonstrate that across its constituent parts it

has:-

- offered to third parties equivalent Inter-Operator Tariff
- offered non-discriminatory discounts against the standard Inter-Operator Tariff
- been able to make at least a reasonable return at the inter-operator tariff level with discounts
- been able to make at least a reasonable return at the retail level with the Inter-Operator Tariff as input costs

## **Annex 2**

### **TERMS AND CONDITIONS OF WHOLESALE SERVICES**

The members of the Divestor's Group shall offer equivalent Wholesale Services on a non-discriminatory basis to all other operators with the appropriate interconnect entitlements. Such services shall comprise but not be limited to standard interconnect relationships, access to location information available to other operators, access to internet portals and such technical information, software and related information as is required by the operator in order for such services to be provided to it.

Prices and quality of services shall be the same as are offered between the members of the Divestor's Group.

## Annex 3

### AVAILABILITY OF ADEQUATE NETWORK CAPACITY AND TECHNICAL FEASIBILITY

#### 76. INTRODUCTION

- 1 The members of the Divestor's Group will not be obliged to provide third parties operators the roaming tariff and/or the Wholesale Services pursuant to Clauses 21 and 22 of this Undertaking provided the criteria and procedure set forth hereafter is complied with:

#### **76.1. Unavailability of adequate network capacity**

- 2 The members of the Divestor's Group will be entitled to rely on the exception of unavailability of network capacity only if the following procedure is complied with and it is demonstrated under the Fast Track Dispute Resolution on the basis of this procedure that the requested capacity is unavailable.
- 3 Within one month of the date of approval of the concentration by the Commission, the members of the Divestor's Group will establish an inventory of the available capacity in the networks solely controlled by the members of the Divestor's Group and shall use its Best Endeavours to establish an inventory of the available capacity in those networks in which the members of the Divestor's Group have an economic interest from time to time falling short of sole control.
- 4 A copy of such inventory will be made available to the Commission. The inventory will be updated by the members of the Divestor's Group or any mobile telecommunications operator in which any of the members of the Divestor's Group has an economic interest from time to time on a quarterly basis.
- 5 Any request of third party operators pursuant to Clauses 21 and/or 22 will be made to the Commission within one month of the approval of the concentration and subsequently within one month of the end of each quarter.
- 6 If the members of the Divestor's Group demonstrate that the requested capacity exceeds the available capacity in any given period, the available capacity will be allocated on a non-discriminatory basis between the requesting third party operators and the members of the Divestor's Group.

#### **76.2. Technical unfeasibility**

- 7 The members of the Divestor's Group will be entitled to rely on the exception of technical unfeasibility only if it is demonstrated under the Fast Track Dispute Resolution that (i) the request from a third party operator presents technical characteristics which are different from those of the operators solely controlled by, or within which an economic interest is owned by the members of the Divestor's Group from time to time and (ii) such difference prevents the provision of roaming and/or wholesale services to a third party operator and (iii) the technical problem cannot reasonably be solved.
- 8 In order to be able to invoke the technical unfeasibility exception, the members of the Divestor's Group must (i) keep the following information in relation to each of its mobile



networks and (ii) produce it upon request to the arbitrators designated pursuant to Clause 24 on the Fast Track Dispute Resolution: technical characteristics, which are detailed/attribution to each country of operation and entity – if different, of (i) signalling and interconnection interfaces (ii) APIs – application programming interfaces.

**Business Plan**

- 9 The members of the Divestor's Group will be required to produce evidence of a business plan drawn up in accordance with the standard of an operator acting at arm's length taking full account of all foreseeable demand from its own customers and third party operator customers as well as foreseeable technical developments and supply side factors.

## **Annex 4**

### **Accounting Principles Applicable to Tariffs for inter-Operator roaming and wholesale services**

The accounting principles applicable to tariffs for inter-operator roaming and Wholesale Services shall be equivalent to the best standards for such functionality as existing in the market from time to time. The applicable principles will include the following requirements:

- The members of the Divestor's Group must be able to demonstrate that there is no element of margin squeeze taking place in the end to end provision of services across the members of the Divestor's Group.
- The members of the Divestor's Group must be able to show that Inter-Operator Tariffs and retail tariffs would allow a reasonably efficient operator offering retail services competing with those of the Divestor's Group and purchasing services from members of the Divestor's Group at the wholesale level to make a reasonable return. Operators offering competing Inter-Operator Tariffs must be able to earn a reasonable rate of return at the network level.
- The margins obtained should be calculated from the difference between the price offered and the underlying costs. Costs should be derived using a fully allocated cost model. The members of the Divestor's Group shall be entitled to a return on capital employed which is at least equal to the members of the Divestor's Group Weighted Average Cost of Capital unless any of the parties to an arbitration can satisfy the arbitrators (referred to in Clause 25) that there are sound commercial reasons to the contrary. Average prices and average costs may be used in the margin calculations provided only that the average is taken across a reasonable bundle of services, and that the cost or prices do not weight solely in favour of services offered by the members of the Divestor's Group.

## Annex 5

### **RULES ON NON-DISCRIMINATION IN RELATION TO THE TECHNICAL QUALITY OF SERVICES**

The members of the Divestor's Group will keep and provide upon the request of any of the arbitrators appointed pursuant to the Fast Track Dispute Resolution Clause the information listed below for the month immediately prior to the request. The information will be presented as ratios of the mobile operators of the members of the Divestor's Group/other mobile operators.

In relation to circuit switched performance:

- dropped calls;

and if technically available at reasonable cost:

- call set up delay;
- refused calls;
- data calls blocked;
- fax calls blocked

In addition, the members of the Divestor's Group will submit to an audit upon request by any of the arbitrators in order to demonstrate that it has not discriminated against third party operators in relation to the technical quality of services offered, for example by providing evidence of call routing for third party calls and members of the Divestor's Group's calls.

As and when the following services are launched and the technology is available at reasonable cost to allow monitoring of such services, the members of the Divestor's Group shall provide information in relation to packet data services performance (for example, but not exclusively GPRS, CDPD, EDGE, IMT20000 and UMTS) over the air interface, including, where possible:

- ratio of requested QoS parameters/granted QoS parameters;
- percentage of performance contracts met;
- average through put;
- average dropped packets;
- average packet delays on the worst 1% of packet delays;
- packet delay variance.

In relation to IP telephony, all the parameters in (ii) above in addition to dropped calls, refused calls and calls set up time.

The above criteria and the addition or deletion of criteria for measuring the technical quality of service in accordance with this Annex 5 may be amended by the arbitrators pursuant to any development of technical products in the mobile telecommunications sector.