Response to Commission consultation on state aid for innovation

Vodafone welcomes the opportunity to comment on the Commission's consultation on state aid for innovation. Vodafone intends to restrict its comments to one particular aspect of the consultation: the impact of the current state aid rules on projects carried out with collaboration between industry and public institutes.

In the consultation document, the Commission recognises that the current R&D framework is not functioning properly in respect of these collaborations and in particular the intellectual property rights ("IPR") arising from them. The consultation document states at paragraph 68 that:

In the current R&D framework, where there is cooperation between industry and public institutes, industry has to pay the full cost of the project or give all intellectual rights to the public institute so that the payments are not classified as State aid. This provision should be amended, and rights should be allocated between partners on a pro rata basis according to the contribution of each partner.

Vodafone agrees with this assessment and would like to take this opportunity to outline its views, formed from recent experience, and respectfully requests the Commission to consider the practical effects of the current framework in order to avoid similar problems arising under the new rules.

As the Commission recognises in its consultation document, state aid should have an incentive effect on innovation. However, for the reasons outlined below, Vodafone believes this is not the current result of the rules. In Vodafone's experience, the current state aid rules on R&D can actually dis-incentivise companies from participating in research projects due to the position on IPR.

The current rules on IPR actually seem to conflict with the position, at least under English law, on the ownership of IPR. The statutory provisions on IPR ownership provide that the first legal owner of IPR is the creator (or the creator's employer). However, in collaborative projects with public institutes there appears to be an obligation for industry partners to legally assign/transfer future or potential IPR in return for state aid funding (or to pay the full costs of the project or the market rate (potentially in advance) for the public institute's IPR). This can mean that if personnel are seconded from an industry partner to the collaborative project and they create IPR, the employer, who under the statutory provisions would be the owner of this IPR must assign the IPR to the public institute and will be obliged to subsequently licence back its own technology and pay for the privilege of doing so. The industry partners also then forego possible revenue from being able to licence this IPR. Such IPR is often the culmination of significant investment by the company in training and maintaining its innovative personnel.

Even where the effective contributions of the industry partners to the project are taken into account in offsetting IPR licence fees, this does not mean that an industry partner will not incur a licence burden for new technology it helped to create if it has to pay a market rate. An industry partner is actually gambling part of the fee upfront in contribution with no guarantee on return. This puts the industry partner in a worse position than third parties who subsequently purchase a licence and effectively free-ride on the risk taken by the industry partners. This can operate as a disincentive to participate in a collaborative project. It can also diminish an open innovation environment if the participants strive for retained ownership and reluctance to share information. Additionally, whilst legal IPR ownership is vested in the creator – author or inventor – such creation is again often the culmination of contributions by all parties which again is not recognised by the current regime.

Under the current rules if a public institute which receives state aid were instead a straightforward commercial partner, it is very improbable that Vodafone would seek to work collaboratively on development work where it would be required to license the subsequent development results to that project participant on these terms. Although freely distributing the results of the research is an option it diminishes the advantages of collaboration with a public institute from the commercial viewpoint. Overall, Vodafone would like to see a solution which reflects a more equitable position for all parties and which is likely to create an environment where access to the IPR reflects a fair return on risk and investment, both for the public institute and the industry partners.

Vodafone believes that in a collaborative project the parties involved should have access to new developments resulting from the project and a share in any subsequent reward opportunities commensurate with the contribution of the industrial parties and shared risk with the public institute. The parties should be able to use commercial solutions such as the participating parties obtaining "royalty free" or rather fully-paid up licences (capped at the level of the parties' contribution) and third party licence revenue being distributed pro rata. If appropriate, the licensing of third parties could be solely controlled by the public institute with such licensing revenue initially reflecting a return to that institute to reflect the state aid funding and subsequent distribution of licence fees being on an equitable basis for all founding parties. Vodafone therefore welcomes the Commission's recognition that rights should be distributed between the parties and looks forward to a suitable change in the rules to ensure industry partners are incentivised and not disadvantaged as against non-participating third parties.

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