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European Commission
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Damages actions for breach of the EC antitrust
rules

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WHITE PAPER on Damages actions for breach of the EC antitrust rules

Comments by WIND Telecomunicazioni S.p.a.



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1 Introduction

WIND Telecomunicazioni S.p.A. ("WIND") welcomes the possibility of submitting comments on the European Commission's "White Paper on Damages actions for breach of the EC antitrust rules" (the White Paper).¹

WIND considers private enforcement as being a fundamental element of the EC Competition Policy, especially after the modernisation process. As a competitor in a liberalised market, WIND strongly believes that the availability of effective remedies against antitrust infringements by incumbents (and dominant undertakings in general) is key for maintaining a strong competitive position. With this in mind, WIND supports the involvement of stakeholders in the consultation on the White Paper, with a view to making private enforcement of EC Competition Law more accessible and effective.

In this document, WIND will express its views on the policy choices put forward by the Commission in the White Paper. WIND would like to point out, at the outset, that it values as equally important the effectiveness of competition law and a balanced approach to civil procedures, based on the principles of access to justice and fair trial.

2 The Commission's policy choices and proposed measures: comments by WIND

The White Paper outlines several policy choices on various aspects of national civil procedure rules which are relevant for damages actions for breach of the EC antitrust rules, and proposes various measures to implement those choices. Below are WIND's comments on the Commission's proposals:

¹ COM (2008) 165 final of 2 April 2008.

2.1 Collective redress

The Commission suggests a combination of two complementary mechanisms of collective redress to facilitate the aggregation of individual claims in the field of antitrust:

- **Representative actions**, which are brought **by qualified entities**, such as consumer associations, state bodies or trade associations, on behalf of identified or, in rather restricted cases, identifiable victims. These entities are either (i) officially designated in advance or (ii) certified on an *ad hoc* basis by a Member State for a particular antitrust infringement to bring an action on behalf of some or all of their members; and
- **Opt-in collective actions**, in which victims **expressly decide** to combine their individual claims for harm they suffered into one single action.

While deeming that the Commission is addressing important issues, WIND does not believe that the introduction of new collective redress actions by means of EC legislation would be an ideal solution. WIND invites the Commission to carefully consider the impact that the introduction of new means of collective redress for antitrust claims would have on national judicial systems, which are subject to different rules and principles and are facing operational conditions which are far from being uniform. Any proposal, such as the one considered here, should necessarily follow a detailed and thorough impact assessment, with a view to avoiding negative repercussions on the functioning of administration of justice.

WIND also notes that the Commission is already developing proposals for the introduction of means of collective redress through DG Health and Consumer protection and that Member States are introducing new remedies in their own procedural systems. Having regard to the existing legislative and pre-legislative initiatives, WIND wonders whether DG Competition's proposal would result in adding further complexity to an already complex scenario. It would be certainly preferable for the Commission to coordinate all its proposals on civil procedure through a single point of contact.

2.2 Access to evidence: disclosure inter partes

The Commission suggests that across the EU a **minimum level of disclosure *inter partes*** for EC antitrust damages cases should be ensured. Building on the approach in the Intellectual Property Directive (Directive 2004/48/EC), access to evidence should be based on **fact-pleading** and **strict judicial control** of the plausibility of the claim and the proportionality of the disclosure request.

The Commission therefore suggests that:

- National courts should, under **specific conditions**, have the power to order parties to proceedings or third parties to **disclose precise categories of relevant evidence**;
- Conditions for a disclosure order **should include** that the claimant has:
 - **presented all the facts and means of evidence** that are **reasonably available** to him, provided that these show **plausible grounds** to suspect that he suffered harm as a result of an infringement of competition rules by the defendant;
 - shown to the satisfaction of the court that he is **unable**, applying all efforts that can reasonably be expected, **otherwise to produce the requested evidence**;
 - specified sufficiently **precise categories** of evidence to be disclosed; and
 - satisfied the court that the envisaged disclosure measure is both **relevant** to the case and **necessary** and **proportionate**;
- Adequate protection should be given to corporate statements by leniency applicants and to the investigations of competition authorities;
- To prevent **destruction of relevant evidence** or **refusal** to comply with a disclosure order, courts should have the power to impose sufficiently **deterrent sanctions**, including the option to draw adverse inferences in the civil proceedings for damages.

Based on its experience, WIND agrees with the Commission that gaining access to evidence is one of the most difficult aspects of antitrust enforcement in court. Evidence of collusive or abusive behaviours in multifaceted markets, such as the ones for electronic communication services, depends on access to



documents (showing, for instance, cost structures and pricing criteria followed by defendants) which are normally not available to claimants. It is certainly useful that, when national legislations do not already provide judges with the power of ordering exhibition of those documents, that power be introduced through EC legislation.

It is obviously of paramount importance that disclosure orders be adequately motivated, in order to prevent undue distribution of company documents and files. Likewise, the conditions outlined by the Commission for the issue of exhibition orders should be fulfilled.

WIND agrees that leniency statements should be protected, in order to preserve the effectiveness of leniency procedures. It would be also recommendable to define with sufficient accuracy the categories of documents to be excluded by the exhibition orders, particularly with a view to protecting client-attorney confidentiality and legal privilege.

2.3 Binding effect of NCA decisions

The Commission suggests the following rule:

- National courts that have to rule in actions for damages on practices under Article 81 or 82 EC on which **an NCA** in the ECN has already given a **final decision** finding an infringement of those articles, or on which **a review court** has given a **final judgment** upholding the NCA decision or itself finding an infringement, **cannot take decisions running counter** to any such decision or ruling.

This obligation should apply without prejudice to the right, and possible obligation, of national courts to seek clarification on the interpretation of Article 81 or 82 EC under Article 234 EC.

The rule set out above confers binding effect only on decisions that are final, i.e. where the defendant has **exhausted all appeal avenues**, and relates only to the **same practices and same undertaking(s)** for which the NCA or the review court found an infringement.



WIND agrees with the Commission's proposal for the following reasons:

- **Harmony of the system:** decisions adopted by the Commission (as an antitrust enforcement authority) on the basis of Articles 81 and 82 EC are binding, pursuant to the principle of supremacy of EC Law, on national judges and competition authorities. Decisions adopted at the national level on the basis of those Treaty provisions should have the same binding force, if the enforcement system following modernisation has to work consistently and effectively throughout the EU. It should be also pointed out that undertakings subject to Commission's decisions would be unduly penalised in comparison with undertakings subject to NCA's decisions, should the former decisions alone be binding on national courts: only those decisions, indeed, would open the door to effective follow-on actions;
- **Effectiveness of the system:** WIND considers that repeating factual analysis of antitrust infringements, which have been already established by the competent authorities having certainly more expertise and resources than courts and private parties, is not ideal for effective antitrust enforcement. Disregarding the value of NCA's decisions implies increasing the length and the costs of civil procedures and entails higher litigation risks for claimants. WIND would therefore support the Commission's proposals, subject to the conditions outlined in the White Paper as to the final character of NCA's decisions;
- **Against this backdrop,** it should be considered that, at least in some Member States, the principles of separation of powers and independency of the judiciary do not allow administrative decisions to be binding on courts. In those cases, WIND considers that NCA's decisions should at least constitute a rebuttable presumption that an antitrust infringement has taken place and that the defendant is liable for it.

2.4 *Fault requirement*

The Commission suggests that :

- Once the victim has **shown a breach of Article 81 or 82 EC**, the **infringer should be liable for damages caused unless he demonstrates** that the infringement was the result of a genuinely **excusable error**;
- An error would be **excusable** if a reasonable person applying a high standard of care could not have been aware that the conduct restricted competition.

WIND supports the view of the Commission on this point.

2.5 *Damages*

To **facilitate** the **calculation of damages**, the Commission therefore intends:

- To draw up a framework with pragmatic, non-binding guidance for **quantification** of damages in antitrust cases, e.g. by means of **approximate methods of calculation** or **simplified rules on estimating** the loss.

WIND supports the Commission's approach to this issue.

2.6 *Passing-on overcharges*

The Commission proposes that:

- Defendants should be entitled to invoke the passing-on defense against a claim for compensation of the overcharge. The standard of proof for this defense should be not lower than the standard imposed on the claimant to prove the damage;
- Indirect purchasers should be able to rely on the rebuttable presumption that the illegal overcharge was passed on to them in its entirety.

While understanding the Commission's concerns, WIND would like to draw the Commission's attention on the fact that passing-on of anticompetitive overcharges is not the rule in all relevant markets. In all markets where a dominant undertaking (or undertakings putting in place collusive restrictions of competition) is active in both the upstream (wholesale) and the downstream (retail) markets, it is highly likely that the undertaking being damaged by anticompetitive prices may not be able to pass the overcharges on retail users.

This is particularly evident in the case of margin-squeeze practices in wholesale markets for access to network infrastructures: dominant undertakings often apply to competitors overcharges on wholesale network access fees. These competitors cannot pass overcharges on retail markets without running the risk of being excluded from those markets.

In the light of the foregoing, WIND would not favour the introduction of a rebuttable presumption of the passing-on of overcharges: this presumption would expose undertakings operating in retail markets to the additional risk of claims by purchasers (which may be found to have *locus standi* against them), after having suffered the anticompetitive damages deriving by the overcharges in the upstream markets.

WIND would also warn against the admissibility and validity of the passing-on defence: even when an undertaking may have passed overcharges on purchasers, this should not be deemed sufficient to exclude that the same undertaking has suffered damages to its competitive positions. Abusive



overcharges on the part of incumbent greatly limit the possibility, for a new entrant, to determine its market strategy in the most efficient and aggressive way. This implies the loss of market position, when not the exclusion from the market.

2.7 Limitation periods

The Commission suggests that the limitation period should not start to run:

- In the case of a continuous or repeated infringement, before the day on which the infringement ceases;
- Before the victim of the infringement can reasonably be expected to have knowledge of the infringement and of the harm it caused him.

The Commission also suggests that:

- A new limitation period of at least two years should start once the infringement decision on which a follow-on claimant relies has become final.

WIND welcomes the Commission's proposal to clarify through specific measures that limitation periods should not start to run before the day on which the infringement ceases, in the case of continuous or repeated infringements, and before the victim of the infringement can reasonably be expected to have knowledge of the infringement and of the harm it caused, as already foreseen by Article 25 of Regulation 1/2003 EC.²

WIND would favour all solutions which can ensure that the parties have sufficient time, after the conclusion of an investigation by the Commission or a NCA, to prepare and introduce a follow-on action. Both the suspension of the limitation period and the introduction of a new one would serve this purpose; in

²

Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, in OJ L 1/2003, pag. 1.



any event, WIND would welcome the possibility that a period of minimum two years be guaranteed.

2.8 Costs of damages actions

The Commission encourages Member States:

- To design procedural rules fostering **settlements**, as a way to reduce costs;
- To set **court fees** in an appropriate manner so that they do not become a disproportionate disincentive to antitrust damages claims;
- To give national courts the possibility of issuing **cost orders** derogating, in certain justified cases, from the normal cost rules, preferably upfront in the proceedings. Such cost orders would guarantee that the claimant, even if unsuccessful, would not have to bear all costs incurred by the other party.

WIND believes that, as a matter of principle, procedural rules should always be designed with a view to fostering settlements, in order to facilitate dispute resolution and ensuring better access to justice. Similarly, WIND believes that court fees should always be proportionate and should **never** constitute a disincentive to **any** legitimate claim.

Against this backdrop, WIND also believes that rules on fees should never create incentives for unmeritorious claims. The Commission's proposal on the derogation from normal cost rules may well entail this risk. WIND warns the Commission on the impact that this proposal may have on the administration of justice, especially if applied in the context of collective actions.

WIND welcomes and supports national measures facilitating access to justice, such as general legal aid schemes. Those measures are fundamental tools in democracies, because they are shaped to preserve and promote the rule of law. They, however, should be enacted to the benefit of all individuals in need and in respect of all claims, as their importance for society goes well beyond the enforcement of competition rules.

2.9 Interaction between leniency programmes and actions for damages

The Commission suggests to apply protection against actions for damages:

- To all corporate statements submitted by all applicants for leniency in relation to a breach of Article 81 EC (also where national antitrust law is applied in parallel);
- Regardless of whether the application for leniency is accepted, is rejected or leads to no decision by the competition authority.

This protection applies where disclosure is ordered by a court, be it before or after adoption of a decision by the competition authority. Voluntary disclosure of corporate statements by applicants for immunity and reduction of fines should be precluded at least until a statement of objections has been issued.

The Commission therefore puts also forward for further consideration the possibility of limiting the civil liability of the immunity recipient to claims by his direct and indirect contractual partners. This would help to make the scope of damages to be paid by immunity recipients more predictable and more limited, without unduly sheltering them from civil liability for their participation in an infringement. The immunity recipient would have to bear the burden of proving the extent to which his liability would be limited.

WIND deems that undertakings taking part in leniency programmes should benefit from all the advantages which derive from such programmes.

The disclosure of leniency statements would impair the effectiveness of the programmes, insofar as it would result in the undue provision of sources of evidence to potential claimants in civil cases.

On the other hand, WIND believes that immunity from fines should be kept separate and distinct from immunity from reparation of damages: should leniency offer shelter from both types of sanctions, undertakings may feel encouraged to violate competition law, rather than have an incentive to comply. The risks of infringing Articles 81 and 82 EC would become not only predictable, but also controllable thanks to the possibility offered by leniency programmes.



This would be at the expense of competitors, whose fundamental interest to claim reparation of damages would be entirely sacrificed in the name of public policy objectives.

3 Additional issues to be dealt with: action for damages and commitments

Pursuant to Articles 5 and 9, NCAs and the Commission may adopt decisions whereby they accept commitments proposed by undertakings subject to antitrust investigations under Articles 81 and 82 EC. The solution of antitrust cases through the proposal, and acceptance, of commitments is likely to become extremely frequent in the future.

While undertakings have the opportunity of avoiding the most serious consequences of Articles 81 and 82 EC decisions (such as sanctions and the binding ascertainment of antitrust violations), the Commission and NCAs can – without investing excessive resources – ensure the smooth functioning of the market by preventing anticompetitive behaviours for the future.

This being said, the consequences of the acceptance of commitments on civil procedures have not been dealt with by the White Paper.

In WIND's opinion, it would be important that the Commission clarify the following issues:

- On evidence: I) what value could be attached to commitments in civil proceedings? and II) which documents related to the antitrust proceedings before NCAs could be used in civil proceedings which are concluded through the acceptance of commitments?;
- Limitation periods: when would limitation periods start to run in the case of decisions of acceptance of commitments? For reasons of legal certainty, WIND recommends that the 2 year limitation period starts to run on that the day in which commitments are accepted;
- Value of commitments in civil procedures: what effect should commitments play on the quantification of damages?



WIND invites the Commission to further investigate and develop this aspect of antitrust enforcement.

4 Conclusions

WIND appreciates the Commission's efforts to ensure the involvement of all the parties in the definition of a framework for damages actions for breach of the EC antitrust rules.

WIND believes that the Commission's proposals should aim at striking a balance between ensuring effective enforcement of Articles 81 and 82 EC and preserving the smooth functioning of civil procedure systems.

WIND deems that the White Paper deals with issues that are serious and are worth deep consideration. Therefore, WIND recommends that an in-depth impact assessment be carried out before the proposals are adopted.

WIND is confident that the Commission will take its observations into account.

Please note that WIND is available to expand on any of the points above and has no objection to these comments being made available to the public.

Any question regarding these comments may be addressed to:

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Sincerely,

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