

Brussels, 14 July 2008

**RIAD Position on
European Commission's White Paper on Damages Actions for Breach of the
EC Antitrust Rules (COM(2008)165)**

RIAD represents some 60 legal protection insurance companies from 18 countries. The Association's primary corporate purpose is the communication, promotion and defense of its Members' interests. Legal expenses insurers facilitate access to justice for their clients by financing proceedings and are affected by any measures addressing the effectiveness of damages actions as providers of legal services¹ but also as prospective defendants of a damages action for breach of the EC antitrust rules. Therefore, RIAD Members take this opportunity to respond to the Commission's White Paper.

1. The Necessity of Measures on a European and on National Levels (points 1.1. and 1.2. of the White Paper)

The European Commission's intention is twofold: firstly, ensuring victims' rights of compensation by making antitrust damages actions more effective and, secondly, safeguarding an undistorted competition within the Internal Market, i.e. deterring businesses to breach EC antitrust rules.

RIAD agrees that there are detriments which prevent the enforcement of individual rights and sometimes render procedures ineffective and extremely costly in particular when it comes to collective actions (we use this phrase as a neutral way of describing any form of collective legal action by or on behalf of a group of claimants) in cross-border cases². Mainly insufficient procedural rules and legislation that does not factor consumers from other Member States into national judicial systems are the reasons for obstacles. Therefore, the Commission's proposals which are aimed at promoting the compatibility of the applicable national rules and convincing Member States to implement mechanisms which open their judicial systems to victims from other Member States instead of pushing an EU instrument are the right approach.

As the Commission puts out in its White Paper, the specific nature of Articles 81 and 82 of the EC Treaty calls for the preservation of strong public enforcement. RIAD Members are convinced that the use of collective redress as a private enforcement mechanism is not the ideal tool for taking action against putative infringers and that public enforcement very often provides better means: only public authorities are able to move quickly enough and in secrecy if there is the danger that a party disposes of important evidence. Moreover, investigations by public authorities are preferable in order to respect and safeguard confidentiality of certain documents and trade secrets especially since it is the intention to open action also to competitors.

¹ See Directive 87/344/EEC of 22 June 1987 on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance (OJ L 185/77 of 04/07/1987): legal expenses insurers give advice, defend or represent the insured person in civil, criminal, administrative or other proceedings or in respect of any claim made against him.

² For instance, the Austrian case "Sparkasse Salzburg": at the outset a test case in behalf of 32 investors, who claimed their investment damages against Sparkasse Salzburg, was brought to court. In the end because Sparkasse Salzburg refused to give a waiver on time limitation thousands of investors had to file their actions in time and attorney fees accrued in the then connected civil proceeding to € 400.000 per day. The case was finally settled out of economic reasons by a compromise after 12 days in court.

Finally, RIAD would like to raise the question of competence in this context: the issues of civil and procedural law, e.g. fault requirements (point 2.4. of the White Paper), damages (points 2.5. and 2.6. of the White Paper), limitation periods (point 2.7. of the White Paper), cost allocations (point 2.8 of the White Paper), remain within the solemn responsibility of Member States and, presently, there is not empirical data to prove the necessity and positive effects respectively of collective redress mechanisms on competition within the Single Market. It is also not clear if other individual legal remedies like the new European Small Claims Procedure³ cannot provide equally efficient and maybe less costly means of pursuing a claim.

2. Standing (point 2.1. of the White Paper)

RIAD shares the Commission's point of view that individuals who suffered harm caused by unlawful behaviour must be able to recover their damages. However, due to their specifics (e.g. length, complexity and costs of proceedings) the real prospect of collective redress mechanisms seems to be rather the use as private law enforcement than as an effective way of pursuing a claim for damages.

This being said, RIAD Members welcome that the White Paper does not advocate an opt-out action. For legal protection insurers the only feasible option is an opt-in collective action considering that this allows legal protection insurers to function as a filter in advising their clients to opt-in if a case is meritorious. Thus, legal protection insurers can keep unmeritorious cases out of the judicial system. Moreover, in Member States where legal protection insurers are legally confined to the compensation of costs and are not (or only to a limited extent) permitted to assist or advise their policy holders it is of particular importance to prevent that costs are incurred involuntarily, i.e. if an insured party is automatically caught by a collective action. Under these circumstances the insured must seek legal advice about what to do and the legal protection insurer does not have any other choice but paying all costs incurred even if neither the insured nor the legal protection insurer were in favour of joining the collective action. Therefore, the free choice of the prospective claimant if he wants to opt-in or not is needed for legal protection insurers for predicting and calculating costs.

3. Access to Evidence (point 2.2. of the White Paper)

In this respect RIAD Members are concerned also as potential defendants: while it is essential for claimants to have access to evidence it is of utmost importance to avoid negative effects of disclosure for the industry. Therefore, legal expenses insurers would like to emphasise that some detriments for companies, e.g. the disclosure of confidential documents or trade secrets, could be avoided if procedures were conducted by public authorities. If competition authorities were in charge of the fact finding companies would not be prone to black-mailing and could not be forced as easily into a settlement as it would be the case if evidence was publicly available to all parties, especially to competitors.

³ Regulation (EC) No 861/2007 of 11 July 2007 establishing a European Small Claims Procedure (OJ L 199/1 of 31/07/2007)

4. Costs of Damages Actions (point 2.8. of the White Paper)

For legal protection insurance the costs of pursuing a claim is one of the most important issues. Since the risk of cost inflation is inherent to collective procedures the question must be twofold: how to foster meritorious claims (i.e. how to exclude effectively unmeritorious claims) and how to implement effective tools for keeping costs low?

The White Paper sets out different approaches of which the use of alternative dispute resolution systems is the most promising. As a matter of fact, in many Member States legal protection insurers are experienced especially with mediation which facilitates out-of-court settlements at an early stage, keeps claims out of the primary judicial system and, thus, is one of the most effective means to reduce costs.

The Commission's proposal to introduce limits on the level of court fees holds less prospects since for collective actions court fees normally account only for a small share of the over-all costs and the effect of this measure would therefore be very restricted. Another effect would be that in some cases the tax payer would have to carry the expenses otherwise borne by the fraudulent wrong-doer, an effect which is politically not acceptable.

Finally, the White Paper invites Member States to change the national cost allocation rules, i.e. to remove the loser-pays-principle. Legal protection insurers see this as a dangerous move since the rules of recovery of costs are a decisive incentive or disincentive for the introduction of a collective action and thus avoid unmeritorious claims: if a claimant is aware of his liability he weighs his chances of winning carefully before introducing an action. Consequently, he is discouraged to bring weak cases and is more likely to favour early settlements to keep costs low.

To conclude, RIAD would like to identify the following areas as cost intensive and holding potentials for cost-cutting: firstly, lawyers' fees and remuneration for representatives are the largest financial risks for claimants and defendants. Introducing fixed fees and limiting the number of lawyers/ representatives assigned to a collective action are obvious ways to reduce costs. In this respect, legal protection insurers can share responsibilities by channelling and managing those cases in-house⁴ or assigning cases of their clients to a selected lawyer. However, since there are usually several insurers involved in each action each insurer will have different panel lawyers and pay scales. Secondly, notification and collection of putative claimants generate substantial costs especially in cross-border cases. Keeping in mind that potentially 27 European countries, involving more than 20 different languages, are concerned, it is important to search for feasible and inexpensive solutions, e.g. a European electronic register of actions⁵ linked with courts' obligation to consult that register before instituting legal proceedings.

International Association of Legal Expenses Insurance (RIAD)
Avenue Michel-Ange 7
B-1000 Brussels
Tel. +32 (0)2 732 36 28
Fax +32 (0)2 732 06 22
E-Mail: secretariat@riad-online.eu
www.riad-online.eu

⁴ Provided that the law of the respective Member States admits legal protection insurance to the market of legal services

⁵ In the UK such a register exists: <http://www.hmcourts-service.gov.uk/cms/150.htm>