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Observations of Assuralia  
concerning  
The White Paper  
on  
Damages actions for breach of the EC antitrust rules

#### Explanatory note

Assuralia, the Belgian insurance association, welcomes the public consultation on the White Paper (WP). This consultation offers a valuable opportunity to get involved in the debate on damages actions for breach of the EC antitrust rules. Assuralia is in favour of developing and sustaining a competitive market in the EU, since competition provides the best incentives for efficiency, innovation and consumer choice. Whereas public enforcement of antitrust law is crucial for creating and sustaining free competition in the Single Market, it is also important that both consumers and businesses can obtain satisfactory redress. However, it doubts whether a special procedure for bringing collective actions and protecting customers in antitrust cases is necessary. It has also some comments and questions related to other proposals in the White Paper, such as the scope of the leniency program and the calculation of damages.

In case of questions or remarks, do not hesitate to contact:

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#### About Assuralia

Assuralia, the Belgian insurance association, was established in 1920. It is the representative body for mutual, co-operative and joint-stock insurance companies in Belgium. Today, it covers about 98% of the Belgian market i.e. currently more than 32,5 billion euro premium income (local business excluding FOS premium and reinsurance premium income). Assuralia represents the interests of the Belgian insurers and actively promotes business co-operation. It is a member of the Comité Européen des Assurances (CEA).

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Deze informatie is strikt voorbehouden aan de leden van Assuralia en mag alleen worden verspreid met haar toestemming

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## I. General comments

1. Assuralia is pleased that the European Commission launched a public consultation on the White Paper. The Belgian association of insurers finds it important to get involved in the debate on damages actions for breach of the EC antitrust rules. In general, Assuralia supports the overall objectives defined by the Commission. Assuralia firmly condemns infringements of EU antitrust rules and anti-competitive behaviour. Therefore, Assuralia favours initiatives aimed at establishing a sound and vigorous competition at EU level, thus guaranteeing companies' increasing productivity and innovative potential and reinforcing consumers' confidence in the market. It agrees that consumers and businesses should be able to get adequate compensation for the losses they suffered because of anti-competitive activities.
2. Assuralia wonders whether a special procedure for bringing collective actions and protecting customers in antitrust cases is necessary, and would certainly recommend a thorough investigation of ADR alternatives which could contribute to compensation and deterrence. It believes that the proliferation of special procedures makes legal systems less transparent. Moreover, Assuralia doubts whether the problems of timing, duration and predictability of procedures – the main obstacles to private actions – will be solved by a competition policy initiative. Assuralia considers that actions for injunctions are already an effective instrument in order to challenge the abuse of a dominant position by one or more undertakings (cf. article 82 of the EC Treaty). However, it admits that compensation of damages goes beyond the scope of the injunctions directive.
3. Actions for damages in case of breach of article 81 of the EC Treaty (wrongful agreements between undertakings) should only be an additional tool for compensation once an infringement has been recognized as such by competition authorities. In this respect, Assuralia agrees with the European Commission that collective redress should not jeopardize public enforcement.

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## II. Specific comments

4. Assuralia welcomes the pro-activity of the Commission. Most of the proposals in the White Paper are very concrete and provided with necessary safeguards to avoid abuses. However, Assuralia does not believe that all the proposals offer the most appropriate solution for the problems that victims of antitrust infringements are confronted with. Moreover, some of the proposals are too far reaching and too burdensome for companies. For that reason, Assuralia refers to its comments on the topics below:

### Topic 1: Collective redress

5. For Assuralia the case for satisfactory redress of torts suffered by customers – private consumers as well as businesses, especially SME's – in case of antitrust infringements is self-evident. However, it believes that a special procedure for bringing collective actions will not be the best solution for victims. In particular with regard to companies that became victim of antitrust infringements, the Commission itself sets out that damages are often too immaterial. Assuralia is not convinced that a special procedure will solve this problem.

The Belgian insurance association wonders whether out-of-court settlements (arbitration and mediation) across sectors and jurisdictions cannot be introduced in antitrust cases. For this reason, the proposal of the Commission to encourage Member States to design procedural rules fostering settlements, as a way to reduce costs (cf. 2.8. WP), is a welcome decision.

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6. Although no advocate of a judicial collective redress mechanism, Assuralia does not want to bury its head in the sand either. If the European Commission really decides to introduce collective actions, it requests the Commission to take the following considerations into account:
- 6.1. The use of a directive instead of a regulation. The Member States should be able to implement the legal provisions in the most appropriate way in line with their own national competition legislation. However, Assuralia is advocate of maximum harmonisation between Member States. This is the best way to avoid forum shopping and to settle cross-border disputes. Consequently, it will be important that the directive gives a clear outline of the minimum conditions that the Member States must respect when implementing the European scheme on collective redress in their own legislation. In this perspective, a framework directive seems to be the most appropriate. Moreover, the activities of different DG's on collective redress, including DG Sanco, should be geared to one another. If not, the aim of more consistency, legal certainty and transparency for customers at large –consumers and businesses – will be put at stake. In this respect, Assuralia finds it premature to consider specific proposals before a general stance on this issue is taken at EU level.
- 6.2. The use of alternative dispute resolution methods (ADR) in antitrust infringement cases should be examined. Assuralia believes that ADR solutions are in the interest of both consumers and business. Non-judicial means of redress make it possible to reach a solution acceptable to both parties more rapidly, at a lesser cost and help to maintain a less confrontational atmosphere between parties. They have proved efficient in several situations in Belgium as well as in other Member States in civil law matters. Many economic sectors have their own kind of sector related ADR mechanisms operating according to EU recommendations. For instance, the insurance sector has its own "ombudsman", which is affiliated to the FIN-NET network.
- 6.3. The collective redress mechanism ought to be organised on the basis of the "opt-in" formula unless the defendant himself prefers the "opt-out"-formula. For several reasons it is important that victims expressly have to decide to combine their individual claims for compensation of the harm they suffered into one single action. It is the best guarantee for fair compensation without putting the survival of the tortfeasor at stake. The calculation of the due compensation is easier and enables the defendant to make necessary provisions in advance. This goes a fortiori for liability and legal expenses insurers if and in so far as they could be involved on either side. To be precise, the insurers involved have to be able to foresee sufficient provisions for their defendant-clients who are covered for their professional liability and/or in legal expenses. While it is unusual for insurers to provide cover for voluntary behaviour, some liability insurance policies like 'Directors and Officers' may be exposed to the claims considered in the White Paper.
- 6.4. Assuralia believes that an opt-out formula would open the door for abuse. The aim of collective redress should only be the compensation of harm of antitrust infringements. Therefore, regimes that encourage the introduction of unmeritorious claims, the creation of war funds or stimulate the financial interest of third parties should be avoided. In this perspective, it is pleased that the European Commission seems to be on the same wavelength. Yet, Assuralia believes that an additional safeguard will be necessary. The opt-in formula should be limited in time by installing a registration deadline. The reason is twofold. On the one hand, a registration deadline will restrict the administrative burden that will inevitably be a result of the organisation of the opt-in procedure. On the other hand, a time limit will avoid abuses along the process. That is to say, it will prevent customers from joining the procedure
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at a later stage only because the outcome of the process seems to turn out beneficial for the plaintiffs who initially signed in to the opt-in formula. Without this safeguard the procedure and the defence may be slowed down unnecessarily and made unreasonable heavy.

- 6.5. The introduction of a collective action should be restricted to persons and organisations that are representative for the group of victims. Therefore, Assuralia approves the proposal of the European Commission of representative actions which are brought by qualified entities. In order to make sure that redress against those qualified entities is possible in case of unmeritorious claims, Assuralia suggests that these entities should fulfil strict conditions (e.g. being recognized on the national level, being legally capable of introducing a claim,...).
- 6.6. In this respect, Assuralia is pleased that the Commission paid attention to trade organisations and consumer organisations. Still, Assuralia wonders if other stakeholders will also be able to introduce a representative action. The White Paper does not say anything about this. Consequently, further clarification seems necessary and the role of the judge will be important in this respect (cf. *Infra*, § 6.5).  
Assuralia calls upon the Commission to exclude state bodies as qualified entities. If state bodies were able to introduce a representative action, they might use information gathered by national competition authorities in the scope of an antitrust case in a civil procedure. This would harm the rights of the defence.  
Furthermore, Assuralia doubts whether the system of representative actions will work effectively without some additional safeguards. Keeping in mind the potential European dimension of a collective action and in order to limit the administrative burden and costs of the pre-trial phase, the only feasible way to notify is by electronic means. The installation of a multilingual European register of pending collective actions could help claimants and judges to identify and bundle cases.
- 6.7. Another important safeguard that is not explicitly mentioned in the White Paper is the role of the judge. Assuralia believes that the court should be in charge of the admissibility examination, the coordination of the notification procedure and the control of the representation criteria. According to Assuralia, the judge should verify admissibility criteria that are related to:
- the registration procedure of the opt-in formula. The registration deadline must be respected;
  - the number of plaintiffs that is necessary to introduce a collective action. Collective actions should only be admitted if they could not better be handled individually and unmeritorious claims must be filtered out;
  - the conditions to leave a collective action when the defendant himself choose the opt-out formula;
  - the control of and the access to evidence;
  - the financial strength of both plaintiffs and defendants to pay the legal costs;
  - the availability of other legal remedies, such as the European Small Claims Procedure (Regulation EC 861/2007), which may be equally efficient and less costly as a mean of pursuing a claim.
- 6.8. The compensation should only cover the proved harm of identified victims of incriminated conduct. In our opinion damages should be defined as compensatory damages with interest from the date of injury. This is in line with recent European Court of Justice jurisprudence. Punitive damages and the recovery of unlawful profits beyond the compensation of the damage suffered should be excluded. However, public authorities could collect unlawful profit as a fine according to applicable legal standards under competition law. This revenue should only be used for public purposes – such as an improved access to justice – and not be granted to individual victims of antitrust infringements.
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7. Finally, Assuralia wants to draw the Commission's attention on two issues with regard to collective redress that have not or not sufficiently been worked out in the White Paper:
- 7.1. Assuralia requests the Commission to safeguard and acknowledge the specific role of legal protection insurers on damages actions for breach of antitrust rules. Legal protection insurers are often the first point of contact for victims. They scrutinize a potential claim and advise their clients how to proceed to receive compensation. If it is obvious that a case is without any merits the insurer will advise accordingly. The case will be kept out of the judicial system. If the case is legitimate the legal expenses insurer will try to negotiate between both parties and examine whether it is possible to reach an agreement through an out-of-court settlement. Otherwise, the case will be sent to court. If needed, this insurance provides for funding of the costs of formal legal procedures (i.e. fees of technical experts to assess the extent and the cause of the damage, attorney fees and costs of bringing cases to court) and thus helps to bear the costs of damages actions. Hence, legal protection insurers function as a filter and so they enable the smooth running of the judicial system by excluding unmeritorious claims.
- 7.2. Advocates of collective redress believe that, firstly, ensuring that EU businesses and citizens are put in similar conditions to exercise their right to damages throughout the territory of the EU, and, secondly, that reducing legal uncertainty for undertakings wishing to engage in cross-border trade are potential benefits of effective antitrust damages actions in the EU. However, the European Commission does not take a clear position in the White Paper with regard to cross-border antitrust infringements and to collective damages actions in this respect. Assuralia believes that further clarification is required. This goes a fortiori for cases involving jurisdictions outside the EEA.

#### Topic 2: Access to evidence (disclosure inter partes)

8. Assuralia is convinced that the proposals will improve access to evidence. However, these proposals may provide opportunity for abuse. Therefore, Assuralia is pleased that the European Commission has taken some safeguards into account, but it has some additional remarks and questions. With regard to the proportionality test, Assuralia wonders whether the test can be applied uniformly and efficiently across the EU.
9. Assuralia believes that the Commission's proposal to disclose "precise categories" of relevant evidence puts the rights of the defendant at stake. It is not clear what the Commission means with "precise categories". Hence, Assuralia prefers to maintain the Belgian system of disclosure (art. 870 ea. of the Judicial Code). That is to say, "access to evidence" should be limited to disclosure of relevant and identified documents only; this under strict supervision of the judge.
10. With regard to the professional secrecy, Assuralia finds it opportune to extend the principle "legal privilege" also to advices of company lawyers. Otherwise, the Commission's proposals on access to evidence will jeopardize the protection of business secrets, the rights of defence, and the "legal privilege" that permits company lawyers to give an independent and objective legal advice. Assuralia is convinced that the "legal privilege" principle leads to a better application of law in companies. Hence, the principle is of general interest and should thus be extended to advices of company lawyers.

#### Topic 3: Binding effect of NCA decisions

11. Assuralia thinks that the "binding effect of NCA decisions" in subsequent civil antitrust damages cases should rather function as rebuttable proof and not as irrefutable proof as suggested by the Commission. The defendant must get the chance to declare why the facts of the infringement must be revised. Moreover, the proposed "binding effect" should never exclude the classical burden of proof that rests with the plaintiff neither the proof of the causality link.
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12. The European Commission should address the fact that NCA's of different Member States do not take their decisions according to identical competition rules. Therefore, Assuralia believes that some safeguards will have to be put in place as long as there is no full harmonisation of national competition law.

Topic 4: Fault requirement

13. Assuralia does not believe that the reversal of the burden of proof is necessary to improve the private enforcement of antitrust rules. On the one hand, the White Paper's proposal differs strongly from the current approach in most Member States. In most Member States it is up to the plaintiff to demonstrate the causality link between the wrongful behaviour and the identified damage. It is mostly up to the defendant to demonstrate that the fault is actually a genuinely excusable error. Thus, changing the burden of proof would be a very far reaching measure. This goes *a fortiori* when the Commission's proposals with regard to disclosure would come into force (cf. *Supra*, Topic 2, § 8-10). A reversal of the burden of proof would lead to an unbalanced situation between the claimant and the defendant.
14. On the other hand, the Commission's proposal is too burdensome for companies. It is important for insurance businesses to know if their cooperation will give rise to claims for damages or not. The law is not always clear enough for companies to be able to rely on self-assessment of their agreements and practices. In this respect, the continuation of the existing block exemption regulation (BER) is of major importance for the insurance sector. This regulation does not provide a safe harbour for agreements that fall outside the application field. Therefore, Assuralia requests the Commission not to change the current fault requirement rules of the different Member States.
15. With regard to "excusable error", Assuralia finds the proposed definition not clear enough. It fears that the definition will give rise to various interpretations. As a result, legal certainty will be jeopardized. Therefore, Assuralia requests the European Commission to formulate an unambiguous definition.

Topic 5: Damages

16. As already stated before (cf. *Supra*, § 6.7.), damages should be compensated with reference to the loss suffered by the claimant as a result of the infringing behaviour of the defendant. Hence, Assuralia is pleased that the focus of the Commission's proposal is limited to a compensation comprising actual loss, loss of profits and interests. It would oppose any punitive elements or undue enrichment of victims.
17. However, the Commission should realize that loss of profit is very hard to calculate. In this respect, Assuralia wonders if the proposed framework with pragmatic, non-binding guidance for quantification of damages in antitrust cases will be a sufficient measure. It calls upon the Commission to work out a detailed calculation and estimation method itself that is compulsory to all Member States. The Commission should take the following constituent elements into account for the estimation of the scope and quantum of the damage:
- 17.1. the correlation between the unlawful behaviour and the actual suffered damage;
- 17.2. a minimum of predictability. This predictability can be facilitated as set out below, *i.e.*:
- limiting the notification procedure in time (cf. *Supra*, 6.4.: registration deadline);
  - exclusion of punitive damages and "war funds";
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Topic 6: Passing-on overcharges

18. Assuralia has no specific comments on this topic.

Topic 7: Limitation periods

19. The European Commission recognizes that limitation periods are important to enhance legal security. However, Assuralia fears that the Commission's proposal will put legal security at stake. The estimation of the financial obligations, in this respect with regard to the price-fixing of insurances, will be put under pressure if companies bear the risk to be summoned at all time. Therefore, Assuralia proposes to apply the limitation periods for damages actions that are currently available in every Member State. It should be up to the Member States if they want to use other limitation periods for damages actions for breach of the EC antitrust rules or not.

Topic 8: Costs of damages actions

20. Assuralia does not fully support the proposals of the Commission on costs of damages actions. Mechanisms that foster early resolution of cases, e.g. by settlements, should be definitely encouraged (cf. Supra, § 6.2.). Assuralia is convinced that this will significantly reduce the litigation costs for the parties and also the costs for the legal system. Though, the two other proposals – limits on the level of court fees and derogation of the loser pays principle – are too far reaching. Assuralia believes that it is necessary that claimants bear their share of legal costs. Otherwise, the number of unmeritorious claims and the risk of financing collective actions with war funds will increase substantially. In this respect, Member States should keep the freedom to preserve the "loser pays principle" that is applicable in many national legal systems.

21. Assuralia is not in favour of the proposal 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. It has doubts about the fairness of this rule as it is not convinced that it will exclude possible abuses. Assuralia fears that some claimants will try to take benefit out of the rule by prolonging the procedure unnecessarily or by increasing the cost order with unjustified expense claims of experts.

Topic 9: Interaction between leniency programmes and actions for damages

22. Assuralia is convinced that leniency programmes can help to break up cartels. Therefore, Assuralia welcomes the protection of corporate statements submitted by leniency applicants against court orders requesting their disclosure. It is logical that business secrets and confidential information are not published at random. However, it believes that the proposals to protect whistle-blowers reach much further than an acceptable reduction of sentence. For that reason, Assuralia calls upon the European Commission to further examine the consequences of limiting the civil liability of the immunity recipient to claims by his direct and indirect contractual partners.

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### III. Conclusion

23. Defending consumer's interests is at the heart of the European Commission's competition policy. Free competition gives citizens and businesses better goods and services. Moreover, it ensures businesses more opportunities to sell them. Yet, it cannot be denied that infringements of competition rules are an everyday occurrence. Next to individual consumers, law-abiding companies also face competitive disadvantages compared to their lawbreaking competitors. Ultimately it is the society at large who pays the bill in case of unlawful cartels and price arrangements. This is clearly unfair and goes against the shared objective of the Lisbon Strategy to make Europe the most competitive region in 2010.
24. Therefore, Assuralia states that any citizen or business – who suffered harm as a result of a breach of EC anti-trust rules, i.e. Articles 81 and 82 – must be able to claim compensation from the party who caused the damage. Victims have right to compensation. This is guaranteed in the jurisprudence of the European Court of Justice (e.g. Manfredi case).
25. Hence, Assuralia welcomes the White Paper on damages actions for breach of the EC antitrust rules. The Commission has taken serious efforts by listing several concrete proposals that deal with difficulties in relation to access to evidence, with troubles when standing in court, with problems related to the proof of the damage suffered, etc.
26. Yet, Assuralia finds it too early to consider specific proposals on collective redress as long as the Commission has not taken a general stance on this issue. The issue should be open to discussion whether it is just one element of a package of measures crucial for effectively compensating victims of competition law infringements or the ultimate solution on a wider application field than competition law alone, including consumer affairs in the broadest sense.
27. Nonetheless, Assuralia has listed some necessary conditions in case collective redress mechanisms were to be regulated at the European level. Besides, it has enumerated some remarks and considerations on the Commission's proposals. Assuralia fears that some proposals – such as the leniency program and the fault requirement – are too far reaching and too burdensome for companies. In addition, the Commission should provide extra safeguards to some proposals (e.g. Topic 2: access to evidence) to avoid any form of abuse. Furthermore, some proposals (e.g. Topic 5: damages) should be refined with specific criteria to enable the implementation in the different Member States.
28. Assuralia requests the Commission to keep a proper balance between "individual interests" (individual complaints, c.q. lawsuit), "collective interests" (collective complaints, c.q. collective redress) and "public interest". It is not appropriate to jumble everything up. On the one hand, individual and collective claims should remain limited to compensation of damages. On the other hand, fines should only be levied by the authorized public body.
29. Finally, Assuralia finds legal certainty of major importance for free competition. It is convinced that the Commission shares this position in its battle against antitrust infringements. Therefore, Assuralia calls upon the Commission not to undermine legislation that enhances legal certainty in the European Union. In this respect, Assuralia requests the Commission to reconsider a possible abolition of the block exemption regulation with regard to the insurance sector.