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INTERNATIONALE VEREINIGUNG DER RECHTSSCHUTZ-VERSICHERUNG
INTERNATIONAL ASSOCIATION OF LEGAL EXPENSES INSURANCE

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**International Association of Legal Expenses Insurance
on the
Green Paper on Consumer Collective Redress (COM(2008)794)**

RIAD is the representative body of some 60 legal expenses insurance companies from 16 European countries, Canada, and South Africa. Our members offer their customers affordable, efficient and effective access to law and justice in providing them actively with legal advice and other legal services needed for pursuing their rights and in covering costs incurred by the insured persons.

Legal protection insurers have been following the ongoing discussions about collective redress mechanisms very attentively since any initiative on a European level might have a direct impact on their activities and the services they can provide to their clients. RIAD has already communicated its Members' opinion in two papers (www.riad-online.eu) and happily seizes the opportunity to respond to the questions raised in the present Green Paper.

I. Key Issues

For legal protection insurers the central question is how to improve **access to law and justice** for the insured persons. According to the European Commission's repetitive affirmations access to law and justice is also the key aspect in the context of collective redress. Obviously, this guiding principle must determine the parameters of collective redress instruments and the overall course any policy in this context should take.

Subsequently, from RIAD's point of view, a collective redress mechanism that contains any element of **private enforcement** is not acceptable.

Moreover, RIAD Members very strongly **reject option 4** of the European Commission's Green Paper, i. e. the introduction of a European instrument of collective redress since it would neither solve the problems in this context nor remove any of the existing obstacles for consumers.

Finally, contrary to a wide-spread comprehension among some stakeholders, legal protection insurers are capable and prepared to share **responsibility in the conducting of collect redress procedures**: legal protection insurances can function as a contact point (also for non-insured persons) when it comes to collecting claimants; they can advice the insured persons how to handle their cases and suggest experts for such proceedings. Equally, in most Member States legal protection insurers cover their clients' and the adverse costs of collective actions. To sum up, the contributions of legal protection insurers can remedy important obstacles inherent in collective redress procedures.

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II. The Questions of the Green Paper

Question 1: What are your views on the role of the EU in relation to consumer collective redress?

The role of the EU in relation to consumer collective redress can only be subordinate and must focus on complementing the efforts and actions taken by Member States and making them more efficient. This is because the positive effects and the functioning of collective redress mechanisms depend primarily on the underpinning civil and procedural law, which are by nature national laws.

Furthermore, the vast majority of the 25 potential obstacles listed in the study regarding the problems faced by consumers cannot be remedied by a European intervention but call for particular actions tailored to the specific impediments, nature of the problem to be solved and national legislation. Consequently, the EU's center of attention should be to ensure that Member States implement collective redress mechanisms which are compatible and open to complainants from other countries.

Question 2: Which of the four options set out above do you prefer? Is there an option which you would reject?

Under the condition that national characteristics and legal systems are respected a combination of options 2 and 3 seems to hold the best prospects for facilitating access to law for consumers. The EU should encourage Member States to implement collective redress mechanisms that can cooperate and guarantee access to law to all EU-nationals in a non-discriminatory way.

RIAD rejects option 4 because there are no real benefits to be expected from a European instrument which would not solve problems like the multitude of applicable laws in collective consumer redress actions (Rome I Regulation) or the question of jurisdiction (Regulation on Jurisdiction).

Question 3: Are there specific elements of the options with which you agree/disagree?

RIAD rejects any collective redress mechanism working with an opt-out system since it would render the calculation of premiums for legal protection insurers very difficult. Moreover, since rulings would be binding for all claimants, regardless whether they decided to be part of the action or had the opportunity to present their cases before the judge, an opt-out instrument would be considered to be unconstitutional by most European jurisdictions.

As option 2 implies, the EU must assure that national collective redress mechanisms function in conjunction with, and are open to consumers from all, Member States. While these mechanisms should meet a minimum standard it is not essential that they are identical in order to guarantee access to law. Therefore, legal protection insurers support the idea to require Member States to implement mechanisms and set up benchmarks for these systems by means of recommendations. In order to facilitate cooperation on an EU level and help cross-border actions, RIAD recommends employing the ECC-NET and the FIN-NET which are already in place and could be developed further to deal with collective actions. In this context the conclusion of the Commission that consumers prefer to bring a

case to their national courts or systems under their national law is noteworthy because the EEC-NET and FIN-NET could work as a kind of clearing system where consumers would bring their claims to the attention of their own national contact points which would then refer the case to the competent system in the relevant Member State.

In addition, revisiting and extending the scope of existing legal instruments could substantially improve access to law for consumers. For instance, legal protection insurers have very good experiences with mediation or other alternative dispute resolution (ADR) schemes, also in cases where a multitude of claimants were involved. Therefore, opening the scope of ADR schemes for collective actions would be a positive approach.

Likewise, legal protection insurers support the idea of revisiting and probably extending the scopes of the Injunction Directive, the Regulation on Consumer Protection Cooperation and the Small Claims Procedure since it would make use of familiar instruments which are already in place before exploring unknown territories like a new European instrument.

Finally, RIAD does not agree that damages actions for breach of the EC antitrust rules should be excluded from the present exercise since both initiatives target at providing remedies for consumers. Separating the two matters could lead to the development of two separate legal instruments which contradicts the intention of simplifying and facilitating redress mechanisms.

Question 4: Are there other elements which should form part of your preferred option?

Costs of litigation have been identified as a major obstacle for pursuing a claim. Consumers can solve this problem by taking out legal protection insurance which provides cover for collective redress actions in most Member States¹ and also cover the costs of the adverse party if the claimant loses. But the prospects of legal protection insurance go beyond the simple compensation of costs: legal protection insurers can provide all kinds of services to their customers; as legal experts and large scale buyers of legal services they can give advice in legal, administrative and other matters. Consequently, legal protection insurers can manage the claims of their clients and collect their data for collective actions. Their activities could even go beyond this if insurers served as a contact point for all potential claimants. However, the question would be how this would be received by the legal protection insured's paying customer since there is undoubtedly a cost involved, i.e. the insured client would be subsidising the uninsured, albeit in a very minor way. This might be a point worth canvassing opinion. To summarise, in order to improve the efficiency and reduce costs of proceedings legal protection insurers should, firstly, not be prohibited from actively supporting their clients and, secondly, be able to bundle cases of their clients and help to manage them efficiently.

¹ Depending on the individual situation, policies can exclude cover for certain areas of law or may require a minimum amount at dispute. These instruments are used by insurers to transfer some responsibility to the insured person who would otherwise not have any incentive to keep costs low or avoid unmeritorious claims or litigations where costs of proceedings are out of proportion to the amount at dispute.

Mediation should be promoted as an easy and cost effective way of settling cases, ensuring, however, that costs are settled by the parties to guarantee that the defendant also contributes proportionally to the costs of the procedure.

Last but not least, an important element to reduce overall costs is preventing unmeritorious claims. From the point of view of legal protection insurance maintaining the "loser pays principle" for collective redress schemes is an important tool to keep claims which do not have good prospects out of the system.

Question 5: In case you prefer a combination of options, which options would you want to combine and what would be its features?

See question 3.

Question 6: In the case of options 2, 3 or 4, would you see a need for binding instruments or would you prefer non-binding instruments?

Except with regard to amending existing directives or regulations, RIAD does not see a need for binding measures in the context of collective redress.

Question 7: Do you consider that there could be other means of addressing the problem?

In many Member States legal protection insurers are large scale providers of legal services and are therefore familiar with the challenges of any kind of redress mechanisms. For consumers these problems are even more important because they very often do not have the knowledge, expertise or financial means to pursue their rights. These fundamental obstacles may become less obstructive if redress procedures in general are made less complex and easier to comprehend. However, due to procedural, systematic, legal and other prerequisites inherent to any remedy it will not be possible to remove all intricacies to an extent where consumers will be able to cope without expert support. Legal protection insurers can provide this expertise and cover the costs of such proceedings at a very reasonable price. Therefore, in the interests of consumers, Member States should be encouraged to maintain or create a legal environment that eliminates unnecessary constraints which increase the costs of legal protection insurance or make the provision of services more costly or complicated for legal protection insurers.