

Brussels, 19 November 2018

**Position
of the International Association of Legal Protection Insurance (RIAD)
on the Proposal for a Directive on Representative Actions for the Protection of the Collective
Interests of Consumers (COM (2018)184)**

Legal protection insurers are dedicated to giving their clients access to law and justice. They do this by providing legal services, giving legal advice and all kinds of assistance to defend and represent insured persons in civil, criminal, administrative and other proceedings or in respect of any claim made against that person and by contributing to the costs of legal proceedings¹. Furthermore, legal protection insurers are also intervening to defend the interests of their policyholders when they are involved in a collective redress action. In these cases, however, the General Contract Terms and Conditions often provide a limited financial support.

RIAD and its members welcome initiatives that support their activities and are able to facilitate access to law and justice for insured persons but want to refer to some important points of the Commission's proposal which could impede legal protection insurers pursuing policy holders' rights and protecting their interests in a collective redress action. In this context it should be noted that legal protection insurers' clients are consumers and small and medium sized enterprises (SMEs) and, consequently, this position takes into consideration the interests of consumers as claimants as well as the interests of SMEs as defendants.

As a general note, all scepticism and difficulties put aside, it seems fair and at the pulse of times to equip consumers with a collective redress instrument. This can enable consumers to defend their rights and pursue mass infringements against gigantic traders and multi-national groups. A collective redress instrument with the objective to create equality of arms in a situation where an individual has neither financial nor personal resources to defend her or his right against an overwhelmingly powerful opponent should be embraced but must be tailored carefully.

RIAD, the International Association of Legal Protection Insurance, is the only body worldwide representing the unique interests of legal protection insurers and service providers in this field from Europe, Canada, South Africa and Japan. In this capacity, RIAD defends the high potential of legal protection insurance as an easy, affordable and high-quality solution for access to justice and the law.
www.riad-online.eu

¹ Please see: Articles 198-205 of Directive 2009/138/EC

Therefore, RIAD wants to emphasise that a European collective redress instrument is a very sensitive and complex undertaking because, within EU Member States, there is no established common practice and there is hardly any one-fits-all solution for 28 (27) jurisdictions with different traditions, infringement procedures and procedural rules. Moreover, as the draft Directive points out, breaches of EU law affecting the collective interests of consumers could strongly increase as a result of globalization and digitization of the economy. Subsequently, the potential number of insured people affected may increase, particularly in the areas covered: financial services, energy, telecommunications, health and environment. Accordingly, legal protection insurers fear a significant financial impact if their policyholders are directly involved in a class action which could also lead to an increase of premiums. Therefore, for legal protection insurers it is essential that a European Directive does not unnecessarily inflate costs of litigations and safeguards legal security. Insurers that are involved in such proceedings must be able to predict and manage the expenses of collective redress actions and, moreover, procedural rules must be as simple as possible and easy to navigate, also on a cross-border level.

Articles 4 (2), 7 of the Proposal: Qualified Entities (QE) on an ad hoc basis – Standing to bring an action

“Member States may designate a qualified entity on an ad hoc basis for a particular representative action [...]” Experience in other jurisdictions, e.g. Canada, USA, or Australia, has shown that it is necessary to restrict the establishment of such entities and to establish strict rules for it. Moreover, the obligation according to Art. 7 (proof of independence and sufficient financial resources), must be met for all kinds of proceedings and not only if the QE is seeking redress measures (Art. 6 (1)). The collective redress system as it is presently established in the draft Directive does not include sufficient precautions to prevent manipulations of the system. Exploitation of the system would be detrimental for the mechanism of representative actions as such and, considering that legal protection insurance could also be a source for funding redress actions, RIAD requests to amend the Directive by introducing more stringent rules for designating QEs.

Articles 5, 6, 8, 10, 16 of the Proposal – Abuse of legal protection insurance, repetitive actions, legal security, effect of actions and decisions, forum shopping

The coexistence of declaratory (Art. 5(2)(b), Art. 6(2)) and damages actions (Art. 6(1)) and, at the same time, the possibility of pursuing collective and individual claims (Art. 6(4)) are problematic for legal protection insurers because insurers may have to pay several times for asserting the same claim. This risk is even higher in the case of cross-border proceedings (Art. 10 (2): no binding effect of a judgment from another Member State), and in case of a settlement (Art. 8(6): individual consumers are free to accept or refuse settlements and consequently pursue their claims individually). Furthermore, under Art. 5(2) subparagraph 2 and Art. 6(3) the mandate of the individual consumers does not constitute a condition to initiate a representative action seeking a redress order (opt-out mechanism). Subsequently, any insured person can get involved in proceedings without needing to take any further action and legal protection insurers could be liable to cover lawyers' costs for each policy holder.

On top of that, Art. 6(4) establishes that any redress obtained through a final decision according to Art. 6(1), (2) and (3) is without prejudice to additional rights to redress, consequently claims could be brought to multiple courts and by any number of consumers. Additionally, in case a claim is brought to another Member State, previous rulings would not even establish legal security regarding the

occurrence of an infringement (Art. 10(2): the final decision taking in another Members State is considered only as a rebuttable presumption that an infringement has occurred). In essence, defendants would hardly ever have legal peace and legal protection insurers would have to cover innumerable proceedings.

In this context Art. 201 (1) of Directive 2009/138/EC has to be considered because this Article obliges insurers to pay the fees of an individual lawyer for each consumer who is involved in a representative action and covered by a legal protection insurance policy. This is particularly detrimental because legal protection insurers have hardly any means to manage or steer these costs. As a matter of fact, in Case Eschig (C-199/08), the European Court of Justice does not allow legal protection insurers to take adapted measures in order to reduce the costs induced by mass claims and proceedings. It is therefore necessary that the Directive ensures that claims can be enforced efficiently and effectively which means that there must be procedural mechanisms that prevent repeated actions and create legal certainty with regard to final decisions; this is even more important in proceedings for which the Directive does not require the mandate of individual consumers (opt-out).

Taking into account the difficulties outlined above and provided that legal protection insurance is considered as a financing vehicle, RIAD calls for the proposed Directive to be revised. Moreover, consideration should be given to introducing mechanisms which allow insurers to administer their costs, also in the interest of the pool of the insured.