Brussels, 21 June 2018

Key concerns about the detail of the EC's proposal on representative actions

- **The establishment of collective redress mechanisms should not compromise their objective of achieving effective and efficient redress for a mass harm.** The EC's proposal is not, however, clear on its objective: is it the effective and efficient rectification of a harm suffered or is it a punishment of defendants who have breached the specific EU law falling within its scope? The incomplete implementation of the opt-in principle and of the loser pays principle raises questions over the proposal's policy objective. Furthermore, effective redress for consumers is not safeguarded in the proposal, as (significant proportions of) awards may be redirected to third-party litigation funders (TPLFs) or lawyers' fees. Transparency to the court of TPLFs' agreements could have improved the proposal. Additionally, the use of awards for small individual losses under Article 6.3(b) for a public purpose serving the collective interests of consumers undermines an objective of *effective redress*. Such claims would likely be better dealt with within the remit of public enforcement rather than private law.
- **Consumers as well as defendants should be properly protected from adverse outcomes from pursuing or defending a collective action.** The EC's proposal does not properly protect consumers pursuing collective action against a defendant. Consumers may not ever know a claim has been started on their behalf or whether it covers their loss because opt-in is not required and, in respect of small individual losses, will not see any redress reach them. In instances where a qualified entity (QE) loses its status as a QE during ongoing litigation, the implications are unclear. The proposal requires only that the QE shows sufficient financial resources to meet any adverse costs orders and to represent the claimants' best interests; it is unclear why no similar obligations are imposed on TPLFs. Defendants are not adequately protected either. It is unclear why the safeguards contained in the 2013 Recommendations 29 and 30 are not repeated. As a result, the avoidance of remuneration mechanisms that incentivise lawyers to litigate is not included in the proposal, nor is the general prohibition on contingency fees. Disappointingly, the provision on evidence is one-sided when it could have been reciprocal. By permitting an administrative authority or judge to require the defendant to serve up evidence, but not placing a similar obligation on claimants, the rules of evidence are imbalanced. There is no justification for this.
  The prohibition in Recommendation 32 against basing TPLFs' remuneration, or interest charged, on the settlement or judicial award except where this is overseen is also missing. This would have protected both claimants and defendants. Finally, the proposal places no requirement of sufficient expertise or staffing on the QEs, thus lowering the criteria imposed on them. Again, this is a feature that would protect the interests of claimants and defendants alike. The absence of these safeguards makes for a proposal that does not properly safeguard the interests of the parties to the litigation.
- **The value of ADR should not be underestimated or undermined. ADR is often a good route to effective and efficient redress for consumers harmed by a breach of law; a point noted in the EC's own Impact Assessment[1].** Insurance Europe welcomes efforts to safeguard the rights of consumers by enforcing EU law where there has been a breach and consumers have suffered mass harm. The objective of any enforcement should be the effective and efficient redress for consumers. In many instances, ADR mechanisms are effective and efficient means to achieve a speedy resolution for consumers, often at low cost and with relatively little effort, with the additional benefit of the remedy going directly to them. Litigation, whether individual or collective, should be a last resort, as it inevitably brings uncertainty as to outcome, costs and duration. Further, litigation does not always lead to effective redress for the consumers affected by the breach being litigated. The proposal fails to encourage voluntary, out-of-court settlement both pre-litigation and during litigation through, for instance, cost consequences. The ability of consumers to choose whether to be bound by a settlement agreement means that pursuing redress may become a "sport" — exhausting collective actions before commencing individual action — and means there is no finality for defendants; an unwelcome detriment to defendants.
- **As a minimum, collective redress systems should follow the EC's own 2013 Recommendations, ensuring minimum safeguards exist to achieve an equitable balance between claimants'**

[1] Commission Staff Working Document Impact Assessment (SWD(2018)96 final part 1/3), pg. 10: "…it is highly effective to have out of court dispute resolution mechanisms in place…"

interests in pursuing a claim for redress and defendants' rights to defend claims. The EC's proposal fails to adhere to its own 2013 Recommendations (Rec) by: not requiring opt-in to collective actions (Rec 21); not requiring that QEs have sufficient staffing and expertise (Rec 4(c)); not imposing a requirement for early verification of claims by the court (ie, certification) (Recs 8 & 9); not explicitly providing for the court to have the ability to stay proceedings in instances of conflict of interest, claimants' insufficient resources or insufficient resources for adverse costs orders (Recs 15(a), (b) and (c)); failing to safeguard the defendant's reputation during litigation (Rec 11); failing to prohibit TPLFs from charging excessive interest on the funds provided to fund the claim (Rec 16(c)); failing to prohibit TPLFs from basing their remuneration or interest on the settlement amount awarded except where the funding agreement is regulated by a public authority (Rec 32); not restricting lawyers from contingency fee arrangements (Rec 30); not cautioning against lawyers' remuneration methods incentivising litigation (Rec 29); and failing to emphasise the value of attempting ADR both pre- and during litigation (Recs 25, 26 and 27). In general, more consideration could be given to imposing on TPLFs the obligations already imposed on lawyers. Including such safeguards would have been welcomed as going in the right direction towards achieving a balance between the parties to collective litigation.

- **Collective redress mechanisms should be designed to prevent them being brought without a clear benefit for consumers, as well as to prevent the development of a litigation culture that could force defendants to make settlements where the claims do not justify it ("blackmail settlements").** The criteria for QEs should therefore have been much tighter. The EC's proposal fails to provide sufficient safeguards to guard against the risk of defendants having to incur cost, stress and a distraction from their core business to defend poorly evidenced claims. Contrary to the EC's 2013 Recommendations, the proposal: does not require claims to be properly evidenced; omits the active involvement of the courts to determine the validity of a claim; and prevents member states from imposing opt-in requirements in respect of representative actions involving small individual losses. Furthermore, the proposal facilitates third-party funding of claims, meaning there may be a proliferation in the number of claims brought against businesses. The risk of blackmail settlements is further compounded by the EC's proposal sitting as a complementary system to any national collective redress mechanisms, meaning that there may be tactical uses of one or other system (or jurisdiction) to maximise the claimants' position.
- **Jurisdiction shopping and tactical seizing of courts could develop**. This may be compounded by QEs that are supported by TPLFs with significant (legal) experience and jurisdictional reach. Thus, again, the balance between the parties may be compromised. This is again made worse by the EC's proposal sitting as a complementary system to any national collective redress mechanisms, meaning that there may be tactical uses of one or other jurisdiction (or system) to maximise the claimants' position[2].
- **Defendants should be afforded finality of litigation to avoid persistent litigation against the same defendant for the same alleged mass harm.** The ability of claimants to elect whether to be bound by settlement agreements, as well as the ability of claimants to rely on previous injunction orders (and declaratory orders) in any (future) action (and their weight in other courts) effectively means that a defendant will not be able to close off the risk of further litigation arising from a specific event or conduct. This is further compounded by the proposal's terms on limitation periods, whereby the limitation period for any redress actions for the consumers concerned is suspended pending the final outcome of the representative action under the proposal. Lastly, chaos is created over which jurisdiction is first seized by the prohibition on opt-in (for small losses) and at the initiation stage for determinable and comparable claims, since it will be impossible to determine which consumers are caught by which litigation. Significant legal uncertainty is created for defendants.

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[2] Commission Staff Working Document Impact Assessment (SWD(2018)96 final part 1/3), pg. 60: [on option 3, as proposed] "This option would require legal changes in all Member States. The extent of these changes would depend on whether Member States choose to integrate the proposed mechanism into existing national schemes or establish it as a separate alternative scheme."
See also the Proposal (COM(2018) 184/3), pg. 7: "The proposed action would respect the legal traditions of Member States since it would not replace existing national mechanisms but instead provide for a specific representative action mechanism, thereby ensuring that consumers in all Member States have at their disposal at least one mechanism with the same main procedural modalities."