

ABI response to the EC
consultation on the "Green
Paper on consumer
collective redress"

1st march 2009

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

ABI is conscious of the need to ensure effective redress for consumers in the internal market. Yet, we are not convinced that interfering with the national policy of access to justice by introducing a judiciary collective redress mechanism at EU level covering both domestic and cross-border claims would be justified, cost-efficient and in compliance with the Treaty.

The circumstance that only 13 over 27 Member States have already adopted judiciary collective procedures creates an uneven playing field for EU consumers, but the decision of introducing such special access to justice remains under the remit of Member States.

ABI recognises the negative consequences, especially the risk of forum shopping, of such differences in the internal market. However, in the area of civil procedural law the EU should limit its own role to put pressure on Member States that still do not have any system for collective redress, to act in this respect. This role may be rightly be played by using recommendations and guidelines. A further study might then be undertaken to see to what extent filling those gaps would have been an efficient solution for improving the consumers' access to redress. At the same time, such an approach would allow the very recent systems adopted at national level to be sufficiently tested before drawing conclusions.

The regulations of the collective redress may both noticeably modify the criteria for the protection of individual rights, as well as to cause considerable relapses on companies and market.

For the banking system, it is fundamental that the recourse to this protection mechanism effectively meets both the requirements for consumer protection and streamlining of the litigation, in addition to those for the defence of the integrity of the business system.

For this reason, the contribution of the European Union shall not now assume the form of binding tools, at least until the single national legislative frameworks have better settled the questions and problems that the adoption of such tools may produce in the single national judicature.

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

Option #2 envisages the development of the cooperation between Member States, making sure that such collective redress schemes are available in all

Countries and are preferred to other means, since this ensures that Member States, having collective redress mechanisms, provide consumers across EU with easy access to redress for mass claims, and that they could be encouraged in those Member States where they do not yet exist. We also underline the importance of creating mechanisms to resolve “collective” small claims.

However, the cooperation among Member States can be more effectively realized – even in the length of proceedings – with reference to structure, that is to say to the coordination of the mechanisms for alternative dispute resolutions, rather than with reference to the definition, that is to say to the introduction of judicial collective redress procedures.

Acknowledged the fact that not all Member States have mechanisms of collective resolution of controversies and that this circumstance might cause forum shopping practices, we deem advisable that the issue of procedural rules related to the dispute resolution is entrusted to the authority of the single Member States.

In this area indeed, we appreciate the role that EU might play by encouraging the Member States to adopt collective dispute resolution mechanisms.

We believe this can be achieved through the issuing of a Recommendation setting out the guidelines that every Country should respect. Such Recommendation should likewise encourage Member States to introduce in their own legislation the necessary measures for alternative dispute resolution mechanisms.

Using the European Consumer Centres Network (ECC-Net) could be advantageous since they are specialized in helping consumers access cross-border out of court actions and, shall the dispute deal with the area of financial services, consumers can rely on the FIN-NET.

However, regarding this option, we have to consider the criticality related to (i) the costs to set up the complaint procedures for consumers from other Member States, in case the latter do not yet provide collective redress mechanisms and therefore they are not subjected to the same obligation, (ii) the jurisdiction and to the regulations that apply either to contractual and non-contractual obligations.

As we shall see hereafter, we consider advantageous the combination of option #2 with option #3.

On the other hand, in the light of the difficulty to apply option #4 to several legislative frameworks and to create a ‘hybrid’ that cannot be easily managed, this option is considered unfeasible, since its implementation entails the arrangement of a single procedure, applicable in all Countries.

The analyses carried out by the Commission on the judicial collective redress mechanisms currently existing in the Member States highlighted some weaknesses of these mechanisms already at national level. Hence, it is inappropriate to want to strengthen and extend to a European level a mechanism that currently cannot be considered well-established at national level.

On the other hand, if the objective of the Green Paper is to favour the redress in those cases where a large number of consumers have been harmed by a trading practice that infringed consumer rules, this objective may be more effectively realized through a simplification of the rules. Such simplification might be advantageous both for consumers and for businesses. Option #4 does not seem to ensure this necessary objective to simplify the norms and, therefore, it is deemed unacceptable.

In parallel, the non-intervention decision on this topic by EU does not seem consistent with the spirit of the Green Paper (option #1).

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

Proposals aimed at encouraging the adoption of alternative collective dispute resolution mechanisms (not judicial) are viewed positively (see paragraph 32): these are tools that reconcile both the consumers' interest to obtain compensation for the suffered loss and the companies' interest to satisfactorily and effectively resolve the cases with their clientele.

The good functioning of the alternative dispute resolution schemes could indeed allow a quicker resolution of these claims, thus considerably cutting down the costs as well as the uncertainties for the operators and contributing towards the building of a more competitive and dynamic EU single market.

The Commission itself underlined, within the 2007-2013 European Consumer Policy Strategy, its aim to monitor and strengthen the enforcement of the Recommendations which represent a series of basic warranties for the alternative dispute resolution schemes, in order to ensure easy access to justice and foster the combination of consumer disputes; the out of court settlement might be more effectively used, either at individual or collective level, in order to resolve very low value claims, thus allowing a rapid settlement of the case with low litigation costs and quicker handling if compared to the lengthy judicial proceedings; in this case, the application of judicial procedures might be superfluous for those claims for which alternative and effective dispute resolution schemes already exist.

The Commission's proposals addressing the achievement of such objectives through self-regulatory measures are welcomed (see paragraph 46) and, in more general terms, the use and issuing of non-binding means, yet equally influential (either encouraging the Member States or directly the economic operators to accomplish the objectives through a moral suasion).

In particular, we welcome the initiative (see paragraph 40) aimed at achieving such objective through an issuing of a recommendation accompanied by a monitoring mechanism based on the results which would offer the possibility to 'change course', according to the achieved results; on the other hand, the issuing of more detailed regulations is not viewed positively (see end of paragraph 40) since this includes the main elements of an alternative dispute

resolution scheme as its own subject matter (such as the composition of the system and the handling procedure).

The possibility to perform actions aimed at informing consumers on the existence and functioning of the redress means is positively valued (see paragraph 47).

On the other hand, we do not agree with the theories formulated by the Commission over the possibility to assign the faculty to force businesses to refund those consumers who suffered detriment caused by an – assessed – intra-Community infringement to the named national Authority responsible for the enforcement of the Regulation on Consumer Protection Cooperation (Reg. #2006/2004).

The collective dispute resolution, indeed, belongs to the sphere of dialectics between the interests of individuals who claim to have suffered damages – and who have to be plaintiff in the legal action – and the interests of the operators responsible for mass torts (see paragraphs 36, 44 and 45). In case of infringement, the consumers who want to obtain redress – during the debate, even when not-judicial – shall see to prove the suffered detriment and its entity. However, it does not seem to be possible that such redress might automatically result from the assessment of the breach by an administrative Authority.

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

We believe that the objectives that the Commission intend to pursue with the present Green Paper may be easily achieved through the combination of option 2 dealing with the cooperation between the Member States, and option 3 pertaining to the association of different instruments.

With particular regard to option 3, the following measures are positively viewed since they are aimed at the:

- a) improvement of the dispute resolution mechanisms;
- b) actions intended to awaken consumers to the existing redress mechanisms.

The latter point is extremely relevant since it is the Commission itself that acknowledged that the performed studies underlined consumers' insufficient information on the different available means of redress and, in particular in the case of cross-border operations. Hence, it would be advisable to improve consumers' awareness on existing instruments, such as the use of the abovementioned European Consumer Centres Network (ECC- NET) or, in the case where the litigation deals with the financial services, of FIN-NET.

As we have already examined under question #3, we do not positively welcome those measures aimed at widening the scope of application of the regulations on the cooperation for the consumer protection, by assigning, in case of infringement of EU or national norms, the faculty to order the compensation in favour of consumers to the competent national authorities delegated to the application of the regulations.

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?

We believe that the involvement of the Member States in the creation of better collective dispute resolution mechanisms can be efficiently achieved, even through the issuing of non-binding instruments

As already stated by ABI in its response to the consultation on the alternative dispute resolution controversies, the organization of meeting events between the ADRs of the FIN-NET, to which invite also those Countries that have not yet joined it, and the issuing of a communication encouraging the Member States to take into consideration the opportunities offered by the setting up of such mechanisms as a means to reduce the workload of the Law Courts as well as to provide the clientele with an effective and economical redress instrument, are viewed positively.

To conclude, we believe that the objectives of the Green Paper may be effectively achieved through the issuance of recommendations – possibly accompanied by a monitoring activity by the Commission – including as their subject matter those reference criteria that the Member States shall adopt when intervening on different issues (for example, on the issue of establishing alternative collective dispute resolution mechanisms).