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REPLY TO THE GREEN PAPER ON CONSUMER COLLECTIVE REDRESS

The EU rule, an other way to approach the problem

(Reply to queries n. 1,7)

The Consumer Collective Redress, in many States, is a still a starting subject. About the legal issue, in fact, is not completed the admission and diffusion of model redress according to the law.

The event asks for the realisation, or to pursue to an high level, the development and testing process about legal national innovations. The new legal instrument, thanks to

the development, compares with the society characters, often profoundly different from State to State.

Testing is essential, it compares with an high experiences panorama about non-EU area. At this actual development point, if it's to avoid a big UE presence, to guarantee, in all the Member States a collective redress existence, it will be hope that, from EU, come a positive impulse to the admission of effective and efficient consumer collective protection.

This impulse has to promote the individual national law awareness and the need to guarantee consumer collective protection with efficient redress.

To promote appropriate development redress could be mean, to make easier the efficient working models.

The UE rule would be focus on, at this actual development point, the promotion through not binding recommendations about this protection forms, respecting the evolution process of the States.

***Alternatives to prefer, to reject,
Binding and non-binding intervention instruments
(Reply to queries n. 2,6)***

Considering the importance of a EU propulsive intervention, the reply at this second question rules out option 1, where the lack of EU measures promote national and EU existing measures to the consumer protection. To reject also option 2, if considered in a isolate way regarding to the following.

The other options, instead, seem need attention , as to define a possible intervention area from EU, and considered like different associated in the EU encouragement action.

EU measures wouldn't be binding to the reason written on top.

***The association of options 2,3,4
About specific elements
(Reply to queries n. 3,4,5)***

It is to be hoped that the effect to promote the collective protection will be pursued, even if, in this actual development moment, only with not binding recommendation instruments to encourage the national testing: alternative dispute resolutions; small claims procedures; consumer protection cooperation regulation; compliance systems; awareness-raising action; judicial collective redress procedure.

I. The consumer awareness.

The success of large, capillary and effective diffusion of consumers protection instruments, would be considered, having priority, like an awareness-raising process, with the consumer education to the individual and collective, judicial and alternative redress.

Appropriate measures consist in information-education activities to consumers about protection instruments. The creation of a new network could lead the existence of additional costs, in this contest, superfluous, since it is already created and working from 1° January 2005 a new network, the ECC-net (European consumer centre

network), that is a network of Centres in the EU States and the SEE, born from the fusion between the pre-existing European extra judicial network and the CEC network (European consumer centres), created from European Commission in 23 Member States in collaboration with national Governments. In this perspective the task of new network should make an activity be heading for:

1. facilitate the consumer knowledge in relation to their rights inside the European Common market, proceeding with an adequate information in the right and in the cross-border consumer; in fact only the consumer who knows his rights, is able to assert them;
2. have a dialogue with companies to explain the consumer reasons and start a more significant awareness process to have a greater number of complaints acceptances;
3. support of cross-border dispute to extrajudicial solutions. In this sense the use of ADR (alternative dispute resolution) development program may lead big benefits for the consumers. Meanwhile European consumer centres could proceed, for this purpose, to inform consumer about what ADR is, ADR procedures and ADR system.

II. Alternative Dispute Resolution.

The conciliatory disputes solution about consumers has a widespread experience. In the alternative dispute resolutions are, also, different considerations depending the field reference.

The individual conciliation in the telecommunications field, for example, demonstrated in Italy an exclusive effectiveness about damage.

Leading to the agreement conclusion, between company and individual customer, which define the refund outside and before the judgement, prevents the emersion of tort, who has, instead, a collective dimension.

The instrument has proved inefficient about deterrent function that instead produces, for example, the inhibitory remedy from consumer associations.

A conciliation encouraging virtuous behaviours for the future agreed with companies, could develop the same inhibitory function about the emerging of tort and operate in order to procure the stopping.

A collective conciliation procedure should lead to the emersion of tort and not to the exclusive damage closing, leaving free the individual sphere from possible fall back resulting from undertaken agreements between representative or the association and the company.

III. Compliance systems.

Firms, such as receiving consumer collective complaints, may answer to these petitions through swift, efficient and low cost action for the consumers.

For companies legal costs are low but on the other hand there are high costs for the implementation of a proper business compliance.

Complaint-handling system in Italy is characterized predominantly from individual complaint.

But there are procedures to handle in pre-trial intra-business period possible disputes through consumers association action. This is a model has found testing in Italy through agreements between consumer associations and business associations than the proposition of injunctions about illegal clauses. This, referring to agreement between

ANIA (national association insurance companies) and the most important consumer associations concluded 11 may 1999.

The convention provides that: in the case of illegal clauses in insurance policies, consumer associations will precede the beginning of inhibitory action (art. 1469 sexies ss., now art 37 cod. Cons.) from a written communication addressed to interested company and to ANIA, where will be specified the deemed illegal clauses and concerning reasons, indicating the name of the person which refer to the procedure.

Associations undertake not introduce inhibitory action before the expiration of 30 days from receipt of the notice. Within that time company will reach a written reply to ANIA and to the interested association, which specify this availability or not to proceed to the abolition or to the review about clause/s and lead time for the concrete implementation of taken decisions.

IV. The strengthening of the consumer protection with recommendation inherent in collective redress (Option 4).

This Section of the paper is to propose a *non-binding EU measure* (something like a Model Law) to suggest that a collective redress action should be introduced in all Member States.

Such a procedure would ensure that every consumer throughout the EU would be able to obtain adequate redress in mass cases through group actions.

Issues to be regulated:

(a) *Funding of collective actions*: to reduce plaintiffs' cost risks under the 'English rule', it should be explicitly permitted for group representatives and attorneys to reach fee agreements, meaning that the attorney's fees are based on the extent to which group members' claims are satisfied.

(b) *Scope of application*. The relief should provide for monetary compensation to groups of consumers in the following cases:

(1) breach of contract;

(2) torts;

(3) unfair commercial practices.

(c) *Standing in court*: parties entitled to bring collective redress actions should be:

(1) consumer associations entered on a special Registry held by the Government;

(2) not registered associations as long as they are 'adequately representative' of collective interests in a particular case. This provision entitles *ad hoc* associations, i.e. even small associations set up with the sole reason to undertake a legal proceeding (consumers should be not required to transfer their individual claims to the plaintiff).

(3) a member of the group, who may be a natural or legal person.

(d) *Venue based on residence of the defendant* (mandatory rule). The collective redress action must be brought in the judicial district in which the defendant has his residence.

(e) *How to prevent unmeritorious claims*: the admissibility of a collective redress action should be subject to a preliminary evaluation.

The action is to admit when:

(1) the group is so numerous that joinder of all members is impracticable,

(2) there are questions of law or fact common to the group,

(3) the plaintiff will fairly and adequately protect the interests of the group.

(f) The choice between *opt-in* and *opt-out approach* is the central issue of the European debate on collective redress actions. There is no need to revisit the assessment of the

pros and cons of the two systems. It is worth pointing out two aspects that are linked to the recent experience.

Firstly, there is a growing awareness that opt-out is the most functional system in order to fulfil the goals of collective redress actions.

Secondly, there is a growing awareness that opt out does not clash with the constitutional principles of ‘due process’, at least in the field of (very) small claims, where the disproportion between the legal costs of proceedings and the economic value of the claims is a deterrent for individual actions.

This creates the option of a ‘*dual system*’, where the choice between opt-in and opt-out should be determined by the value of the claims. This choice could be left either case by case to the judge (following the example of Danish law), or based on strict legislative quantification⁽¹⁾.

(g) *Publishing the action*. If the action is admissible, the court should order a suitable form of publishing the collective action. Those who fit the plaintiff’s description of the group must be informed about the action, by personal notice or in some other suitable way, and afforded the opportunity to inform the court that they wish to opt in (in case of an ‘opt-in proceedings’) or to opt out (in case of ‘an opt-out proceedings’), by the stipulated deadline.

Notices to members of the group should be handled and paid for by the court.

(h) *Res judicata*. In case of an opt-in proceedings, the judgment can only be invoked by consumers who have joined in the action. Joining in the action is a two-edged sword: obviously parties are also bound by a judgment that rejects a claim. Vice versa, consumers that have not joined in the collective action can still take individual action.

In case of an opt-out proceedings, all group members who did not have opt out are bound by the judgment

(i) *Distribution of compensation*. In an opt-out proceedings the plaintiff may face a burden when they have to identify the victims and distribute the compensation.

In an opt-in proceedings the problems could be solved by the court distributing the compensation and/or by allowing consumers to join a mass settlement after the judgment has been delivered.

(l) *Collective Settlement*. The plaintiff should be empowered to settle on behalf of the group. However, group members are not bound by the settlement unless it is approved by the court. The court is not permitted to approve the settlement if it is unreasonable.

⁽¹⁾ Development towards an opt-out approach in the field of small claims is exemplified by a recent Italian court decision. In a proceeding for injunction, the *Tribunale di Roma* ordered *Sky Italia Pay Tv s.r.l.* to reimburse subscribers the amounts already paid for automatic mailing of the new TV programme magazine, since these amounts had been wrongfully claimed in breach of the contractual terms. In other words, the Court ordered the company to reimburse each subscriber, as this was the correct measure to eliminate the damaging effects of the infringement. In the case in question, a remedy similar to the results of a US class action was granted.