

Position Paper

on the Proposal for a Directive on representative Actions for the protection of the Collective Interests of Consumers, and Repealing Directive 2009/22/EC (2018/0089 (COD))

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The **German Banking Industry Committee** is the joint committee operated by the central associations of the German banking industry. These associations are the Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR), for the cooperative banks, the Bundesverband deutscher Banken (BdB), for the private commercial banks, the Bundesverband Öffentlicher Banken Deutschlands (VÖB), for the public-sector banks, the Deutscher Sparkassen- und Giroverband (DSGV), for the savings banks finance group, and the Verband deutscher Pfandbriefbanken (vdp), for the Pfandbrief banks. Collectively, they represent more than 1,700 banks.

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I. Preliminary remark

In April 2018, the Commission submitted its proposal regarding the 'Directive on Representative Action' (2018/0089 (COD)) in the context of the 'New Deal for Consumers'. The regulations proposed in the Draft Directive

- fail to respect the legal traditions of the member states contrary to the statement of grounds,
- significantly interfere with the German law of civil procedure,
- fail to account for fundamental basic rights in numerous instances; specifically, there is a lack of requirements that guarantee the fundamental procedural rights of the defendant and prevent abusive utilisation of representative actions.

Thanks to the effective consumer protection instruments in place in Germany, the GBIC believes that there is no need for the introduction of EU representative action.

II. Core demands

In response to the draft report by the responsible European Parliament committee (JURI) dated 12 October 2018, we would like to once again present our core demands:

1. Stricter requirements for qualified entities (Art. 4)

- The requirements applying to qualified entities should prevent the improper pursuit of individual financial interests.
- To this end, the requirements applying to qualified entities should follow the German Act Introducing a Model Declaratory *Action* under *Civil Procedure* [Gesetz zur Einführung einer zivilprozessualen Musterfeststellungsklage] and the criteria specified therein (in particular the requirements to either consist of ten entities operating within the same scope of duties or 350 private individuals and furthermore being registered and in existence as a qualified entity for at least 4 years).
- Ad-hoc entities should not be allowed to bring representative actions since this would circumvent the provisions protecting against abuse.

2. Stricter requirements for representative actions (Art. 5 and Art. 6)

- The requirements regarding the admissibility of representative actions are not strict enough and should be adjusted.
- Courts must be in a position to exclude evidently unfounded or vexatious actions.
- To protect companies from a plethora of identical actions, legally binding decisions should make any further decisions on the same situation inadmissible.

3. No representative actions without consumer's mandate (Art. 5 (2))

- It is crucial that the 'opt-in procedure' (participation with consumer's mandate only) is available in the case of representative actions. Consumers must be in a position to decide for themselves whether or not they want to enter into litigation.
- An opt-out solution for representative actions is diametrically opposed to the legal systems and legal principles applicable in numerous member states. Any respective sections in the proposed Directive should be removed.
- The impact of the option to bring representative actions in the case of 'scattered' or low-value damage is equivalent to US punitive damages and should therefore be avoided.

4. No trial funding by third parties (Art. 7)

- The sources of funds of the entities entitled to sue must be transparent.
- Trial funding by third parties must not be permitted as it could lead to the pursuit of improper individual financial interests (warning against US conditions).
- The payment of fees in the case of failed representative actions is a crucial corrective. Otherwise, the doors would be wide open to abusive litigation.

5. No disproportionate information duties for companies (Art. 9)

- There must be no disproportionate information duties for companies.
- We reject any obligation by companies to inform consumers of low-value damage at their own expense.
- As a minimum, it should be sufficient that the necessary information is published on the company's homepage (and even then only in the case of a conviction).

6. Exploratory evidence should be avoided (Art. 13)

- The option of 'exploratory evidence' as provided for by the Directive should be strictly avoided due to its susceptibility to abuse.
- Discovery proceedings fundamentally clash with the legal traditions prevailing in many member states according to which each party to the civil proceedings is itself responsible for presenting all relevant facts in their submission and for providing evidence in cases of doubt.
