Bundesverband der Deutschen Volksbanken und Raiffeisenbanken e. V.
Bundesverband deutscher Banken e. V.
Bundesverband Öffentlicher Banken Deutschlands e. V.
Deutscher Sparkassen- und Giroverband e. V.
Verband deutscher Pfandbriefbanken e. V.

Die Deutsche Kreditwirtschaft

Comments

on the interinstitutional negotiations about the proposals for a Directive on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC (2018/0089 (COD))

Contact:
Arndt Kalkbrenner
Telephone: +49 30 2021- 2315
Fax: +49 30 2021-192300
Email: a.kalkbrenner@bvr.de

Berlin, 16 January 2020

Leadership:
Bundesverband der Deutschen Volksbanken und Raiffeisenbanken e. V.
Schellingstraße 4 | 10785 Berlin
Telephone: +49 30 2021-0
Fax: +49 30 2021-1900
www.die-dk.de

Comments on the interinstitutional negotiations about the proposals for a Directive on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC (2018/0089 (COD)), of 16 January 2020

I. General preliminary remark

The proposed regulations

- do not respect the legal traditions of the Member States, in contrast to the reasons stated in the explanatory memorandum;
- represent a substantial intervention into German civil procedure law;
- disregard fundamental rights in many places; in particular, there are no specifications to guarantee the fundamental procedural rights of the defendant party and prevent the abuse of the representative action.

Furthermore, we would like to emphasise that from the point of view of Deutsche Kreditwirtschaft (DK) a satisfactory solution needs to be found in particular for the demands made on the entities entitled to sue because this is a central issue regarding precautions against so-called "forum shopping" and hence abuse of the representative action option that harms not only the business enterprises but ultimately the system of justice and, as a consequence, the Member States themselves (cf. III.4.).

In addition to this, DK has serious reservations against the retroactive effect of the Directive introduced by Article 20 of the Council text that is incompatible with general constitutional principles.

Therefore, in the opinion of the DK, the **proposal of the Council of the European Union (General Approach)** is the one that **most likely** could be called **balanced**. All in all, therefore, the regulations provided therein are rather to be preferred. However, this is subject to the aspects set out below which we would like to point out individually:

II. Subject matter, scope and definitions (Chapter 1)

The text proposal of the Council of the European Union is to be preferred in relation to Article 2 of the proposed Directive. For reasons of a level playing field, in particular the **possibility to bring an action in case of national gold plating**, as envisaged in the Council text, **is to be rejected**.

III. Representative actions (Chapter 2)

1. To prevent abuse and exclude the pursuit of inadmissible individual economic interests, it is indispensable to make **high demands on qualified entities**. Ideally, these high demands should apply to both domestic and cross-border actions. At any rate, it is to be ensured that Member States can make high demands on qualified entities with regard to domestic actions and that the final text of the Directive gives the Member States scope for implementation in this respect. Accordingly, Article 4 of the Council text generally deserves to be given preference.

2. We see the danger that prevention of **actions filed abusively in the case of qualified entities that are constituted ad hoc** cannot be entirely guaranteed. We, therefore, are critical of Article 4 (4b) of the Council text and support the deletion by the Parliament of the regulation of Article 4 (2) in the Commission draft. Should the deletion not be maintained, the Council's considerations in Recital 11a, according to

which a cross-border class action should not be brought by qualified entities constituted ad hoc, are correct. However, this principle should be applied also to domestic actions because the need to protect the enterprises sued against actions filed abusively or against being threatened with actions exists in the same way in the case of domestic actions.

3. The **court** applied to in the representative action **must be able to check** whether a qualified entity still fulfils the conditions imposed on it. Ideally, the court should even be obliged to check the admissibility of actions beforehand in each case, in particular with respect to third-party financing cases, obvious lack of merit and abuse. We, therefore, recommend to not dispense with a regulation based on the model of Article 4 (5) of the proposal of the European Parliament for domestic cases and based on the model of Article 4b (3) for cross-border cases.

4. To prevent forum shopping, it is to be appreciated that Article 4a (3) of the Council text **makes particular demands on qualified entities for cross-border actions**. In particular, the criteria set out in Article 4a (3) (a) ["Founding and activities history"], (cb) ["Independence"] and (cc) ["Disclosure of the financing"] have to be emphasised especially because they guarantee that entities entitled to sue cannot pursue commercial interests and can perform their tasks permanently and appropriately.

5. In compliance with generally valid legal principles (principle of party disposition) and the fundamental rights of the litigants to fair proceedings and fair hearing, we believe that a **binding opt-in requirement** is **absolutely** necessary **for all types of action**. A consumer must be able to decide himself whether he wishes to conduct a lawsuit or not. Alternatively, we in so far support the Commission text that provides in Article 6 (1) for a right of the Member States to request a mandate by the individual consumers concerned before a declaratory decision or a redress order is issued.

6. We support the proposal of the Commission that **only a declaratory action** is possible in cases of Article 6 (2) in which the **specific actual damage** cannot be **stated**. The approach taken by the Council as evidenced by Article 5a (2) is also welcomed that the qualified entity, in cases other than injunctions, must state the specific actual damage, with the consequence that otherwise not only an action for satisfaction but also a declaratory action would not be possible.

7. To avoid excesses, a "**loser pays principle**" with respect to court costs is indispensable also in cases where a representative action fails. Article 7 of the Commission proposal and Article 7a of the Parliament text take account of this. By contrast, the Council text intends to delete Article 7, which is to be objected to. Should the wording in Article 5 (4a), that the qualified "entities have the rights and obligations of a party to the lawsuit", be meant to also regulate the taxing of costs in case of defeat, it would be advisable to do this expressly, so as to avoid any doubt.

8. It must be guaranteed that the **duties to inform** regulated in Article 9 can be designed in a fair and **balanced** way. This would be the case, for example, if as a rule the defeated party had to inform the consumers concerned and this obligation could also be fulfilled exclusively online or by means of a website. Therefore, Article 9 (2a) of the Parliament text is expressly appreciated.

9. As regards the effects of final decisions, the Council text, in Article 10, reaches the conclusion that it shall be possible to use them as evidence of the existence of an infringement. This result is the most appropriate one because otherwise the defendant would be expected to not introduce rebutting evidence in new proceedings.

10. The **discovery** envisaged in Article 13 is to be strictly **rejected** due to its susceptibility to abuse. It contravenes the European legal traditions and the fundamental procedural rights of the parties to the proceedings according to which, in civil proceedings, each party must itself present and prove all facts relevant to its submission. At least, in the second sentence of Article 13, the Council text allows the creation of a certain **equal fire power of the parties to the lawsuit**. We, therefore, recommend to adopt this regulation at any rate.

IV. Final provisions (Chapter 3)

According to Article 20 of the Council text, the rules established on the basis of this Directive shall no longer be applied only to infringements of Community Law regulations that have been committed after the entry into force of these rules but also to actions brought after the entry into force of these rules. As a consequence, these rules might be applied also to infringements of Community Law regulations that have been committed before the entry into force of these rules. This is **hardly compatible with procedural principles of non-retroactivity**. Not only consumers should be able to trust that acts that are lawful by today's standard cannot be declared unlawful retrospectively, which might even give rise to an obligation of restitution.

*****