Frankfurt am Main,
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BVI position on the European Commission´s proposal for a Directive on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC as part of the New Deal for Consumers (COM(2018) 184 final)

BVI[1] considers high levels of consumer protection as well as the facilitation of access to justice as important to enhance consumers´ confidence in the Single Market, especially the financial markets. Therefore, we follow the European developments on collective redress with close interest and gladly present our views on this proposal.

A. General Remarks

From a German asset management sector perspective we see no necessity for additional collective redress mechanisms on a European level.

Consumers in the European market for retail investment funds benefit from a most highly regulated and supervised industry providing services under e.g. the UCITS Directive (2009/65/EC) and the AIFM Directive (2011/61/EU). In terms of access to justice and collective redress for consumers in retail financial services, especially retail investors, Germany provides - apart from a yet effective judicial system in general - a well-balanced environment of options for collective claims, representative actions by consumer organisations, highly developed, easily accessible, fast and cost-free alternative dispute resolution schemes (ADR) in the financial sector as well as regulatory collective redress resp. compensation mechanisms.

In Germany retail investors in investment funds and other securities can make use of the **German Capital Markets Model Case Act** (KapMuG) as collective claims mechanism applicable in cases of false, misleading or omitted public capital markets information. Consumer organisations, on the other hand, can seek the cessation or prohibition of infringements by traders under the **Injunctions Directive** (2009/22/EC) in the de facto collective interest of consumers. This has already turned out to work well for consumers suffering mass damages in the financial sector in conjunction with mechanisms of ADR procedures under the **ADR Directive** (2013/11/EU) when it comes to enforcement resp. redress. By example, in 2014 e.g. the German Federal High Court declared certain bank fees in consumer credit contracts unfair. This decision emerged to be a mass issue which was most effectively tackled by over 150,000 consumers making use of banking ADR schemes seeking redress based on the court´s decision.

[1] BVI represents the interests of the German fund industry at national and international level. The association promotes sensible regulation of the fund business as well as fair competition vis-à-vis policy makers and regulators. Fund companies act as trustees in the sole interest of the investor and are subject to strict regulation. Funds match funding investors and the capital demands of companies and governments, thus fulfilling an important macro-economic function. BVI's over 100 members manage assets of more than 3 trillion euros for private investors, insurance companies, pension and retirement schemes, banks, churches and foundations. BVI's ID number in the EU Transparency Register is 96816064173-47. For more information, please visit www.bvi.de/en.

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Not least, ADR schemes in the financial sector itself are capable of handling collective claims or issues to a certain extent. In 2012 BVI´s independent ADR scheme competent for the German investment industry was used to deal with a single mass complaint on behalf of almost 800 retail investors suffering from problems with open-ended real estate funds. The German Insurance Ombudsman explicitly offers a model case procedure in its Code of Procedure. In addition, under a collective redress perspective investors in investment funds on the one hand are safeguarded under the **German Capital Investment Code** by the obligation of a fund´s independent depositary to claim e.g. for compensations in the collective interests of fund investors in case the investment management company violates investment law or breaches the rules the investment contract. On the other hand they benefit from regulatory collective compensation mechanisms investment management companies are obliged to set up in case of wrongfully calculated share prices and the violation of investment limits and criteria.

Beyond that, the German Parliament already has adopted a horizontal model case mechanism on national level to facilitate collective consumer claims (Musterfeststellungsklage) especially against the background of the so-called Diesel-scandal.

In a nutshell, we see no additional value in imposing European rules on representative actions in the collective interest of consumers.

In fact, we believe the EU representative action model as proposed as way too complex in light of the diverging legal systems in the various Member states, especially their local civil procedural traditions, which would need to be reconciled. It is obvious that already the introduction of model claims resp. collective redress mechanism in one single jurisdiction faces numerous and difficult legal and practical challenges. It must be doubted, too, whether the EU is competent at all to set such rules since the proposal extensively interferes with national civil procedure law which lies in the competency of each single Member State.

In addition, we think that EU representative actions bundling claims from various Member States will be practically suffering from the necessity of a single competent court to consider as many jurisdictions, an aspect not yet sufficiently reflected in the proposal. EU representative actions, and thereby the harmed consumers, will also be suffering in terms of complexity and lengthiness since the proposal as a rule offers mass claims for redress or other compensation measures. Therefore and on contrary, the current German proposal of a “Musterfeststellungsklage” for good reasons favours declaratory decisions as a rule which, if required at all, could be combined and easily enforced via ADR in terms of redress.

Not least, we fear the evolution of a massive abusive litigation industry as well as forum shopping since the proposal does not contain sufficient and effective safeguards harmonising jurisdictions in Member states, e.g. regarding the so-called qualified entities. By all means, looking at the comprehensive negative experiences with collective redress mechanisms in third countries, e.g. US class actions, it is most likely that imbalanced and not well elaborated rules on EU representative action will seriously harm Europe´s businesses without having the aspired benefits for the consumer interests.

B. Remarks in detail

Article 3 (3) [Definitions]

We recommend determining a specific minimum number of consumers on EU-level to describe the collective interests of consumers.

The proposal is designed to enable consumers in mass harm situations to claim their rights not only individually, but also collectively. It aims especially at mass damages which from a consumer perspective are often not worth to claim individually because of the minor amount of damage under dispute in a single case. In this sense the collective interest of consumers should not be seen as affected until a minimum amount of 100 harmed consumers is reached. The possibility for representative actions in minor cases does not ensure that it is actually a mass harm situation to deal with and might result in an excessive and/or abusive use of court proceedings. Especially for such minor cases in terms of the number of harmed consumers and/or damages the EU provides under the ADR Directive efficient, fast and cost-saving ways to claim for redress. The determination of a specific number of consumers on EU-level provides for legal certainty and avoids forum shopping as well.

Article 4 [Qualified entities]

We strongly recommend determining sufficiently harmonised minimum criteria on EU-level for qualified entities being able to bring representative action under the new Directive to protect consumers, provide legal certainty and clarity for businesses, to avoid abusive representative actions as well as forum shopping to Member States with less stringent requirements.

In this context we refer to the above mentioned German proposal for a consumer model case mechanism and the therein actually discussed minimum criteria for qualified entities and propose the following minimum criteria on EU-level:

(a) certain minimum size of the qualified entity as regards members and / or balance sheet
(b) no qualified entities on an ad hoc basis but minimum track record as qualified entity of at least four years according to Article 4 (3) Directive 2009/22/EG or respective qualifying period before being able to bring representative actions under the new Directive
(c) main business focus on non-profit consumer counselling
(d) no representative actions for purpose of realisation of profits
(e) maximum private funding of 5 percent from companies or any other third party entities

Article 6 [Redress measures]

Against the background of the different legal systems and civil procedural traditions as well as the time-consuming complexity of collective redress actions we recommend leaving it to the sole discretion of every Member State to decide whether to impose collective claims mechanisms issuing declaratory decisions or redress orders as laid down in the proposal.

The German proposal for a consumer model case discussed at the moment favours declaratory decisions as general rule since inter alia collective redress actions under German law require that every single consumer opted in has to demonstrate and prove the individual damage suffered. This legal requirement immensely complicates and protracts collective redress procedures as proposed which is not in the best interest of the single harmed consumer. In this regard the so-called “Musterfeststellungsklage” is way more efficient and produces relatively faster results in the collective interest of consumers than the proposed representative action which the individual consumer then can make use of by way of bilateral settlement or ADR due to own preferences and case specifics.

Not least, in mass harm situations in which it might be for whatever reason disproportionate to enforce damages using court procedures because the individual consumer suffered a small amount of loss ADR offers the adequate tool to compensate even those individual consumers instead of expropriating them for the benefit of public purposes as proposed in Article 6 (3)(b).

Article 7 (2) [Funding]

We recommend, referring to our remarks on Article 4, prohibiting any third party funding of specific representative actions except for other qualified entities according to the Directive.

Article 9 [Information on representative actions]

We recommend refraining from any obligation for traders to inform affected consumers at their expense about a final decision providing measures referred to in Articles 5, 6 and the approved settlements referred to in Article 8. By all means traders should not be obliged to inform affected consumers individually.

Consumers affected from infringements will learn about a starting or ongoing representative action by information of the qualified entity which is already at the expense of the trader in case the action is successful (Article 15 (2)). It is for sure that consumers will be informed by the qualified entity either in case the representative action is upheld. There are no additional benefits for consumers being informed twice but rather additional costs for traders. In any case traders should not be obliged to inform con-

sumers on an individual basis since in many cases traders depending on the nature of their business do not know their customers personally.

Article 11 [Suspension of limitation period]

We recommend clarifying that the suspension or interruption of limitation periods as effect of a representative action benefits only consumers having opted-in for the action or having registered their claim in due course. The wording of Article 11 is vague in this respect.

Beyond that, German law in any case requires certain measures to be taken (e.g. action, complaint, negotiation) by an individual claimant to benefit from a suspension of limitation periods. The German proposal for a consumer model case discussed at the moment e.g. requires claimants to file their claim in a register to benefit from the outcome of the action resp. the suspension of limitation periods. An automatic suspension of limitations periods solely by submitting a representative action by a qualified entity for an unknown number of consumers concerned without any measures taken by them individually stands in contrast to German civil law and bears incalculable risks for traders.

Article 13 [Evidence]

We strongly recommend deleting Article 13. Although the Commission has stated on several occasions not to be in favour of legal instruments known for their abusive potential, especially in connection with US class action law, it nevertheless has opted in its proposal for rules on evidence / burden of proof which resemble Anglo-American discovery proceedings to a large degree. Such rules stand in sharp contrast to the rules of civil procedure in Germany as well as in other Member states, will result in cost-intensive, resource consuming proceedings and should be refrained from.