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Public Consultation on the Transposition of Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC

A. Overview

Introduction

The Department of Enterprise, Trade and Employment invites submissions to a public consultation on the transposition of [Directive \(EU\) 2020/1828](#) on representative actions for the protection of the collective interests of consumers, and repealing [Directive 2009/22/EC](#).

While the Directive contains some mandatory provisions for Member States, it also provides options to Member States in other areas. This consultation is primarily seeking views on the Member State's options under the Directive and opportunity is also given to provide general comments, including on the mandatory provisions of the Directive in the Response Template provided.

Background

A “[New Deal for Consumers](#)” package was launched by the Commission on the 11 April 2018 and aimed to facilitate coordination and effective action from national consumer authorities at EU level and reinforce public enforcement action and better protection of consumer rights. The package comprised proposals for two new Directives, one of which, was a proposal on representative actions for the protection of the collective interests of consumers. This proposal repeals the current [Directive 2009/22/EC](#) on injunctions for the protection of consumers' interests and aims to improve tools for stopping illegal practices and facilitating redress for consumers where a number of them are victims of the same infringement of their rights, in a mass harm situation.

The proposal was examined during the Bulgarian, Austrian, Romanian and Finnish Presidencies by the Working Party on Consumer Protection and Information and was formally adopted on the 25 November 2020. It was published in the Official Journal on the 4 December 2020 and Member States have until the 25 December 2022 to transpose.

Objective of the Directive

[Directive 2009/22/EC](#) of the European Parliament and of the Council enabled qualified entities to bring representative actions primarily aimed at stopping and prohibiting infringements of Union law harmful to the collective interests of consumers. However, that Directive was considered not to sufficiently address the challenges for the enforcement of consumer law. To improve the deterrence of unlawful practices and to reduce consumer detriment in an increasingly globalised and digitalised marketplace, it was deemed necessary to strengthen the mechanism for protection of collective interests of consumers to cover redress measures as well as injunction measures.

Representative action procedures, both for injunction and redress measures, vary across the Union and offer different levels of protection for consumers. There are also Member States that at present do not have any collective redress procedure in place, including Ireland. This could diminish consumers' and businesses' confidence and ability to operate in the internal market, distort competition and hamper the effective enforcement of Union law in the field of consumer protection.

This Directive aims at ensuring that at least one representative action procedure for injunction and redress measures is available to consumers in all Member States, to allow for effective and efficient representative actions available at national and the Union level. This will help consumer confidence; empower consumers to exercise their rights; contribute to fairer competition; and create a level playing field for traders operating in the internal market.

The agreed Directive proposes a modernised system of representative actions, building on the existing Injunctions Directive ([Directive 2009/22/EC](#)) to:

- expand the scope of the old Directive to cover other horizontal and sector-specific EU instruments relevant for the protection of collective interests of consumers in different economic sectors such as financial services, energy, telecommunications, health and the environment,
- allow non-profit making qualified entities such as consumer organisations or independent public bodies, which have been designated in advance by Member States, to take either domestic or cross border representative actions to defend the collective interests of consumer in cases of mass harm,
- require Member States to ensure 'due expediency' of procedures and to avoid procedural costs becoming a financial obstacle to bringing representative actions,
- require that Member States shall lay down the penalties applicable to non-compliance with decisions issued within the representative action, that they shall take all necessary measures to ensure that they are implemented and shall ensure that penalties may take the form of fines, and
- enable qualified entities to bring representative actions seeking different types of measures as appropriate, depending on the circumstances of the case i.e. interim or definitive measures to stop and prohibit a trader's practice or to eliminate the continuing effects of the infringement. The latter could include redress orders establishing the trader's liability towards the consumers harmed by the infringements.

Implementation of provisions with options for Member States

The Department of Enterprise, Trade and Employment is consulting on the use of Member State options, being matters in respect of which Member States can or must make a choice. Interested parties are asked to bear in mind that, except for the exercise of options, Member States are obliged to implement the Directive into Irish law in full.

In the response template respondents also have the capacity to generally comment on the Directive or other Articles without Member State options. The provision of such views will facilitate the Department's work on transposition of the measures.

Please use the separate response template for your submission to the consultation.

B. Implementation of the Directive

Directive (EU) 2020/1828 must be implemented into Irish law by the 25 December 2022.

Submissions

Submissions are invited on the transposition of the Directive into Irish law, in particular answers to the questions raised are sought. A separate response template is attached, completing the template will assist with achieving a consistent approach in responses returned and facilitate collation of responses.

Respondents are requested to make their submissions by email to conspol@enterprise.gov.ie.

Hardcopy submissions are not being received at this time due to remote working.

The closing date for receipt of submissions is **Friday 7 May 2021**. Please clearly mark your submission as 'Public Consultation on the Transposition of Directive (EU) 2020/1828'.

Any queries in relation to the consultation can be directed to the Competition and Consumer Policy Section of the Department at the following contact points:

- Aedín Doyle at Tel. 087 1489785 (or at Aedin.Doyle@enterprise.gov.ie)
- Paul Brennan at Tel. 087 7434526 (or at Paul.Brennan@enterprise.gov.ie).

General Data Protection Regulation

Respondents should note that the General Data Protection Regulation ('GDPR') entered into force in Ireland on 25th May 2018 and it is intended to give individuals more control over their personal data.

The key principles under the Regulation are as follows:

- Lawfulness, fairness and transparency;
- Purpose Limitation;
- Data minimisation;
- Accuracy;
- Storage Limitation;
- Integrity and confidentiality, and
- Accountability.

The Department of Enterprise, Trade and Employment is subject to the provisions of the Regulation in relation to personal data collected by it from 25 May 2018.

Any personal information, which you volunteer to this Department, will be treated with the highest standards of security and confidentiality, strictly in accordance with the Data Protection Act 2018.

Publication of Submissions

The Department may make public on its website all submissions received under this consultation.

However, should you submit information that you consider commercially sensitive, please identify that information in your submission and give reasons for considering it commercially sensitive.

The Department will consult with you regarding such information before making any decision to disclose it.

Freedom of Information Act 2014

Attention is drawn to the fact that information provided to the Department may be disclosed in response to a request under the Freedom of Information Act 2014. Therefore, should it be considered that any information provided by a respondent is commercially sensitive, please identify same, and specify the reason for its sensitivity. The Department will consult with interested parties making submissions regarding information identified by them as sensitive before making a decision on any Freedom of Information request.

C. Questions on Member State Options

The text of each Article on which we have questions from Directive (EU) 2020/1828 of the European Parliament and of the Council are inserted in the tables that follow. The ***bold italicised text*** relates to options or mandatory provisions on which we are seeking input. The numbering on each question relates to the subsection of the relevant Article. Please note that references and footnotes included in the Directive have been removed in this paper.

Article 4

Qualified entities

1. Member States shall ensure that representative actions as provided for by this Directive can be brought by qualified entities designated by the Member States for this purpose.

2. Member States shall ensure that entities, in particular consumer organisations, including consumer organisations that represent members from more than one Member State, are eligible to be designated as qualified entities for the purpose of bringing domestic representative actions, cross-border representative actions, or both.

3. Member States shall designate an entity as referred to in paragraph 2 that has made a request for designation as a qualified entity for the purpose of bringing cross-border representative actions if that entity complies with all of the following criteria:

(a) it is a legal person that is constituted in accordance with the national law of the Member State of its designation and can demonstrate 12 months of actual public activity in the protection of consumer interests prior to its request for designation;

(b) its statutory purpose demonstrates that it has a legitimate interest in protecting consumer interests as provided for in the provisions of Union law referred to in Annex I;

(c) it has a non-profit-making character;

(d) it is not the subject of insolvency proceedings and is not declared insolvent;

(e) it is independent and not influenced by persons other than consumers, in particular by traders, who have an economic interest in the bringing of any representative action, including in the event of funding by third parties, and, to that end, has established procedures to prevent such influence as well as to prevent conflicts of interest between itself, its funding providers and the interests of consumers;

(f) it makes publicly available in plain and intelligible language by any appropriate means, in particular on its website, information that demonstrates that the entity complies with the criteria listed in points (a) to (e) and information about the sources of its funding in general, its organisational, management and membership structure, its statutory purpose and its activities.

4. Member States shall ensure that the criteria they use to designate an entity as a qualified entity for the purpose of bringing domestic representative actions are consistent with the objectives of this Directive in order to make the functioning of such representative actions effective and efficient.

5. Member States may decide that the criteria listed in paragraph 3 also apply to the designation of qualified entities for the purpose of bringing domestic representative actions.

6. Member States may designate an entity as a qualified entity on an ad hoc basis for the purpose of bringing a particular domestic representative action, at the request of that entity if it complies with the criteria for designation as a qualified entity as provided for in national law.

7. Notwithstanding paragraphs 3 and 4, Member States may designate public bodies as qualified entities for the purpose of bringing representative actions. Member States may provide that public bodies already designated as qualified entities within the meaning of Article 3 of Directive 2009/22/EC are to remain designated as qualified entities for the purposes of this Directive.

Questions

1. Which body(ies)/organisation(s) in your view should deal with the application and designation process for:

- qualified entities bringing domestic representative actions, and
- qualified entities bringing cross border representative actions?

Please provide reasons for your answer.

5. Should Ireland avail of this option and apply the criteria specified in paragraph 3 to qualified entities seeking designation to bring domestic actions? Please provide reasons for your answer.

6. Should Ireland avail of this option and allow qualified entities to be designated on an ad hoc basis in order to bring a specific domestic action? Please provide reasons for your answer.

7. Should Ireland avail of this option and as part of the transposition process designate specific public bodies for the purposes of bringing both domestic and cross border actions? Please provide the name of such bodies, if applicable, and the reasons for your answer.

Article 7
Representative actions

1. Member States shall ensure that representative actions as provided for by this Directive can be brought before their courts or administrative authorities by qualified entities designated in accordance with Article 4.
2. When bringing a representative action, the qualified entity shall provide the court or administrative authority with sufficient information about the consumers concerned by the representative action.
3. The courts or administrative authorities shall assess the admissibility of a specific representative action in accordance with this Directive and national law.
4. Member States shall ensure that qualified entities are entitled to seek at least the following measures:
 - (a) injunctive measures;
 - (b) redress measures.
- 5. Member States may enable qualified entities to seek the measures referred to in paragraph 4 within a single representative action, where appropriate. Member States may provide that those measures are to be contained in a single decision.**
6. Member States shall ensure that consumers' interests in representative actions are represented by qualified entities and that those qualified entities have the rights and obligations of a claimant party in the proceedings. The consumers concerned by a representative action shall be entitled to benefit from the measures referred to in paragraph 4.
7. Member States shall ensure that courts or administrative authorities are able to dismiss manifestly unfounded cases at the earliest possible stage of the proceedings in accordance with national law.

Question

5. Should Ireland take the option to allow qualified entities to seek these measures within a single representative action and for a single final decision? Please provide reasons for your answer.

Article 8
Injunction measures

Member States shall ensure that injunctive measures referred to in point (a) of Article 7(4) are available in the form of:

- (a) a provisional measure to cease a practice or, where appropriate, to prohibit a practice, where that practice has been deemed to constitute an infringement as referred to in Article 2(1);
- (b) a definitive measure to cease a practice or, where appropriate, to prohibit a practice, where that practice has been found to constitute an infringement as referred to in Article 2(1).

2. A measure referred to in point (b) of paragraph 1 may include, if provided for in national law:

- (a) a measure establishing that the practice constitutes an infringement as referred to in Article 2(1); and**
- (b) an obligation to publish the decision on the measure in full or in part, in such form as the court or administrative authority considers appropriate, or an obligation to publish a corrective statement.**

3. In order for a qualified entity to seek an injunctive measure, individual consumers shall not be required to express their wish to be represented by that qualified entity. The qualified entity shall not be required to prove:

- (a) actual loss or damage on the part of the individual consumers affected by the infringement as referred to in Article 2(1); or
- (b) intent or negligence on the part of the trader.

4. Member States may introduce provisions in their national law or retain provisions of national law under which a qualified entity is only allowed to seek the injunctive measure referred to in point (b) of paragraph 1 after it has entered into consultations with the trader concerned with the aim of having that trader cease the infringement as referred to in Article 2(1). If the trader does not cease the infringement within two weeks of receiving a request for consultation, the qualified entity may immediately bring a representative action for an injunctive measure.

Member States shall notify the Commission of any such provisions of national law. The Commission shall ensure that that information is publicly available.

Questions

2. Should Ireland avail of the options in paragraph 2? Please provide reasons for your answer in each case.

4. Should Ireland introduce or maintain provisions of national law where the qualified entity is only able to seek the injunction measures in paragraph 1(b) after it has attempted to achieve the cessation of the infringement in consultation with the trader?

If Ireland was to introduce such provisions what form should they take and should a third party be required to facilitate it?

If applicable, indicate any such provisions currently in national law?

Please provide reasons for your answers.

Article 9

Redress measures

1. A redress measure shall require a trader to provide consumers concerned with remedies such as compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid, as appropriate and as available under Union or national law.
- 2. Member States shall lay down rules on how and at which stage of a representative action for redress measures the individual consumers concerned by that representative action explicitly or tacitly express their wish within an appropriate time limit after that representative action has been brought, to be represented or not by the qualified entity in that representative action and to be bound or not by the outcome of the representative action.**
3. Notwithstanding paragraph 2, Member States shall ensure that individual consumers who are not habitually resident in the Member State of the court or administrative authority before which a representative action has been brought have to explicitly express their wish to be represented in that representative action in order for those consumers to be bound by the outcome of that representative action.
4. Member States shall lay down rules to ensure that consumers who have explicitly or tacitly expressed their wish to be represented in a representative action can neither be represented in other representative actions with the same cause of action and against the same trader, nor be able to bring an action individually with the same cause of action and against the same trader. Member States shall also lay down rules to ensure that consumers do not receive compensation more than once for the same cause of action against the same trader.
5. Where a redress measure does not specify individual consumers entitled to benefit from remedies provided by the redress measure, it shall at least describe the group of consumers entitled to benefit from those remedies.
6. Member States shall ensure that a redress measure entitles consumers to benefit from the remedies provided by that redress measure without the need to bring a separate action.
7. Member States shall lay down or retain rules on time limits for individual consumers to benefit from redress measures. **Member States may lay down rules on the destination of any outstanding redress funds that are not recovered within the established time limits.**
8. Member States shall ensure that qualified entities are able to bring representative actions for a redress measure without it being necessary for a court or administrative authority to have previously established an infringement as referred to in Article 2(1) in separate proceedings.

9. The remedies provided by redress measures within a representative action shall be without prejudice to any additional remedies available to consumers under Union or national law which were not the subject of that representative action.

Recital 43

(43) Consumers concerned by a representative action for redress measures should have adequate opportunities after the representative action has been brought to express whether or not they wish to be represented by the qualified entity in that specific representative action and whether or not they wish to benefit from the relevant outcomes of that representative action. To best respond to their legal traditions, Member States should provide for an opt-in mechanism, or an opt-out mechanism, or a combination of the two. In an opt-in mechanism, consumers should be required to explicitly express their wish to be represented by the qualified entity in the representative action for redress measures. In an opt-out mechanism, consumers should be required to explicitly express their wish not to be represented by the qualified entity in the representative action for redress measures. Member States should be able to decide at which stage of the proceedings individual consumers are able to exercise their right to opt in to or out of a representative action.

Questions

2. and Recital (43) Should Ireland introduce an opt-in or opt-out mechanism, or a combination of both bearing in mind that an opt-in system automatically applies to individual consumers who are not habitually resident in the Member State of the court or administrative authority before which a representative action has been brought?

At what stage of the proceedings should individual consumers be able to exercise their right to opt in to or out of a representative action?

Please provide reasons for your answers.

7. Should Ireland avail of this option and, if so, where should such outstanding funds be directed? Please provide reasons for your answer.

Article 11

Redress settlements

1. For the purpose of approving settlements, Member States shall ensure that in a representative action for redress measures:
 - (a) the qualified entity and the trader may jointly propose to the court or administrative authority a settlement regarding redress for the consumers concerned; or
 - (b) the court or administrative authority, after having consulted the qualified entity and the trader, may invite the qualified entity and the trader to reach a settlement regarding redress within a reasonable time limit.
 2. Settlements referred to in paragraph 1 shall be subject to the scrutiny of the court or administrative authority. The court or administrative authority shall assess whether it has to refuse to approve a settlement that is contrary to mandatory provisions of national law, or includes conditions which cannot be enforced, taking into consideration the rights and interests of all parties, and in particular those of the consumers concerned. **Member States may lay down rules to allow the court or administrative authority to refuse to approve a settlement on the grounds that the settlement is unfair.**
 3. If the court or administrative authority does not approve the settlement, it shall continue to hear the representative action concerned.
 4. Approved settlements shall be binding upon the qualified entity, the trader and the individual consumers concerned.
- Member States may lay down rules that give the individual consumers concerned by a representative action and by the subsequent settlement the possibility of accepting or refusing to be bound by settlements referred to in paragraph 1.***
5. Redress obtained through an approved settlement in accordance with paragraph 2 shall be without prejudice to any additional remedies available to consumers under Union or national law which were not the subject of that settlement.

Questions

2. Should Ireland allow for the court not to approve settlements that are unfair? Please provide reasons for your answer.
4. Should Ireland lay down rules that allow for consumers who are part of the representative action to accept or refuse to be bound by settlements referred to in paragraph 1? Please provide reasons for your answer.

Article 13

Information on representative actions

1. Member States shall lay down rules ensuring that qualified entities provide information, in particular on their website, about:
 - (a) the representative actions they have decided to bring before a court or administrative authority;
 - (b) the status of the representative actions they have brought before a court or administrative authority; and
 - (c) the outcomes of the representative actions referred to in points (a) and (b).
2. Member States shall lay down rules to ensure that the consumers concerned by an ongoing representative action for redress measures are provided with information about the representative action in a timely manner and by appropriate means, in order to enable those consumers to explicitly or tacitly express their wish to be represented in that representative action pursuant to Article 9(2).
3. Without prejudice to the information referred to in paragraphs 1 and 2 of this Article, the court or administrative authority shall require the trader to inform the consumers concerned by the representative action, at the trader's expense, of any final decisions providing for the measures referred to in Article 7 and any approved settlements as referred to in Article 11, by means appropriate to the circumstances of the case and within specific time limits, including, where appropriate, informing all consumers concerned individually. This obligation shall not apply if the consumers concerned are informed of the final decision or approved settlement in another manner.

Member States may lay down rules under which the trader would only be required to provide such information to consumers if requested to do so by the qualified entity.

4. The information requirements referred to in paragraph 3 shall apply mutatis mutandis to qualified entities concerning final decisions on the rejection or dismissal of representative actions for redress measures.
5. Member States shall ensure that the successful party can recover the costs related to providing information to consumers in the context of the representative action, in accordance with Article 12(1).

Questions

3. Should Ireland avail of this option and allow for traders to provide this information only if requested by qualified entities? Please provide reasons for your answer.

Article 14

Electronic databases

- 1. Member States may set up national electronic databases that are publicly accessible through websites and that provide information on qualified entities designated in advance for the purpose of bringing domestic and cross-border representative actions and general information on ongoing and concluded representative actions.**
2. Where a Member State sets up an electronic database as referred to in paragraph 1, it shall notify the Commission of the internet address at which that electronic database is accessible.
3. The Commission shall set up and maintain an electronic database for the purposes of:
 - (a) all communications between Member States and the Commission referred to in Article 5(1), (4) and (5) and Article 23(2); and
 - (b) cooperation between the qualified entities referred to in Article 20(4).
4. The electronic database referred to in paragraph 3 of this Article shall be directly accessible to the extent relevant, respectively, for:
 - (a) the national contact points referred to in Article 5(5);
 - (b) courts and administrative authorities, if necessary under national law;
 - (c) qualified entities designated by the Member States for the purpose of bringing domestic representative actions and cross-border representative actions; and
 - (d) the Commission.

Information shared by the Member States within the electronic database referred to in paragraph 3 of this Article regarding qualified entities designated for the purpose of bringing cross-border representative actions referred to in Article 5(1) shall be publicly available.

Questions

1. Should Ireland set up such databases and what form should they take? Please provide reasons for your answer.

Article 20

Assistance for qualified entities

- 1. Member States shall take measures aiming to ensure that the costs of the proceedings related to representative actions do not prevent qualified entities from effectively exercising their right to seek the measures referred to in Article 7.**
- 2. The measures referred to in paragraph 1 may, for example, take the form of public funding, including structural support for qualified entities, limitation of applicable court or administrative fees, or access to legal aid.**
- 3. Member States may lay down rules to allow qualified entities to require consumers who have expressed their wish to be represented by a qualified entity in a specific representative action for redress measures to pay a modest entry fee or similar charge in order to participate in that representative action.**
4. Member States and the Commission shall support and facilitate cooperation between qualified entities and the exchange and dissemination of their best practices and experience as regards dealing with domestic infringements and cross-border infringements as referred to in Article 2(1).

Recital 70

(70) Having regard to the fact that representative actions further the public interest by protecting the collective interests of consumers, Member States should retain or take measures aiming to ensure that qualified entities are not prevented from bringing representative actions under this Directive due to the costs associated with the procedures. Such measures could include limiting applicable court or administrative fees, granting the qualified entities access to legal aid, where necessary, or providing qualified entities with public funding to bring representative actions, including structural support or other means of support. However, Member States should not be required to finance representative actions.

Questions

1., 2. And Recital (70) What measures should Ireland take to implement these provisions and in what circumstances do you think a qualified entity should merit consideration for these measures?

Which measures do you think would be most appropriate for a qualified entity seeking to launch a representative action in Ireland and should there be distinctions made between a domestic qualified entity and a cross border qualified entity seeking to launch a representative action in relation to what type and level of support they could seek?

What conditions should be placed on such an organisation to ensure it acts in the best interests of its clients and fulfils its duties?

Please provide reasons for your answers.

3. Should Ireland avail of this option and allow for qualified entities to require consumers to pay a modest entry fee?

If so, what amount should be charged and in what circumstances?

Should there be a waiver for consumers in certain circumstances?

Please provide reasons for your answers.