



An Roinn Fiontar,
Trádála agus Fostaíochta
Department of Enterprise,
Trade and Employment

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

Response Template

March 2021

As set out in the consultation, the Department of Enterprise, Trade and Employment is specifically seeking views on the Member State options in the Directive.

Respondents have the opportunity to comment generally on the Directive at the end of the template and express any views on other specific articles of the Directive should they wish.

Please include your response in the space underneath the relevant option, to set out/ explain your views on each. Completing the template will assist with achieving a consistent approach in responses returned and facilitate collation of responses.

When responding please indicate whether you are providing views as an individual or representing the views of an organisation.

Respondents are requested to return their completed templates by email to conspol@enterprise.gov.ie by the closing date of **Friday 7 May 2021**. Hardcopy submissions are not being received at this time due to remote working. 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).

Name(s):	Raymond O'Rourke and Dermott Jewell
Organisation:	Consumers' Association of Ireland (CAI)
Please briefly describe your interest in this Directive:	<p>The CAI has been lobbying since 2004 for the introduction into Ireland of a Collective Redress mechanism for consumer disputes. In 2009 we made our first official submission to Government proposing then the establishment of a Group Action Legal Procedure in Ireland.</p> <p>The Association was founded in 1966 and is recognised as Ireland's independent, not-for-profit, NGO and consumer representative body both at home and across the European Union. The references within the directive to qualified entities apply to the Association.</p>
Email address:	cai@thecai.ie
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Article 4

Qualified entities

Question:

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.

Response:

As per Article 4(2) and(3) of the Directive (EU) 2020/1828 providing and requiring that:

Member States shall ensure that entities, in particular consumer organisations, be designated as qualified entities for the purpose of bringing domestic representative actions, cross-border representative actions, or both;

And

That the representative entity shall be a non-profit, non-government association demonstrating independence and actual public activity in the protection of consumer interests;

The Consumers' Association of Ireland (CAI), since its establishment in 1966 as a non-profit, non-government organisation, has had as its sole purpose the protection of consumer interests and has since then been pursuing numerous activities in this respect, as documented by our website and regular newsletter, our frequent involvement in public debate and our promotion of Irish consumer interests on the international level. We therefore consider that the Consumers' Association of Ireland fulfills, in every way, the requirement and intention of the Directive and should be the designated representative entity (qualified entity) in Ireland, both as regards domestic and cross-border actions.

Question:

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.

Response:

Yes. The CAI meets all of the qualifying criteria as set out above.

Question:

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.

Response:

We would consider this to be wholly inappropriate. To do so could present the ability for any private entity to undermine the intention of the Directive. It is obviously important to avoid the risk that collective redress be used for undue purposes beyond consumer protection. Experience in the EU countries which have a national collective redress procedure and as provided by BEUC Members engaged in the procedure, clearly shows that consumer associations successfully make use of their role and, e.g., ensure that only well grounded cases are taken forward.

Indeed, that national experience of our BEUC colleagues also shows that it is a poor solution to facilitate bodies beyond the non-profit, non-government sphere to be relied upon which is why the applicability criteria, in Art.4(2) and (3) require to be applied with the consideration of what is intended under the Directive in terms of independent designation and priority.

Question:

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 and the reasons for your answer.

Response:

We would consider that this would be contrary to the philosophy and intention of the Directive.

As we have outlined above, national experience reflects that it is a poor solution to facilitate public or private bodies to be solely relied upon which is why the applicability criteria require to be applied with the consideration of what is intended under the Directive in terms of independent designation and the priority that this reflects.

Please indicate any other general comments or recommendations you may have on Article 4:

The Consumer' Association of Ireland (CAI) has been representing the independent voice of the Irish consumer for 55 years both at home and across the European Union.

The CAI is a member of BEUC –the European Consumer Organisation and currently holds the Presidency of ANEC – the European Consumer Voice in Standardisation.

The Associations's experience is a matter of record and its connections to and representations, across many agencies, boards and committees of the State and EU are of significance in recognising its wealth of knowledge and experience of the consumers needs and entitlements.

Article 7

Representative actions

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.

Response:

The intention, as we understand it, is for a single action to be taken on behalf of the collective interests of consumers where feasible and under specific conditions. Providing this option is therefore a requirement if that is to be achieved.

Please indicate any other general comments or recommendations you may have on Article 7:

Article 8

Injunction measures

Question:

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

Response:

Yes. It would make sense that, if the representative action demonstrates an infringement of EU consumer law (transposed by national law), then it should follow that the court's decision is published –(added to the Commission database mentioned later) – by way of assisting Consumer NGOs throughout Europe to use these decisions to highlight the usefulness of the Directive and its capabilities in determining successful consumer redress.

Question:

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.

Response:

We would not agree with the introduction of such a provision.

Such an option under Irish law would necessitate the qualified entity being mandated to undergo consultations with the trader to cease the infringement before the court would have decided upon the representative action.

Firstly, these additional measures would add another level of complexity and, secondly, acts to further surrender consumer rights and entitlements. The State already provides sufficient and significant funds and resources to bodies to mediate and mitigate upon consumer losses and related issues of complaint.

It is the failure of this process that it at the heart of the provisions of the Directive – its goal is to put an end to the undermining of EU Consumer law by offering an appropriate mechanism for redress that seeks to eliminate poor and bad practice and, key to its provision, require a factor of compensation for continual breach of that law.

The consumers and, later, the representative funded bodies will already have engaged with and exhausted efforts in realising a solution for the individual consumer.

For the force of the representative action to be beneficial to consumers & their rights then it should be a clean, efficient procedure where businesses have lost or forfeited their rights to mediation and must face the court – the CAI would argue strongly that to give this ‘mediation’ option to traders/businesses is to weaken EU Consumer Law.

Please indicate any other general comments or recommendations you may have on Article 8:

Article 9

Redress measures

Question:

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.

Response:

This has continued to be a complex and difficult decision for many of the Member States. The Association considers that an opt-in mechanism would be best suited for Ireland.

We consider that the choice offered of opt-in and the attending requirement that they notify the qualified entity provides a better option for certainty and clarity with regard to the subject matter of the complaint upon which the action will be based.

With regard to staging of procedure, obviously with legal advice and management of the manner and means of registration (opting in), we would consider that the appropriate method would be through a deadline, flagged well in advance, through appropriate channels and media services deemed most appropriate.

Question:

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

Response:

Outstanding funds should be maintained and retained, after all costs have been paid in full, by the qualified entity – the Consumer NGO. It follows that full oversight and external auditing will be necessitated for transparency. It must be clearly defined where the collected funds go and to what purpose they have been used. Importantly, it is to be avoided that funds are directed toward the state treasury as this goes distinctly against a resulting effective compensation to the consumers.

There does require to be a discussion regarding a return, in some reasonable part or percentage, of advance funding provided toward the establishment of capacity to the qualified consumer association.

Please indicate any other general comments or recommendations you may have on Article 9:

Article 11

Redress settlements

Question:

2. Should Ireland allow for the court not to approve settlements that are unfair? Please provide reasons for your answer.

Response: Yes, this is a logical provision provided there is clarity upon the influencing factors of the decision and, notably, that it is not unfair to either party. Of course, while it is a situation to be avoided, it would follow that such decision could be appealed to a higher court.

Question:

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.

Response:

Again, this is a challenging question.

However, if the consumer has responded to the invitation, clearly outlined and detailed, to opt-in and are provided with the option to opt out – post the hearing of and decision upon the case - this would seriously undermine the very basis of the collective redress facility provision and its intended purpose.

It follows that, having chosen to opt-in they must be bound to accept the decision and settlement terms.

Please indicate any other general comments or recommendations you may have on Article 11:

Article 13

Information on representative actions

Question:

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.

Response:

No. The qualified entity should provide all information on representative actions.

We see no reason why the trader/business can be required to only provide limited information – if there is an issue of e.g. a trademark, confidential corporate information that will have been adjudicated – and argued - in the court

It is a matter of current procedure that our Courts have the right to publish settlements and court decisions. This is a matter of public disclosure and entitlement that must be protected.

Please indicate any other general comments or recommendations you may have on Article 13:

Article 14

Electronic databases

Question:

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

Response:

We do not consider this to be necessary at this point and notably as there is provision for a Commission database.

What will be key is that there is a known and, preferably, single point of access for consumers to engage through and opt in. This can best be facilitated through a simple click-on point on the home page of the qualified entity website for active representative actions.

Alternatively, it could be facilitated that the entry could be made on the national website with the final result uploading simultaneously to the Commission and national entity sites.

This would also support the provision under Article 20 that 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).

Please indicate any other general comments or recommendations you may have on Article 14:

Assistance for qualified entities

Question:

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.

Response:

On the basis that measures are required to ensure that the qualified entity is not prevented from effective exercise of their rights as provided and also the guide for structural support of qualified entities, it has always been the case in our previous submissions that a focus to the lower courts and robust management of costs would be a guiding principle.

However, in context, it must be understood from the outset that such costs are, generally, dictated by the established process and fees for judicial actions and, in addition, professional fees, at best negotiated under tender, for what are established legal actions through the lower courts.

Recital 70 refers to access to legal aid but this is, generally, under particular limitations and it would likely fall that such actions would be required to be taken by means of structural and other means of support.

Question:

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.

Response:

This, again, could refer in the context of Recital 70 in that it refers to other sources and means of support.

However, while some form of contribution would be a plausible and reasonable expectation in such cases, as is referred to here, it could only be at a modest sum and at a suggested maximum example for consideration of €10.

We consider this a maximum as it is appropriately below the cost of a Small Claims Court fee and personal action in seeking redress through this long established and popular consumer means of affordable access to justice,.

This would be important in the sense that it must be affordable and sufficient to reflect an intention to opt in. There can be consideration of reductions, for example, to €5 in the case of student/low paid or waiver in the case of unemployed. But these require further examination and discussion.

What is of primary importance is that there is provision for redress actions and acknowledgement that no individual wishing to join a collective action is not denied the ability to do so.

Please indicate any other general comments or recommendations you may have on Article 20:

General comments on the Directive or on other specific articles of the Directive

General comments on the Directive:

The provision of representative actions is a long required and crucial strengthening of private enforcement of consumer law for Irish consumers. It offers a realistic and affordable opportunity for obtaining redress for damages caused by mass infringement of our laws.

There is the opportunity to close a significant gap in our enforcement of consumer rights and it will empower consumers in a fair and supportive manner in areas which have eluded sufficiently prepared and grouped actions to date.

It is a reality that certain traders do, and will continue to, abuse their position and by doing so cause loss and damage to the interests of consumers. The inability to take action facilitates continuity of a number of mass breaches which, if not challenged, will result in further erosion of consumer rights and the loss of trust in the market and in regulators and governments from unsupported consumers.

It is important that the Directive is established properly from the outset.

This necessitates, we consider, that a respected, trusted, experienced and independent consumer association is resourced to take effective and efficient actions – as is recommended.

We submit, respectfully, that the Consumers' Association of Ireland (CAI) is the appropriate and proven entity to be qualified and supported to take this position.

ENDS

Consumers' Association of Ireland

6th May 2021