



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 from the Competition and Consumer Protection Commission

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):	Policy and International Division
Organisation:	Competition and Consumer Protection Commission (CCPC)
Please briefly describe your interest in this Directive:	The CCPC is an independent statutory body with a mandate to enforce competition and consumer protection law in Ireland. As the organisation responsible for the enforcement of a wide range of consumer protection legislation, the CCPC constantly monitors developments in this sector. Under s.10 (1) of the Competition and Consumer Protection Act 2014, the CCPC has a statutory function to promote competition and to promote and protect the interests and welfare of consumers. It is in this context that the CCPC responds to this consultation.
Email address:	advocacy@ccpc.ie
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Article 4

Qualified entities

Article 4 paragraph 11

Question: 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:

Article 4.1 of the Directive requires that Member States shall ensure that representative actions as provided for in the Directive can be brought by qualified entities designated by the Member States for this purpose.

The scope of consumer law covered by the Directive, as outlined in Annex I, is very broad and covers a large number of areas of consumer protection such as but not limited to product safety, medicinal product safety, food safety and consumer rights regarding electronic communications networks and services, energy services, financial services, air and sea travel services, environment-friendly products and services.

As such, the CCPC considers that a large number of bodies in different, relevant sectors could act as qualified entities for representative actions. The organisation responsible for the designation process for qualified entities bringing both domestic and cross-border representative actions should be separate from the entities themselves. In other words, to ensure good governance, qualified entities should not be responsible for the designation of other bodies.

With the above in mind the CCPC recommends that a lead Government Department is nominated for overseeing the application and designation of qualified entities in accordance with the Directive.

Article 4 paragraph 3

Question: 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:

Article 4.3 of the Directive sets out the criteria with which bodies should comply in order to be able to be designated as a qualified entity for the purpose of bringing cross-border representative actions. These criteria include:

- a) The entity 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.

Article 4.4 requires that 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 the Directive. Article 4.5 adds that Member States may decide that the criteria listed in paragraph 3 also applies to the designation of qualified entities for the purpose of bringing domestic representative actions.

The CCPC notes that the Directive will provide for the first time for a compensatory collective redress procedure in Ireland. It is suggested that employing the criteria as set out in Article 4.3 would allow for the greatest degree of certainty as to the operation of the provisions of the Directive, particularly as it will be a novel development in Irish law.

Article 4 paragraph 6

Question: 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:

Article 4.6 states that 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.

Recital 28 provides context regarding the designation of qualified entities on an ad-hoc basis at a domestic level. It underlines that the Directive should not encourage Member States to introduce the possibility of designating qualified entities on an ad hoc basis. However, for the purpose of domestic representative actions, the Directive states that Member States should also, or alternatively, be able to designate qualified entities on an ad hoc basis for a specific domestic representative action. The Directive adds that it should be possible for such designation to be made by the court or administrative authority seised, including by way of acceptance, where applicable. However, the Directive does stress that for the purposes of cross-border representative actions, common safeguards are needed. Therefore, qualified entities that have been designated on an ad hoc basis should not be allowed to bring cross-border representative actions. The CCPC does not consider that there is a reason why qualified entities could not be designated on an ad hoc basis for the purposes of a specific domestic action as long as they meet the criteria set in law for designation.

Article 4 paragraph 7

Question: 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:

Article 4.7 of the Directive enables Member States to designate public bodies as qualified entities for the purpose of bringing representative actions. The Article further states that Member States may provide that public bodies already designated as qualified entities, within the meaning of Article 3 of the Directive 2009/22/EC, are to remain designated as qualified entities for the purposes of this Directive.

The CCPC suggests that significant consideration is required to provide for the required legislative and operational changes necessary to enable group litigation in Ireland. The resource implications for designated public bodies to operate as qualified entities for the purposes of transposing the Directive must form part of this consideration.

The CCPC notes the recommendation of the Review of the Administration of Civil Justice, for the purposes of designating qualified entities, that a Group Litigation Order-type procedure should be introduced in the High Court and the Circuit Court.

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

The CCPC would like to add the following comments regarding Article 4 of the Directive:

The CCPC considers that the potential resource implications on a qualified entity could be very significant, and this should be taken into account in the considerations around this question. As highlighted in the Directive, it is crucial that if public bodies are designated as

qualified entities they should have the necessary resources to undertake representative actions, and funding should not act as a deterrent or barrier to them.

Furthermore, given the location in Ireland of many large traders who trade across the EU, it is possible that a qualified entity in Ireland could be requested to take on proceedings on behalf of consumers located outside the Irish jurisdiction, which implies significant resource implications which should be considered in this regard.

Article 7

Representative actions

Article 7 paragraph 5

Question: 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:

Article 7.5 states that Member States may enable qualified entities to seek injunctive or redress measures within a single representative action, where appropriate. It also adds that Member States may provide that those measures are to be contained in a single decision.

Allowing qualified entities to seek both injunctive and redress measures within a single representative action and for a single final decision would enable certain efficiencies for consumers and for the overall process. It is therefore the CCPC's view that qualified entities should be able to seek these measures within a single representative action and for a single final decision.

Some Member States only allow representative litigation for injunctive or declaratory measures. A declaratory decision can then be used by consumers to engage in further proceedings to seek redress measures by themselves or through another representative action if possible in the relevant country. The result of this is that often consumers who engage with the initial representative action seeking injunctive measures will not want to engage with follow-on representative actions or additional proceedings due to the resource implications.

The CCPC notes that the 'Review of the Administration of Civil Justice' report recommended that a comprehensive multi-party action procedure should be introduced in Ireland in the form of a Group Litigation Order (GLO) model. This model differs from the class action approach in that it consists of a scheme for the management of individual cases which give rise to common or related issues of fact or law by a single judge. The report does however acknowledge that there will also be a need to legislate for a single

representative action procedure encompassing multiple claims to meet the requirements of this Directive.

The CCPC considers that a single representative action for both types of measures would create efficiencies such as freeing judicial resources which might have been used for the purposes of several actions brought about against the same trader for the same matter and can also reduce time and potential costs for plaintiffs and for defendants, who need to litigate the disputed issue only once rather than numerous times.

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

The CCPC has no further comment on Article 7 of the Directive.

Article 8

Injunction measures

Article 8 paragraph 2

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

Response:

Article 8.1 requires that 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).

Article 8.2 then notes that 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.

Injunctive measures as referred to in point (b) of paragraph 1 of Article 8 are definitive measures to cease a practice or where appropriate, prohibit a practice, where that practice has been found to constitute an infringement. In order to ensure that a final decision ruling that a practice should be ceased or prohibited is recognised nationally and

across Member States, any such decision should establish that the practice constitutes an infringement.

Article 8 also sets out that a definitive measure to cease a practice or prohibit a practice could include 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. As consumer protection decisions may affect large proportions of the public, it is the view of the CCPC that transparency and consumer awareness of any such decision would be two important principles to promote when transposing the Directive. Therefore, measures to publish decisions should be included unless exceptional circumstances could be argued. The European Commission follows this transparency principle and publishes information around its decisions on infringements online¹. The European Commission also publishes an annual report which presents infringement cases by policy area and country.

Article 8 paragraph 4

Questions: 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:

Article 8.4 indicates that 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 definitive injunctive measure to cease or prohibit a practice after it has entered into consultations with the trader concerned with the aim of having that trader cease the infringement. 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. The Article further states that Member States shall notify the Commission of any such provisions of national law. The Commission shall ensure that the information is publicly available.

The Injunctions Directive (S.I No.555 of 2010)², which will be repealed by the Representative Actions Directive, currently provides in Article 3 subsection 4 that before a qualified entity makes an application to the Court for an injunctive order, it should make reasonable efforts to consult with the person for the purposes of achieving the cessation

¹ https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/?lang_code=en

² <http://www.irishstatutebook.ie/eli/2010/si/555/made/en/print>

of the infringement concerned, and request the person not to infringe those interests. Subsection 5 states that if after consultation or reasonable efforts at consultation, the qualified entity is of the opinion that the person has continued to act, or is likely again to act, in a manner that constitutes an infringement, the qualified entity may, two weeks after the commencement of such consultation, for the purposes of protecting the collective interests of consumers, make an application for an injunctive measure.

The CCPC has found, in its experience with the Injunctions' Directive, that the mandatory period of consultation with the infringing party has hindered the effectiveness of the regime and detracted from the effectiveness of the system, often causing delay in the interruption or termination of an unlawful or harmful practice, which is particularly problematic in cases where the harm or detriment caused by the practice is very high. Furthermore, the measure has had a particularly negative impact on the ability of the CCPC to react efficiently in ceasing harmful practices by traders in fast moving markets.

If similar requirements were to be implemented in national law, the CCPC would stress that qualified entities should be able to seek interim measures as outlined in Article 1(a) of the Directive to cease a practice or prohibit a practice before engaging with the trader and without any delay.

Furthermore, as the Representative Actions Directive sets out in Recital 20, qualified entities should also be able to bring an injunctive action against infringements that have ceased before the representative action is brought or concluded, since it might still be necessary to prevent the repetition of the practice by prohibiting it and to establish that a given practice constituted an infringement or to facilitate consumer redress. Therefore, a qualified entity may find it necessary to bring a representative action to the Courts for injunctive measures even if the trader has agreed to cease a practice or to not act in a certain manner in order to establish the practice as an infringement. In such cases, the qualified entity may not consider it necessary to engage with the trader.

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

The CCPC particularly welcomes the proposal to allow infringements which have ceased before the representative actions commenced to be addressed by the Directive. This would go some way towards addressing the 'phoenix syndrome' where traders having occasioned particular consumer detriment dissolve one corporate entity to re-emerge in another guise.

Article 9

Redress measures

Article 9 paragraph 2 & Recital (43)

Questions: 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:

Recital 43 states that Member States should provide for an opt-in mechanism or an opt-out mechanism or a combination of the two which best responds to their legal traditions for their system of representative action. As outlined by the recital, 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.

Article 9.2 of the Directive stipulates that Member States should 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.

It is the view of the CCPC that the system for collective action in Ireland should rely on an opt-in system. Both the Law Reform Commission's consultation paper and the 'Review of the Administration of Civil Justice' report reviewed the use of opt-in and opt-out models and indicated that the opt-in model would be more appropriate for a system of collective redress in Ireland. While acknowledging the potential benefits of an opt-out models, both documents highlighted that an "opt out" model would be an unfamiliar concept within the law system in Ireland. Furthermore, they indicated that the opt-out model usually serves other much larger jurisdictions, where claimants are dispersed over a wide geographical area and where it may be difficult to communicate the commencement of the group to many of those affected. However, the Law Reform Commission argued that because in Ireland the pool of potential litigants is relatively small, "an organised and targeted means of notification should serve the objective of widespread reach and obviate the need for an opt-out approach". In short, the report argued that the geographic and demographic profile of Ireland does not warrant an opt-out model.

However, in a report by the Civil Justice Council providing recommendations for reform for collective actions in the UK³, it is argued that opt-in mechanisms are not ideal vehicles for the prosecution of collective claims, as they can represent a barrier to entry to access to

³ <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/CJC/Publications/CJC+papers/CJC+Improving+Access+to+Justice+through+Collective+Actions.pdf>

justice, and therefore cannot provide effective access to justice for those individuals whose claims are of limited individual quantum and where the litigation (cost) risk far outweighs the potential value of a successful judgment.

Looking across collective action systems across the European Union, it can be noted that although most Member States officially use either an opt-in or opt-out system for collective actions, many actually use a mix of both systems under certain circumstances. A review of these systems seem to indicate that opt-in mechanisms may be preferable in small actions where it is easy to identify the members concerned, while opt-out measures may be preferable for collective actions with a large number of members concerned and where a low monetary value is being sought for reparation to each members.

The CCPC notes that the adoption of an opt-in system for representative actions in Ireland could have significant cost implications for the qualified entity or any other body responsible for the identification, communication and engagement with the relevant consumer groups.

The CCPC recommends that there should be a limitation period for individuals to opt-in before a claim is certified by a Court. Furthermore, the CCPC would recommend that any representative action using an opt-in system should ensure that the group of consumers concerned are appropriately defined before the action is brought to the Courts. The use of 'joint action contracts' would be particularly useful in this endeavor. In the case where opt-out mechanisms were to be allowed in Ireland for representative actions, the CCPC would recommend that these should allow for individuals to opt-out until late in the proceedings.

For instances when individuals should be able to opt-in to a multi-party action, the Law Reform Commission's consultation paper recommended that at the certification stage, the court should determine a cut-off date beyond which entry on the register would require court authorisation. Where an individual litigant wished for whatever reason to opt out of the group beyond the filing, court permission should be required, and it should be open to the court to make a costs order penalising the individual litigant for the delay in opting-out and for the potential harm caused to the proceedings.

The Law Reform Commission also contended in its consultation paper, that it is arguable that the Constitutionally guaranteed right of access to the courts involves a corresponding and converse right of non-access or, in other words, a right not to be compelled to litigate⁴. Therefore, should such measures be put in place in Ireland, any action brought under an opt-out mechanism should allow concerned consumers to opt-out as late as possible into the proceedings.

Article 9 paragraph 7

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

⁴ <https://www.lawreform.ie/fileupload/consultation%20papers/cp25.htm>

Response:

Article 9.7 of the Directive sets out that Member States should lay down or retain rules on time limits for individual consumers to benefit from redress measures. It further adds that Member States may lay down rules on the destination of any outstanding redress funds that are not recovered within the established time limits.

The CCPC notes that examples of this practice exist in some legal systems for collective action across Member States and the UK.

The CCPC proposes that consideration could be given to the possibility of a distribution of funds based on what is known as the Cy-Pres doctrine. Distribution according to the “Cy-Pres” doctrine in anti-trust litigation means that damages awarded are not distributed directly to those injured to compensate for the harm they suffered but are rather used to achieve a result which is as near as possible (e.g. damages attributed to a fund protecting consumers’ interests in general). Alternatively, any outstanding funds could accrue to the Exchequer.

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

The CCPC has no further comment on Article 9 of the Directive.

Article 11

Redress settlements

Article 11 paragraph 2

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

Response:

Article 11.2 of the Directive states that settlements (either jointly proposed by the qualified entity and the trader or invited by the court or administrative authority), 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. The Article further adds that Member States shall lay down rules to allow the court or administrative authority to refuse to approve a settlement on the grounds that the settlement is unfair.

The CCPC notes that the ‘Review of the Administration of Civil Justice’ report recommended that where the terms on which the proceedings are to be compromised/settled are not agreed between the parties, the court must convene a case

conference to arrange for the terms to be agreed, if need be by mediation. In the absence of a mediated agreement, the court shall specify the terms on which proceedings are to be compromised or settled. The CCPC observes that the measures in Article 11(2) would complement the above recommendations of the Review Group and would further allow for the protection of the interests of consumers.

Article 11 paragraph 4

Question: 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.

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

The CCPC has no further comment on Article 11 of the Directive.

Article 13

Information on representative actions

Article 13 paragraph 3

Question: 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:

Article 13.3 of the Directive sets out that 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 decision providing for the redress measures as outlined in Article 7 and any approved settlements as outlined in Article 11. This information should be conveyed by means appropriate to the circumstances of the case and within specific time limits, including, where appropriate, informing all consumers concerned individually. The Directive highlights that this obligation shall not apply if the consumers concerned are informed of the final decision or approved settlement in another manner. The Article adds that 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.

The CCPC recommends that similar arrangements to those set out in the Consumer Protection Act 2007 – Section 82 subsections (2) & (3) should be put in place when transposing the Directive.

Currently, under the Consumer Protection Act 2007, the Court may, on conviction of a person and on application of the agency, order the person to publish the facts relating to the commission of the offence and a corrective statement in respect of those facts at their own expense and in any manner the court considers appropriate.⁵ The Court may also, based on the submissions of the Agency in the application and as it considers appropriate, specify the form and content of the corrective statement or give any directions in respect of the publication of that statement.⁶

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

The CCPC has no further comment on Article 13 of the Directive.

⁵ Consumer Protection Act 2007 – Article 82 subsection (2)

⁶ Consumer Protection Act 2007 – Article 82 subsection (3)

Article 14

Electronic databases

Article 14 paragraph 1

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

Response:

Article 14.1 of the Directive indicates that 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.

The CCPC would consider the set-up of such a database an asset to the overall collective redress system in Ireland. A national electronic database could also ease reporting to the European Commission as outline under Article 5.1 and Article 23.2 of the Directive, and enable greater exchange of information with other Member States. The CCPC would also suggest that qualified entities also publish information regarding representative actions on their website and link to the overall database.

The availability of publicly accessible national electronic databases which provide such information would align with government objectives to be more transparent and increase public access to government data.

In recent years, there have been multiple examples of open government databases directly accessible to the public through websites. A good example of a government database is the Irish State Administration Database⁷ which has been available to the public since 2006. The database records information about all national-level public organisations and provides a very useful resource for members of the public seeking further information around the public sector. The ongoing cost and resourcing of such a database would need to be considered.

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

The CCPC has no further comment on Article 14 of the Directive.

⁷ <http://www.isad.ie/>

Article 20

Assistance for qualified entities

Article 20 paragraph 1, Article 20 paragraph 2 & Recital (70)

Questions: 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:

Article 20.1 states that Member States shall take measures that aim to ensure that the costs of the proceedings related to representative actions do not prevent qualified entities from effectively exercising their right to seek redress measures. Article 20.2 adds that these measures 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. It is noted that Recital (70) states that Member States should not be required to finance representative actions.

As outlined in the Directive, it is important that any designated qualified entity has to be able to demonstrate that it has sufficient funds to resource the action. Therefore, if the Government were to designate and appoint certain qualified entities for specific areas of consumer law, it should ensure that these organisations are appropriately resourced to do so.

Recital (39) of the Directive provides that Member States should ensure that qualified entities are not prevented from bringing representative actions under the Directive because of the costs involved with the procedures. Unlike some other Member States, Ireland does not have a tradition of well resourced 'non-State' not-for-profit consumer organisations. The organisations that do exist are generally voluntary by nature with limited resources. Even where funding might be available to those organisations through a third party, CCPC understands that such funding might not be permitted other than in limited circumstances under national law. In May 2017, the Supreme Court upheld the law that precludes persons with no interest or connection in proceedings from funding the litigation of one of the parties in the case of *Persona Digital Telephony Limited and Another v The Minister for Public Enterprise, Ireland and Others* [2017] IESC27 ("Persona"). The CCPC notes that the law on champerty and maintenance, as confirmed in the decision in *Persona*, provides that third party funding is unlawful in Ireland. The

CCPC further notes that this matter was considered by the Review Group on the Administration of Civil Justice in Ireland. On the question of whether the law on champerty should be revised, the report concluded that 'the Review Group considers that the weighing of the policy considerations should await completion of the more detailed examination of this subject being undertaken by the Law Reform Commission' on Contempt of Court and other Offences and Torts Involving the Administration of Justice. To that end it would appear that any decision on third party funding should consider the outcome of the Law Reform Commission's work in this area. It is also noted that Article 10 of the Directive states that where third-party funding is permitted by Member States 'conflicts of interests are prevented and that funding by third parties that have an economic interest in the bringing or the outcome of the representative action for redress measures does not divert the representative action away from the protection of the collective interests of consumers.'

The CCPC notes the recommendation of the Review Group on the Administration of Civil Justice in Ireland that guidelines be drawn up for the assistance of parties and their representatives, by reference to individual items that could be outlined in a table of costs. The Report states that such guidelines 'should take into account prevailing economic conditions and refer to the need to ensure no more than a reasonable level of remuneration on a party and party basis.' The report further suggests that such guidelines may be drawn up by either the Office of the Legal Costs Adjudicator or the Legal Services Regulatory Authority. The CCPC would welcome greater certainty in any guidance produced with the aim of reducing the cost of litigation. This would in turn be of value for qualified entities in undertaking representative actions.

Furthermore, one of the significant barriers in terms of resources for qualified entities seeking to bring a representative case might be the timescales involved. The CCPC would therefore suggest that consideration be given to the possibility of 'fast-tracking' relevant procedures for representative actions. Finally, the resource implications for public bodies designated as a 'qualified entity' may be significant and would require consideration before such designation decisions are made.

Article 20 paragraph 3

Questions: 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:

Article 20.3 of the Directive indicates that 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.

Ultimately, the CCPC considers that fees from group members would not be necessary for a system of representative actions in Ireland, but they could be a source of support for qualified entities seeking financial aid in order to carry-out a representative action using an opt-in system. The fee however should not be so high as to deter consumers which have been harmed by an infringement to join the action.

Should an opt-out system for collective redress be established in Ireland, the CCPC considers that it would not be appropriate to charge a modest fee in opt-out proceedings, where concerned individuals may be numerous and difficult to identify. Any fee could be seen as a barrier to access to justice. This should be taken into account, particularly given the aim of this Directive is to allow a large number of consumers to be compensated, where that individual sum of compensation may be quite small. It may not be worthwhile to consumers if they have to incur a fee to seek redress.

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

The CCPC has no further comment on Article 20 of the Directive.

General comments on the Directive:

Overall, the CCPC welcomes the Directive and considers that its transposition should provide an opportunity for Ireland to establish a system for collective actions which is much more efficient than the current system. Many breaches of consumer protection law result in small losses to large numbers of individual consumers and consequently large overall gains by the traders concerned. The CCPC believes that representative actions for the protection of collective interests of consumers would be an additional and effective enforcement tool for combating such consumer harm. Such representative actions are likely to be the most effective way of achieving compensation for categories of consumers harmed by breaches of consumer protection law.

The CCPC however notes that the scope of the Directive is confined to representative actions brought in respect of breaches by traders of consumer protection law (as set out in Article 2(1) and Annex I to the Directive). It is noted that Annex I lists Regulation 2016/679 (the General Data Protection Regulation). As noted in the Review Group report, the Data Protection Act 2018 at Section 120(1) provides that a 'data subject may mandate a body, organisation or association to which section 120(2) applies' to bring an action under Section 128 (a 'data protection action') against a data controller or processor for an infringement of a data subject's right to protection of their personal data. Section 128 allows for compensation to be awarded for breach of data rights. Section 120(1) also provides that a data subject may mandate such a body to appeal a decision of the Data Protection Commission made under Section 150 of the Data Protection Act 2018. Section 120(2) provides the criteria to be met by such bodies, organisations or associations. The interaction of Section 120 of the Data Protection Act 2018 with the provisions of this Directive should be carefully considered.

From its 2018 report on the implementation of the Recommendation of 11 June 2013 on collective redress mechanisms in the EU⁸, the CCPC considers that the European Commission clearly envisages that collective redress mechanisms should be available across a broad spectrum of policy areas and not solely limited to the area of consumer protection law.

The Directive requires that representative actions be brought before courts or administrative bodies in the Member States. In Ireland, this entails that the access for representative action should be either through the Circuit or High Court. The CCPC notes that injunctive relief is only available in the Circuit Court (in limited circumstances) and the High Court. Representative Actions which include the possibility of injunctive relief will of necessity be heard in those Courts. In that instance CCPC is mindful of the 'sufficient information' obligation that may need to be provided to initiate the action.⁹

⁸ <https://ec.europa.eu/transparency/regdoc/rep/1/2018/EN/COM-2018-40-F1-EN-MAIN-PART-1.PDF>

⁹ In Recital (49) and Article 7 paragraph 2, the Directive stipulates that Member States should require qualified entities to provide sufficient information in support of representative actions for redress measures. Recital 49

Article: 3**Comments:**

The CCPC would suggest that some consideration will have to be given to establishing whether a threshold figure for consumers harmed is necessary in order to commence an action. It is not clear from the definition in Article 3 what number of consumers must be affected before it can be considered a 'collective' interest.

adds that this should include a description of consumers affected by the infringement and the questions of fact and law to be dealt with in that representative action.