



DLA PIPER RESPONSE

PUBLIC CONSULTATION ON THE TRANSPOSITION OF
DIRECTIVE (EU) 2020/1828

7 May 2021





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Public Consultation On The Transposition Of Directive (EU) 2020/1828

Our response

We refer to the above public consultation (**Consultation**) published by the Department of Enterprise, Trade and Employment (**Department**).

DLA Piper Ireland welcomes the opportunity to provide observations on the questions raised in the Consultation. DLA Piper is a global law firm representing clients who will be directly affected by the implementation 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 (**Directive**).

Please see our comments below in the Response Template. We greatly value the opportunity to offer our views on the Consultation and would be delighted to discuss these further with the Department.

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Our Response

Article 4

Qualified entities

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.

The Irish Courts are best placed to certify and approve applications to be designated as qualified entities. The application and designation process should act as a systematic check and filter against abusive or frivolous litigation. The role of the certifier should be to ensure that only entities which have a *bona fide* interest in consumer rights are certified, as opposed to entities which are set up to operate on a profit sharing basis and the Irish Courts are best place to carry out this role effectively. However any designated process should be applied on an *ad hoc* basis, as a check rather than a hurdle.

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.

Yes. The criteria in Article 4(3) are essential to implement the objectives of the Directive to allow *appropriate* qualified entities to bring claims to protect consumer rights and also to prevent abusive litigation. The criteria also will also serve to better protect consumers who will rely on such entities. These criteria ensure a necessary degrees of transparency, particularly in relation to funding, and evidence-gathering, which is critical for qualified entities. For both domestic and cross-border qualified entities, it should be possible for defendants to challenge and verify compliance with the above criteria in the Irish courts, as referred to in Article 5(4).

The representative actions potentially may be brought for an extensive and diverse range of breaches under a variety of domestic and EU legislation. The actions may impact on a broad range of sectors. It is therefore essential that the qualified entities are appropriately qualified to bring actions to ensure consumers have their rights enforced effectively.

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.

Yes, subject to our comments above.

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.

Yes. There is a benefit to ensuring that certain public bodies are designated as qualified entities. The public bodies should also satisfy the criteria in Article 4(3) and be formally designated to allow such actions to be commenced. The entities should include those bodies which are already empowered to protect consumers rights, such as the Competition and Consumer Protection Commission (CCPC), and the Commission for Communications Regulation (ComReg).

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

N/A

Article 7

Representative actions

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.**

We believe that it is a safeguard for a single representative action with a single final decision to be possible, as it will facilitate the smooth operation of such actions. We believe a single representative action would enhance legal certainty and will prevent the unnecessary escalation of costs and court time. This is consistent with the current basis for obtaining injunction relief.

However, there may be circumstances where it might be appropriate to allow actions to be brought independently for both remedies, and in circumstances where redress is not an appropriate or adequate remedy, then a class can bring a claim for injunctive relief.

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

We consider that it should be possible for the Irish courts to dismiss manifestly unfounded cases at the earliest possible stage of proceedings in order to avoid vexatious litigation, as mentioned in Recital 39 and Article 7(7).

Article 8

Injunction measures

2. Should Ireland avail of the options in paragraph 2?

Please provide reasons for your answer in each case.

Providing this discretion to the Irish courts is unnecessary and disproportionate to the objectives of the Directive, in circumstances where there is an adequate regime for injunctive measures to safeguard the rights of consumers, including the ability of the court to bring an ongoing practice to an end and to prohibit a practice going forward. An adverse judgment by the Irish courts may already constitute a decision that a practice is an infringement, if that is the subject of the dispute. The proposed measures do not remedy an infringement. There are additional measures in the underlying consumer protection regime which ensures sufficient information is provided to consumers, and is adequate to safeguard consumers in this regard. Arguably these measures go against the need to discourage vexatious claims.

As a matter of general principles, decisions of the Irish courts are published publicly, and are frequently reported by the media.

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.

Yes, the implementation of the Directive should provide that injunctive relief may only be sought where there has been an attempt in good faith to achieve the cessation of the infringement in consultation with the trader. This acts as an important check to ensure the purpose of any action is to end the infringement of consumer rights, and provides an opportunity to reach a resolution which benefit consumers in timely manner without incurring the costs of litigation or engaging the court's time. Further, the existing checks and balances, which are well entrenched in Irish law, should be applied to any injunctive relief sought under the Directive.

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

N/A

Article 9

Redress measures

- 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.

We recommend that the opt-in mechanism be introduced in Ireland, as it is important to ensure that the class members are appropriately identified and proactively join a class by providing individual and explicit consent. Claimants should be identified clearly as parties to the litigation and will be bound by any judgment or settlement to follow. It is in the interests of sound administration of justice, and to safeguard against frivolous and vexatious litigation, and other abuses which opt-out is likely to result in, that an opt-in mechanism be introduced, with consumers opting-in at the earliest stage possible, and where possible before the representative action is brought. It is on this basis of early and consensual opt-in that the Irish courts will be able to approve and certify the class.

Opt-in is an effective mechanism to implement the Directive, particularly in a jurisdiction which to date does not permit group actions.

Qualified entities are responsible for ensuring that consumers are informed about representative actions being brought and actively engaged in the process, in keeping with the aims of the Directive. Individual consumers should opt in before initiation of the claim formally before the Irish courts, or alternatively in any event before pleadings are closed. Qualified entities should be able to evidence that consumers have explicitly expressed their wish to be represented by the qualified entity in the representative action for redress measures.

It must be possible for defendants to identify the class of consumers involved in the representative action in order to properly defend a claim and effectively evaluate potential liability at the earliest stage possible.

- 7. Should Ireland avail of this option and, if so, where should such outstanding funds be directed?**

Please provide reasons for your answer.

Yes, redress funds which are unclaimed by consumers should be redirected after a reasonable time frame has expired. Such a time limit should be clearly established and well publicised. There should be an obligation on qualified entities to inform consumers of this timeframe and undertake all reasonable efforts to ensure funds are distributed.

Such a provision should not apply to funds which are paid in settlement pursuant to a contractual agreement, and only to redress funds paid in compliance with a court order.

Any unclaimed redress should not revert to the qualified entity engaged in the representative action as this may erode or appear to erode the legitimate interests of the consumer, where it may create an interest or conflict. Any unclaimed redress should be directed to an appropriate charitable organisation which supports consumer rights.



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

N/A

Article 11

Redress settlements

2. Should Ireland allow for the court not to approve settlements that are unfair?

Please provide reasons for your answer.

The Irish courts cannot 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. We consider that this is sufficient to satisfy the terms of the Directive, and therefore there is no requirement for further restrictions. We do not believe that Ireland should provide for the Irish courts not to approve settlements on the basis of perceived unfairness.

Commercial negotiations should be permitted and encouraged, as is presently the case under Irish law. The Directive allows for sufficient safeguards such as the qualified entities being appropriately designated and the criteria in Article 4(3) being applied. Parties to a dispute should retain the ability to enter into any agreement to resolve the issues raised. It is a fundamental feature of commercial settlement that parties are at liberty to negotiate freely. Parties to a settlement will have information pertinent to settlement and the appropriate terms, which will not necessarily be before the court. The freedoms of parties to negotiate fully should not be eroded, and such a restriction on rights is not required in order to implement the Directive.

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.

It is our view that approved settlements should be binding upon the qualified entity, the trader and the individual consumers concerned. Our recommendation is that individuals opt in to such actions at the earliest stage, and therefore any actions proceed collectively. This meets the purpose and objective of the Directive to facilitate cases brought on behalf of collective groups, rather than fragmented litigation. An important feature of representative actions is the ability to achieve efficiencies for all parties, including the qualified entities, which would be undermined by settlement being negotiated and agreed on an individual basis.

There would also be logistical issues to be overcome in an individual continuing a court action which has been settled. In circumstances where individual consumers opted out of settlement, this may create difficult issues as to the allocation of costs where an action is in progress and an individual seeks to continue the action. An individual could be unduly exposed to legal costs where the action is in progress and settlement otherwise agreed.

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

N/A

Article 13

Information on representative actions

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.**

Our recommendation is that Ireland should introduce rules that traders only provide this information on request by qualified entities. The principal obligation to communicate the state of the representative actions should remain with the qualified entities who have undertaken an action, and qualified entities have an obligation to ensure that the qualified entity provides sufficient and timely information to consumers, and any measure over and above is unnecessary. There should not be a mandatory obligation on traders, as no such obligation currently exists under Irish law, but there should be discretionary provision for this information to be provided.

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

N/A

Article 14

Electronic databases

1. Should Ireland set up such databases and what form should they take?

Please provide reasons for your answer.

Our view is that a publicly accessible electronic database would be beneficial for identifying designed qualified entities, and should include evidence that the appropriate criteria to be designated has been met. This is in addition to the obligations on qualified entities under Articles 14(3) and (4). We do not make any proposals as to the form or structure, but recommend that the database is free at the point of access and easily accessible. It is important that consumers are aware of ongoing actions, and able to easily identify which qualified entities are capable of bringing an action, particularly if the opt-in mechanism is chosen.

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

N/A

Article 20

Assistance for qualified entities

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.

At the outset, we believe that this Consultation should also have addressed long standing issues of litigation funding, particularly given that many consumers and qualified entities will struggle to avail of the remedies under the Directive without third party funding.

Qualified entities should be able to clearly identify the source of funds for the particular litigation and its operation, and demonstrate that there is no conflict between litigation funder and the legitimate interests of the action.

The existing principle of adverse costs should apply and qualified entities should be required to demonstrate sufficient funds in commencing an action. A preliminary hearing should take place to address any issues arising regarding funding.

Court fees should not act as a hurdle to bringing representative actions, and modest court fees should be maintained.

Should any public funding, limitation of court fees, or access to legal aid be provided for, it is essential that this is balanced against the objectives of the Directive. Only qualified entities which meet the criteria of Article 4(3) should have access to any public funding or measures under this Article, to avoid commercial or inappropriate use of funds.

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.

We consider that the legislation should provide the ability for a modest entry fee to be charged by qualified entities. However it is important that there is a modest statutory cap on any such fee, and that a waiver be available in circumstances where the entry fee acts as a barrier to accessing the remedies under the Directive. It will be a decision for the qualified entities as to whether the application of a such a fee is appropriate.

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

N/A

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

General comments on the Directive:

The Directive reflects the importance of ensuring consumer protection, and providing procedural mechanisms for collective redress.

Ireland is a hub for legal services and a key jurisdiction for EU headquartered entities, with many global companies domiciled in Ireland. Businesses share an aim to ensure that consumer confidence is high, and that, particularly with ever increasing globalisation and digitalisation, that consumers are not harmed by unlawful practices. It is in the shared interest of both traders and consumers that harmful infringements are prohibited, and that there are effective means to bring unlawful practices to an end. An important consideration for any commercial entity is the certainty of the legal framework, confidence in the judicial system, and an ability to assess the risk of defending claims. There is a clear benefit for such organisations in there being an avenue for multi-party claims being brought comprehensively in one action, rather than fragmented litigation which incurs higher costs and significant court time.

As multi-party actions continue to grow in prominence, and become an inevitable reality, Ireland has the opportunity to introduce a framework which allows such claims to be brought in an efficient manner, avoiding unnecessary costs and court time. Certainty and procedural clarity allows businesses to understand and assess litigation risk. The Directive facilitates the bringing of cross-border actions, and it is imperative that Ireland is a leading jurisdiction, rather than a scenario where Irish domiciled entities are routinely sued outside of the jurisdiction due to the difficulties in accessing the Directive remedies nationally. Having at least one effectively implemented procedural mechanism for representative actions available creates a level playing field for litigation against traders across the internal market. It is in the commercial interests of the businesses active in Ireland that multi-party claims are properly funded and structured.

The Directive should be given effect in Ireland with a robust framework, with appropriate checks and balances. There is a manifest interest in ensuring that the necessary balance between protecting consumers' access to justice and providing appropriate safeguards to avoid abusive litigation that would unjustifiably hinder the ability of businesses to operate is maintained. The existing court framework should be enhanced to facilitate the bringing of any actions under the Directive. The implementation of the Directive raises matters of court policy procedure, and significant developments are required to ensure the system is fit for purpose. We would recommend that alongside the implementation of this Directive there should be detailed consideration of any necessary steps to facilitate actions under the Directive being brought, and how collective actions can be implemented in the existing framework.

The issue of third party funding should be addressed as a matter of priority. Ireland is almost unique in common law jurisdictions in prohibiting such funding, and in circumstances where there is limited recourse to civil legal aid, it is extremely difficult to envisage how qualified entities will be funded in order to pursue representative actions.

In terms of the redress which might be awarded, the Directive does not provide any mechanism or guidance on the quantification of damages. This is a complex issue for the courts to consider in the context of litigation. As is already the case in Ireland, the awarding of punitive damages should be avoided to prevent the misuse of representative actions. Irrespective of whether an opt-in or opt-out mechanism is adopted for identifying representative classes, the broad axe principle for determining damages should apply.

Article: 6(3) Bringing of cross-border representative actions**Comments:**

As part of the implementation of the framework for bringing representative actions, specific provision should be made to allow for the Irish courts to examine whether the statutory purpose of the qualified entity justifies its taking action in a specific case, and for defendants to challenge this.

Article: 10 - Funding of representative actions for redress measures**Comments:**

We believe that many consumers and qualified entities will struggle to avail of the remedies under the Directive without third party funding. Funding should be considered when it is in the legitimate interest of protecting consumer rights. As Ireland does not have an established framework for funding, there should be consultation specifically on how this will be implemented and the impact on the existing rules against such funding. Maintenance and champerty are both torts and criminal offences. As was recently recognised by the Supreme Court in *Persona Digital Telephony Limited v The Minister for Public Enterprise*, for-profit third party funding is unlawful. The Supreme Court has previously recognised the importance of reform in this area, and in *SPV OSUS Limited v HSBC Institutional Trust Services (Ireland) Limited & Ors*, which concerned the legality of an assignment of a cause of action, called upon the legislature to urgently reform the area.

Article: 19 - Penalties**Comments:**

Any penalties imposed in relation to a failure to comply with an injunction should be by reference to existing provisions under Irish law.

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