



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](mailto: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](mailto:Aedin.Doyle@enterprise.gov.ie))
- Paul Brennan at Tel. 087 7434526 (or at [Paul.Brennan@enterprise.gov.ie](mailto:Paul.Brennan@enterprise.gov.ie)).

Name(s):	Gerard Rudden
Organisation:	Global Justice Network
Please briefly describe your interest in this Directive:	I am an Irish solicitor and board member of the Global Justice Network. The Global Justice Network ("GJN") is a network of lawyers from across the globe who bring court actions in order to protect the rights of victims and consumers. GJN has particular expertise in the area of collective redress actions. GJN recognises the importance of the transposition of Directive 2020/1828 into individual member state law. The transposition of Directive 2020/1828 offers a unique opportunity to redress the imbalance between consumers and large traders. This imbalance is particularly accentuated in Ireland where, due to high legal costs, it is impossible for a consumer to assert their rights on an individual basis. While each individual claim may be small, the cumulative effect on society and on confidence in the internal market cannot be underestimated. In order to protect consumers, it is essential that the transposition of Directive 2020/1828 removes all hurdles to achieving that goal including the archaic laws of champerty and maintenance. It is in my capacity as board member of GJN that I make these submissions.
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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 the body responsible for enforcing consumer protection, it appears that the Competition and Consumer Protection Commission is best placed to deal with the designation process for qualified entities.**

**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 or, at least, a slightly amended version. It is important to ensure that any entity that seeks to be designated has a bona fide interest in pursuing the litigation in order to protect consumers. The criteria set out at Article 4(3) seems to achieve that objective.**

**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: No. Designation should not be granted on an ad hoc basis linked to specific litigation. If an entity satisfies the criteria for designation as a qualified entity set out in Article 4 and makes an application to be so designated, it should be designated. There should be no prospect of an entity being refused designation due to the specific litigation that it proposes to bring.**

**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: GJN does not wish to answer this question.**

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

**An application for designation as a qualified entity should be opened in advance of the Directive being transposed. The application for designation should be a swift procedure. The nature of this litigation, in particular where injunctive relief is sought, is that the plaintiff must act without delay. The process for designating qualified entities must not result in a huge delay in consumers asserting their rights.**

#### *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: Yes, there should be a single representative action and a single final decision. Given the rules of evidence in Ireland, it would be a waste of time and resources to require more than one trial in relation to the same issues and facts so that different orders could be sought.**

**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 be beneficial for Ireland to avail of the options in paragraph 2. The option at paragraph 2(a) appears to be akin to declaratory relief which is a relief already available in Irish domestic law. The option at paragraph 2(b) appears to be justified on the basis that a central objective of Directive 2020/1828 is to provide an effective means to bring unlawful practices to an end, to obtain redress for consumers and to increase consumer confidence in the internal market. The publication requirement at paragraph 2(b) would assist greatly in achieving that objective.

**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:** No, in the case of imminent harm to consumers, a qualified entity should be permitted to seek immediate injunctive relief. However, if it is determined by the judge that the qualified entity ought to have engaged with the trader in advance of applying for injunctive relief, he/she should be entitled to penalise the qualified entity in a costs order.

**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: Ireland should operate an opt out mechanism or a combination of both opt out and opt in. It should not operate a solely opt in mechanism.**

**Recital 1 of the Directive states the following:**

**“Without effective means to bring unlawful practices to an end and to obtain redress for consumers, consumer confidence in the internal market is reduced.”**

**The most effective means to bring unlawful practices to an end and to obtain redress for consumers is through opt out mechanisms. Opt out mechanisms are available in jurisdictions across the European Union including the Netherlands, Belgium, Spain, Portugal and Italy. An opt out mechanism is also available in the UK. There is an economic and strategic benefit for Ireland to be a dispute resolution hub. Furthermore, the opt out mechanism would fit well in the common law system. Individual consumers should be afforded a period of between 3 and 6 months from the date the proceedings have issued to opt out of the representative action if an opt out mechanism is employed. Similarly, if an opt in mechanism is employed, individual consumers should be afforded a period of between 3 and 6 months for the date the proceedings have issued to opt in to the representative action.**

#### 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: Yes, for certainty Art 9(7) should be adopted. Option include returning the funds to the Defendant, distributing the funds to charity/non-profit, redistributing the funds to members of the class that have claimed or, preferably, a combination of the above.**

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

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*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, in order to provide an extra layer of protection for consumers, court approved settlements should be required.**

**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: No. In circumstances where individual consumers have either opted in or not opted out depending on the mechanism employed, they should be bound by the court approved settlement.**

**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: Yes. If the qualified entity is of the view, given the particular facts of the particular case, that it is not necessary that the trader be subject to the notification requirement, the trader should not be put to the expense of notifying individual consumers. In practice however, it is likely that in the vast majority of cases the qualified entity will require the trader to be subject to the notification requirement.**

**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: Yes. It is essential for consumers that an easy and accessible information is available.**

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

*Article 20*

**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: For the Directive to achieve its objective in Ireland, it is critical that litigation funding would be permitted for consumer actions in the jurisdiction. The laws of champerty and maintenance, if not revoked, will act as a barrier to the objectives set out in the Directive. Ireland should use the opportunity presented by the transposition of the Directive to set down rules in relation to litigation funding to ensure that it is regulated properly. If proper rules regarding litigation funding are put in place, the need for State support will be diminished.**

**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: No, there should be no cost for consumers as it will act as a barrier to them vindicating their rights.**

**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*

<b>General comments on the Directive:</b>
<b>Article:</b> <b>Comments:</b>
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