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):	Leisha Daly, Head of Governmental Affairs & Policy, Ireland Carol Leland, Legal Director Janssen Ireland
Organisation:	Johnson & Johnson (J&J)
Please briefly describe your interest in this Directive:	Johnson & Johnson is a leading global healthcare company with a strong presence in Ireland. Johnson & Johnson supports a fair and balanced access to justice for all parties involved
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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:

The appropriate body to deal with the application and designation process is the Competition and Consumer Protection Commission ("the CCPC"). The CCPC is already the Irish "Single Liaison Office" as per Art. 3.7 and 5 of REGULATION (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws. It already has Qualified Entity ("QE") status under the European Injunctions Directive, 2009/22/EC.

To the extent CCPC has insufficient expertise to assess criteria for qualification for the full sectoral scope of the transposed Directive, (cf. Annex 1 to the Directive for the width of the many EU law provisions to be covered) the CCPC should seek the advice of similar statutory bodies, or of the regulators themselves, for other sectors. So it should get advice, for example, for information about suitable QEs for the health sector from the Health Products Regulatory Authority, the HPRA, which through its Surveillance and Market Action function already oversees regulatory compliance.

The CCPC should designate both types of QEs, taking into account the recommendations by sectorally competent bodies where appropriate. This is because there should be no distinction in the criteria to be applied to domestic or cross-border QEs (for reasons explained below) . Both should be required to pass the Article 4 (3) tests, and for transparency, consistency and standardization of review and decision-making, it is sensible to have the one body, the CCPC, with the relevant experience, responsible for assessing the qualification criteria against each applicant for either type of designation.

The CCPC should be required to communicate data on an upcoming or ongoing claim at various stages with a relevant Ombuds entity, to the extent it exists, and if not, with the relevant regulator. The concept of designating, in advance, QEs to represent consumers seeking injunctive and redress measures means relevant data can be captured and fed concurrently across a framework of agencies capable of conducting Alternative Dispute Resolution (ADR), including Regulators and Ombuds entities.

The QE should in general demonstrate at least 12 months of (consumer protection) activity. A period of longer than 12 months would be preferable. "Grandfathered" QEs should also comply with these criteria. The CCPC (or nominated body) should ensure the same body is designated as both a domestic QE and a cross-border QE.

The CCPC/nominated body should put in place a transparent system for monitoring QEs' actions. Such a proposed system would require the CCPC or nominated body to update and communicate information regarding actions taken to the sector specific competent authorities (such as the HPRA) and involved ombuds 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.

There is no logical reason to distinguish between the criteria for designating a QE for the purpose of bringing a cross-border Representative Action and the criteria for designating a QE for bringing a domestic Representative Action. Any entity purporting to represent the collective interests of consumers in bringing a Representative Action should meet one set of criteria across the EU.

The Article 4 (3) criteria for the admission of cross-border QEs are not difficult to meet for an entity genuinely and legitimately wishing to represent consumers' interests by bringing representative actions. So they are not more onerous for entities seeking domestic-designated qualified status than for cross-border status. In substance, there is no difference, and there should be no difference, in the quality of a reputable entity proposing to conduct litigation within or outside the jurisdiction.

Another reason for consistency of qualification criteria is to avoid the risk of forum shopping. The Directive allows Member States to designate domestic QEs with little or effectively no controls. The result might be that entities will seek designation in those Member States with no control over the quality of domestic QEs and then bring multi-jurisdictional Representative Actions in that Member State.

Furthermore, the Directive does not specifically prohibit a domestically designated QE from bringing a cross-border action. It says that cross border QEs in the Commission's list under Article 5 (1) *must* be accepted by MS courts as having the necessary legal standing to bring a cross-border action. But a domestic QE will have legal standing (in its own jurisdiction); and if it purports to represent consumers in the foreign jurisdiction in which it is attempting to sue, the foreign court may well be disposed to allow it to sue under its purely national rules. Of course it may not; or it may require that QE to requalify. But requiring domestic QEs to requalify themselves before commencing foreign litigation does not make much sense if, and when, it is

simple for a Member State's laws to require all QEs to comply with the same criteria before being designated.

The way to prevent forum shopping in the Irish jurisdiction is thus to have common entry standards (the Article 4 (3) criteria) for all QEs, including those QEs which have been designated abroad and who are seeking to bring proceedings in Ireland, whether or not they purport to represent Irish consumers.

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

Ireland should not allow QEs to be designated on an ad hoc basis.

Recital 28 of the Directive states the Directive is explicitly not encouraging ad-hoc designation yet it contemplates that such designation "by the court of administrative authority seized", should be possible. This confuses the designation process of a QE, which is administrative, with the admissibility (or certification) process, which is judicial.

There have to be entry-level criteria which any applicant for designation needs to meet at the administrative stage to enable it to qualify for designation as a QE, and those criteria need to be standardized for all applicants. Designation of an ad-hoc QE (perhaps more accurately, a one-off QE), is a contradiction in terms unless it, too, is required to meet the Article 4 (3) criteria.

The court should not be involved in the designation process. Designation is an administrative process whereby the CCPC (in our submission the appropriate body), designates prior to any legal proceedings being initiated (or decides not to designate). Whereas admissibility (or certification) is a judicial process, whereby the court determines whether the litigation initiated or proposed by the QE should proceed as a Representative Action.

Article 7 (6) requires MSs to ensure that qualified entities "have the rights and obligations of a claimant party in the proceedings". But they have to be *qualified* first.

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: Yes

Ireland should 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.

The obvious public body for Ireland to designate for this purpose is the CCPC. It is already a Qualified Entity under the Injunctions Directive but it doesn't necessarily comply with Art 4(3) criteria. Its statutory remit may need changing to allow this to happen. If it is also to be the body responsible for designating (other) Irish QEs as we have suggested in answer to the question on Art 4 (1) there is no reason it cannot discharge this function.

We recommend keeping the task of enforcing consumer law also by way of collective actions fully in the hands of the state as described in the previous paragraphs and not create or support creation of a multiplicity of actors. This would be too harsh a change from the reasonable traditional Common Law doctrines, i.e. the prohibition of barratry, champerty and maintenance.

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

The European Commission's Internal Market Information System ("IMI System") should oversee and govern disputes relating to the recognition of designated QEs. This would ensure a central, multilingual and standardized platform for communication and conflict resolution across all Member States in this regard.

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.

Remedies available under Ireland's current representative action regime are limited to injunctive and declaratory relief only. Damages cannot be awarded.

There is no reason in principle why a claimant (here a QE) should not claim an injunction and damages in the same set of proceedings, although the process, procedural steps and substantive law governing these remedies are substantially different, and would be likely (if defended) hugely to increase the cost and complicate the objectives.

When transposing the Directive, for Ireland to allow QEs to seek both injunctive measures and redress measures (damages) within a single representative action for a single decision, guidance should be taken from Mr. Justice Peter Kelly and his review group's (the "Kelly Review Group") report entitled "Review of the Administration of Civil Justice Report" (the "Kelly Review Group Report") published in October 2020. The Kelly Review Group Report shares the Law Reform Commission's preference for a multi-party action model along the lines of the Group Litigation Order ("GLO") procedure in England and Wales, which allows for both injunctive relief and redress measures to be awarded within a single action. The Kelly Review Group Report found, however, that even if a form of the GLO model is adopted, to comply with the Directive there would be a need to legislate discretely, whether by adapting the existing representative action for that purpose or by providing separately for such an action.

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

Article 7 (3) requires MS courts to assess the "admissibility" of each specific representative action "in accordance with this Directive and national law". This is a crucial safeguard, which Ireland should adopt robustly in the transposition process by ensuring meaningful certification standards are specified and applied by the court at the "gatekeeper" stage.

The Irish courts are well used to assessing the admissibility of claims in the sense of disclosing a reasonable cause of action, and in the context of their existing jurisdiction, to determining whether a representative action should be allowed to proceed, but not, yet, within the framework of certifying a multi-party action ("MPA"). A Representative Action envisaged by the Directive is very similar to a MPA in its objectives.

The Art 7 (3) requirement invites certification in accordance with national law, thus inviting Ireland to formulate its own rules. Ireland can and should formulate stringent certification rules.

There are many precedents. All class action and multi-party action procedures across the common law jurisdictions (except Australia) have a certification stage, and specified criteria - more stringent in some jurisdictions than others - which have to be met by the claimant in order to have the litigation certified by the court, and proceed, as class or group litigation.

The Kelly Review Group's Report into the Administration of Civil Justice in Ireland recommends an MPA model along the lines of the Group Litigation Order ("GLO") procedure in England and Wales, which among other features, has a certification stage where the court considers whether to make the GLO by reference to set criteria, which are broadly expressed: the headline one being, the aggregation of claims "*which give rise to common or related issues of fact or law* (the 'GLO issues')". That test is a good starting point and has been shown to work, but it is a minimum; it is

not as stringent as the certification tests in Rule 23 of the Federal Rules of Procedure in the US, but these are for an opt-out procedure. A further key safeguard of the GLO is that it is opt-in.

Although the Kelly recommendations address an MPA model, rather than a QE/Representative Action model as mandated by the Directive, the fact that Art 7 (3) requires MS courts to assess the admissibility of the intended litigation in each case means that the GLO criteria, at the very least, could function equally well, for both models.

Another key safeguard in the GLO model procedure which under the Kelly proposals, can and should be easily adopted by the Irish system, given the similarity in court systems, and because it is intrinsic to the Irish system, is a strong judicial control of the litigation, and specifically a management judge having flexible and strong case management powers to deal with the exigencies of the particular MPA.

Furthermore, a pre-action protocol needs to be written into the procedural rules of court for consideration by the court at certification stage. The QE applying to certify a Representative Action needs, as a condition precedent, to satisfy the court at the certification stage that it has performed the terms of a pre-action protocol, which will include a requirement for prior mediation or other ADR process, and explain to the court's satisfaction, if necessary inter partes, why such mediation or other process has not succeeded.

Additionally the Irish court, as part of its certification process, should ask the prospective QE claimant to explain why a Representative Action appears to be the most economical and efficient way to resolve the proposed mass consumer claim, rather than pursuing the claim via an existing relevant ombuds entity if one exists, or a regulatory body able to coerce or nudge the defendant into a swift settlement, and the court should be empowered to defer certification (admission) of the collective action and request these other steps be taken first before it admits a costly and lengthy collective procedure, whether that QE is a domestic or a foreign one.

In addition, in a cross-border Representative Action brought in Ireland by a QE designated outside Ireland, in addition to facing the scrutiny of the Irish court "to examine whether the statutory purpose of the qualified entity justifies its taking action in a specific case" (Art 6 (3)), the Irish legislator would be free to require, and should require, just as for the admission of a Representative Action in Ireland, that consumers wishing to opt into such action taking place in an Irish court should be required to show:

(a) that there is no other suitable Representative Action in the respective consumer's home jurisdiction (Ireland for the Irish and their respective home MS for consumers from other MSs), and

(b) what attempts such consumer has made to submit his claim to the ombuds or regulatory redress bodies of their respective own jurisdiction.

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

There is no reason why Irish law should not allow a court judgment which grants a final injunction ("a definitive measure to cease a practice") to include: Art 8 (2) (a) a declaratory judgment, (provided one has been sought); and Art 8 (2) (b) an obligation in such form as the court considers appropriate, upon the trader to publish the "decision" - presumably the injunction, and/or further information.

However, imposing upon the trader the significant costs and timeline involved in this obligation to publish need to be taken into account. The obligation must be subject to careful scrutiny and be proportionate to the nature of the infringement.

By way of example, if the injunction were to be that the trader must cease the manufacture and supply of, say, an agrochemical product licensed for use in Ireland, or a licensed medicinal product on prescription in Ireland, then that is a different matter from a pervasive but one-off financial product mis-selling in Ireland. Quite apart from the practicalities of ceasing manufacture, and collaborating with the licensing authority, ensuring the effect of unwinding the complexities of the supply chain and in the case of a medicinal product, the doctor/patient relationship, would require substantial time for the right information to be imparted by the trader.

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: Yes

Ireland should introduce provisions of national law where the QE is only able to seek the injunction measures in Article 8(1)(b) (i.e. 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)) after it has attempted to achieve the cessation of the infringement in consultation with the trader.

The proposed consultation measure between the QE and the trader is a sensible one, as such a measure may prevent litigation being pursued at all. However, the suggested period of two weeks for the trader to cease an alleged infringement, from the date of receiving a request for consultation, is extremely short and in certain contexts probably unworkable.

The QE should only be allowed to seek injunctive relief after exhausting all attempts to achieve the cessation of the infringement in consultation with the trader. A period of six weeks, rather than two weeks, within which to do this may be more appropriate. Only in the most exceptional circumstances would two weeks be an appropriate timeframe, for example, where there is an endangerment of life or some form of catastrophic personal injury. In such circumstances, when balancing the endangerment of life or potential for catastrophic personal injury against the probable immense economic interference for the trader, the QE should be allowed to seek an interim injunction measure against the trader on the express basis that any such interim application be made on notice to the trader, and not on an *ex parte* basis.

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

None.

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: The procedure should be opt-in only for redress measures.

All discussion on the reform of Irish law in the area of multi-party actions in the last 18 years, which has included numerous comparative law analyses of different jurisdictional models, has concluded that opt-in is the appropriate mechanism for an Irish model. The Kelly Review Group's Report on its Review of the Administration of Civil Justice recommended opt-in as recently as October 2020 for their proposed Irish multi-party action procedure. The same reasoning they adopted applies to any form of representative action which gives effect to the Directive in Ireland.

The opt-in mechanism has been tried and tested in in England in over 100 Group Actions since inception of CPR Rule 19 establishing the English GLO procedure. Accordingly, there is long experience of its efficacy as a management tool in multiparty actions. Under this regime, a claimant on the Register cannot opt-out of the proceedings without dicontinuing his/her claim.

In practice the discipline inherent in every claimant issuing proceedings and signing onto a Register and, in a costs-follow-the-event regime, being in part on risk as to costs, ensures - combined with the absence of the other features of US class actions which encourage abuse - there is less risk of litigation hijack compared with an opt-out system. Thus, the likelihood of representatives (and funders) acting against the group's interest is greatly diminished. This topic has been the subject of reform discussion in Ireland for the past 18 years. Most recently, a comprehensive analysis of various comparative jurisdictions was carried out by the Kelly Review Group and set out in the Kelly Review Group Report.

The clear choice of exclusively opt-in implementation is all the more important as the Directive has difficult provisions about limitation periods in Articles 16 and 22.3, which need careful scrutiny in the transposition phase in any event, but would be wholly inoperable in an opt-out mechanism.

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

Surplus funds are an outcome normally possible only in an opt-out system. This is one of many reasons not to have an opt-out system.

In a normal multi-party action opt-in procedure, the risk of there being undistributed funds is negligible. This is because any award whether by judgment or settlement should have been arrived at by applying some form of triage assessment on a case-by-case basis, across categories and sub-categories of the Group on the Register as determined by the case managing judge. This is but one of the many advantages of an opt-in system. If the triage concludes that a consumer claiming to benefit suffered no loss, nothing is paid in respect of that applicant. And the Group is finite so there should be no surplus funds.

However, given that the concept of a QE driven Representative Action necessarily involves layers of communication with uninvolved if not totally detached opt-in

consumers via a third party intermediary, and the Directive mandates that Member States define time limits for individual opt-in claimants to benefit from a damages award or settlement, it is possible to envisage some opt-in consumers failing to claim their share in time after receiving notice from the QE. This might lead to surplus funds. In which case there needs to be a specified destination for such surplus.

Such excess or surplus funds are compensation due to identifiable consumers represented by a QE, but not claimed and therefore not paid to such consumers. They should be paid only to neutral, independent statutory bodies such as the CCPC.

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

Article 9 is very unclear in some of its wording. What does "..tacitly express" a wish to be represented mean, in Art 9 (2)? What is intended in the same para. by allowing consumers who expressly opt-in (to be represented in the specific RA), nevertheless express a wish "to be bound or not by the outcome of the representative action"? How do Art 9 (5) and (6) sit with an opt-in system and how , in Art 9 (6), are consumers who have not opted in, entitled to "benefit from the remedies provided by that redress measure?" The mechanics are unclear.

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

Ireland should allow for the court not to approve settlements that are unfair.

As collective redress actions are intended to be an efficient means of access to justice, fairness and transparency must be paramount. It would seem proper, therefore, that the court assigned with managing and hearing a representative action (and which is familiar with the details of the case) should be required to scrutinize any proposed settlement. In doing so, it should have the right not to approve the proposed settlement on grounds that include the settlement being unfair.

Further, where in accordance with Article 11 (1)(b) a court has the power to invite the parties to reach a settlement regarding redress, it seems sensible that that court's inherent jurisdiction would include sanctioning a settlement between the

parties and refusing to do so where it considers there to be unfairness within the proposed terms.

Only upon obtaining the court's approval that the settlement is fair (in addition to it being in compliance with mandatory provisions of national law) should the action be dismissed.

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

If there is to be a fully operational and exclusively opt-in system for all Representative Actions, then consumers who have opted into the action ("the individual consumers concerned by a representative action and by the subsequent settlement") cannot opt-out of the court approved settlement. Any other result would obviate the entire purpose of the opt-in representative action, and not achieve the finality which is another fundamental objective of the representative action procedure.

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

None.

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

The obligation upon the trader to inform under Art 13 (3) could be a very onerous one, depending on numbers. Ireland should therefore avail of this option and lay down rules for the trader to provide such information only if requested by the QE.

That this is especially problematic is shown by the blurred or muddled version of an opt-in Representative Action envisaged by the Directive whereby (a) individual opt-in consumers can opt-out of the outcome Art 9 (2); and (b) if the court describes the

group of consumers "entitled to benefit from the remedies provided by the redress measure" rather than specifying the individual consumers entitled to benefit. (Art 9 (5)).

Furthermore, the practicality of involving the QE, or the trader, or both, in communicating such information depends on who holds the most precise data. If the action is an opt-in regime sufficient data for the trader to notify all concerned will be relatively easy to access. If the trader does not know who outside those opting in (and staying in) may have some claim to the outcome (as postulated in the blurred situation above) the position is very unclear.

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

None.

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

Databases showing publicly available, useful, sufficiently detailed, and independently produced, information about qualified entities and current and concluded actions is crucial in the public interest to allow consumers and traders to be informed, and to enable them to identify Qualified Entities legitimized by an independent designation system, facilitating access to justice.

Such databases should provide links to the sites of relevant Irish regulators and Ombudsmen where they exist, and signpost consumers to them. Such an interface is a good means of encouraging alternatives to mass litigation, namely regulatory oversight and ADR uptake.

The website should also link up, separately, with the EU's IMI (Internal Market Information System) to allow sharing of information about domestic and cross border Representative Actions and QEs across the EU's regulatory authorities.

A database containing the specified information would naturally sit within the website of the DETE or the Ministry of Justice. der Representative Actions and QEs across the EU's regulatory authorities.

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

Article 14 (4)(c) - The database for the purposes of all communications between Member States and the Commission referred to in Art. 5.a, 5.4 and 5.5 and 23.2 should be opened only to those QEs which are designated well in advance, and then only on a confidential basis.

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:

The required measures are those which substantially reduce the cost of pursuing litigation in Ireland. It is widely recognized that Ireland is one of the costliest jurisdictions for litigation. Accordingly, the provisions of Article 20 requiring MS to ensure that the costs of Representative Actions do not prevent QEs from "effectively" exercising their right to litigate can only be dealt with by altering the litigation costs regime in Ireland to make the litigation much less expensive, or to put it in another way, to make it more attractive to consumers.

Fortunately, this has been addressed in some detail by the very recent Kelly Report, which looked at all the options for funding the high costs of litigation in Ireland, and came up with a set of majority recommendations, (including non-binding guidelines) and a set of minority recommendations (including the employment of tariffs and

tables of costs) on how to reform litigation costs in line with the remit of the Group to review ways of reducing costs (cf. Chapter 9, pp. 265-325, and the Minority Report pp. 425-435). The thorough analysis has therefore very recently been done. There is not uniformity as to how to proceed but the outlines of the issue are clear.

The "modest entry fee or similar charge" envisaged as a condition of individual consumers participating in a Representative Action is a sensible disincentive to reckless opt-in. However, this will not pay for the costs of litigating a multiparty action. Interestingly the criteria do not require the putative QE to show financial viability, just to show it is not insolvent or likely to be.

As there is very limited capacity for extra public funding of litigation, an extra dimension to solving the problem is the experience of the Canadian Province of Québec where it has successfully operated, for the last 4 decades, a central justice fund fed by very limited contributions from each and every collective action taking place in that Canadian province[1].

This is where the EU debate about class litigation could have grasped the bigger picture: the obvious better, cheaper and more efficient alternatives that already exist to private litigation. These are given merely lip service by the Directive's Article 23 (3) of a European Ombudsman for representative actions may be coming into being in 2028, which anyway relates only to cross border Representative Actions. The Directive limits its purview to measures relating to the "costs of proceedings", as opposed to transferring the costs of litigating to the public sector by means of ADR, Ombudsmen and Regulatory redress.

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: Yes.

Ireland should lay down rules to allow QEs to require consumers who have expressed their wish to be represented by a QE 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.

One of the many premises of an opt-in regime is that claimants "own" their claims and, at least share some of the responsibility of providing instructions and assisting with the initial administrative costs associated with any representative action. A "modest fee" for each opt-in claimant would be the claimant's *ad valorem* court fee for commencing proceedings.
Please indicate any other general comments or recommendations you may have on Article 20: **None.**

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

General comments on the Directive:
Article 18: Disclosure of Evidence **Comments: Many civil code jurisdictions have extremely limited disclosure obligations, and this Article seems designed to address the disclosure deficit in those jurisdictions, rather than the common law systems which already have extensive disclosure obligations.** **Nonetheless, transposition of the Directive into Irish law needs to ensure that fishing expeditions are not permitted. As judges will be the gatekeepers of representative actions brought, strong judicial control will be required. The Kelly Review Group Report considered the disclosure/discovery process in Ireland in detail. It confirmed that discovery in Irish litigation is frequently disproportionate to the objectives of the litigation and the interests of one or both parties. It recommended radical changes to the basis of discovery under Irish procedural rules (including primary legislation to replace the 'Peruvian Guano' dictum on relevance with much more limited criteria), changes which are designed to reduce its scope, and therefore its cost, and reduce the potential for major disruption of, and imbalance between the parties in the litigation process.** **Until those changes materialise, the model adopted by the Irish government to give effect to this Directive should ensure that the relevant procedures reflects those intended changes and that discovery in any representative action is proportionate in all the circumstances of the case.**