



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):	Stuart Trotter, Branch Manager
Organisation:	Liberty Seguros, Compania de Seguros Y Reaseguros, S.A, trading as Liberty Insurance (hereinafter ' we ' or ' Liberty Insurance ')
Please briefly describe your interest in this Directive:	<p>Liberty Insurance is part of the Liberty Mutual group, a group with over 100 years' experience in providing insurance to millions of customers around the world. Liberty Mutual is headquartered in the United States. In the Irish market, we offer a range of personal insurance products including car, motorbike, home and van.</p> <p>Europe is Liberty Mutual's second largest market, with operations in France, Germany, Ireland, Italy, the Netherlands, Portugal, UK and Spain. As an insurer, we can be affected directly by the representative action framework established by the Directive in our capacity both as defendants and liability insurers.</p> <p>We also have a broad interest, as an entity founded on the philosophy of fairness and doing the right thing for customers, in promoting safeguards in the implementation of the Directive. Such safeguards draw on our knowledge of the pitfalls of the U.S. class action system and are aimed at preventing detrimental</p>

	effects to consumers, businesses and the European economy at large.
Email address:	Stuart.Trotter@libertyinsurance.ie
Telephone number:	correspondence by email only please

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: Liberty Insurance does not seek to put forward a specific body or organisation which should deal with the application and designation process for qualified entities.

However, by way of a general comment on this Article 4(1), we would submit that strict scrutiny, on an on-going basis, of the fulfilment by qualified entities of the criteria set out by the Directive and transposing measures, is an important safeguard to avoid abusive, unmeritorious litigation and to ensure that entities filing representative actions are acting in the best interests of the consumer.

In the United States, where class action abuse has significant consequences, any plaintiff can represent a class by meeting general requirements. These general requirements, however, have been abused by creative lawyers, leading to a proliferation of suits which have provided little redress to consumers, while financially rewarding the lawyers.

We would therefore suggest that the body/organisation that is appointed to deal with the application and designation process:

- (1) Has adequate resources to manage the application and designation process in an effective manner;
- (2) Is a publicly funded entity which can act impartially in the assessment of qualified entities;
- (3) Maintains a robust certification process for the designation of qualified entities; and
- (4) Maintains an annual review process, pursuant to which designated qualified entities would be re-evaluated against the designation criteria on a yearly basis.

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: We recognise that consumer organisations play an important role in the EU and that many are also involved in other Member States in bringing collective redress actions. Nevertheless, as set out in the response on Article 4(1) above, we would stress

the importance of scrutinising the standing of qualified entities to ensure the balance between access to justice and avoiding abusive litigation is appropriately struck.

We urge the criteria in Article 4(3) of the Directive be applied to qualified entities bringing domestic actions as well. Without parallel application, qualified entities will be incentivised to seek designation to bring domestic actions to avoid the requirements included in the Directive. (This is because the Directive defines whether an action is cross border or domestic solely based on how the qualified entity is designated, leading to an incentive for qualified entities to designate themselves as domestic only to avoid additional requirements/scrutiny). Moreover, we see no public policy reason why the common sense requirements applied to cross border qualified entities should not be applied to domestic qualified entities (i.e., chartered for, and at least 12 months of experience in, protection of consumer interests, being non-profit in nature, solvent and not influenced by persons with an economic interest in such actions).

Additionally, we also suggest that Ireland go beyond the minimum criteria specified in Article 4(3) of the Directive in the following two ways:

- (1) Require that qualified entities share the same objective as the subject matter of the litigation, as included in the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (OJ L 201, 26.7.2013, pp. 60-65) (the '**Commission Recommendation**'). This criterion should be in addition to the requirement set out in Article 4(3)(b) of the Directive which requires that the qualified entity's 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 of the Directive. We would consider that the requirement that the qualified entity share the same objective as the subject matter of the litigation to be more focussed on the specific nature of the action in question than the existing requirement in Article 4(3)(b) and therefore necessary to ensure that the qualified entity is representing customers within an area that it has expertise and a bona fide interest.
- (2) Require the qualified entities to have the experience, administrative and financial capacity to appropriately represent the interests of claimants, as included in the Recommendation.

In addition to these safeguards, we would suggest that Ireland consider other requirements to ensure qualified entities do not have a financial incentive to bring actions, including by prohibiting such entities from sharing litigation awards and limiting relationships between law firms and qualified entities.

Question:

6. Should Ireland avail of this option and allow qualified entities to be designated on an ad hoc basis in order to bring a specific domestic action? Please provide reasons for your answer.

Response: We would suggest that Ireland consider not permitting qualified entities to be designated on an ad hoc basis in order to bring a specific domestic action.

We note that the Directive provides in Article 4(6) that in order for a qualified entity to be designated on an ad hoc basis, it must comply with the criteria for designation as a qualified entity provided for in national law and we further acknowledge that the criteria a qualified entity must fulfil in order to bring a domestic action have not yet been established in Ireland.

However, we would consider that such criteria, once established and considering the overall aim of the Directive to ensure only qualified entities who have a demonstrable history of public activity in the protection of consumer interests are designated, would highly likely negate the necessity for an ad hoc mechanism because entities fulfilling those criteria would, if actively operating in the consumer protection space, already be eligible and likely already designated, as qualified entities in advance.

Indeed, if such entities were not already designated in advance, considering the powerful tools the Directive presents to such entities in stopping illegitimate practices and obtaining redress for consumers, it would be questionable whether those entities operate genuinely in the protection of consumer interests.

In addition, we would consider that the designation of ad hoc qualified entities is not necessary for a strong collective representation framework, as consumers interests would be best protected by the qualified entities who have sought designation in advance, motivated by the objective of protecting and seeking redress for customers, rather than a desire to pursue a specified domestic action.

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: Liberty Insurance would suggest that Ireland avail of this option and designate specific public bodies for the purpose of bringing both domestic and cross border actions.

As a general point, we would consider that public bodies are well suited to act as qualified entities, as being publicly funded they can act in the best interests of the consumer, free from the potential conflicts of interest which can arise from underlying relationships between a third party funder (should such funding be permitted in Ireland, see below response on Article 10 of the Directive) or law firm and a non-publicly funded qualified entity.

We would suggest that the Competition and Consumer Protection Commission (the 'CCPC') be considered for designation as a qualified entity. The CCPC is already designated as a qualified entity under Directive 2009/22/EC. The CCPC likely fulfils the criteria set out in Article 4(3) of the Directive and to the extent that it does not meet any of those criteria, adjustments should be made. Further, the CCPC is capable of fulfilling the additional two criteria we have identified above in our response to Article 4(5). In respect of the first criterion, the CCPC, as the statutory body for ensuring compliance with over 40 legislative instruments in the competition and consumer protection space in Ireland, will highly likely

share the same objective as the subject matter of the litigation which is being brought in defence of consumer interests. In respect of the second criterion, the CCPC has demonstrated through the high quality performance of its existing functions that it has the necessary capacity, experience and expertise to identify and pursue collective actions which provide access to justice and real benefits for consumers.

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

While Liberty Insurance views the criteria for the designation of qualified entities to be an important measure to avoid an abusive litigation culture, we would consider that the other safeguards we refer to in this response paper, namely third party litigation funding ('TPLF'), admissibility and the 'loser pays' principle to be of greater significance.

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:

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

Liberty Insurance considers the assessment of admissibility of specific representative actions, at the earliest opportunity, to be a crucial safeguard against unmeritorious litigation. In the absence of such a mechanism, companies may be exposed to baseless litigation which can lead to material and reputational costs and pressure companies to promptly settle.

As the admissibility of a collective action under the Directive is to be determined in accordance with the Directive and national law, Liberty Insurance would suggest that Ireland as part of the transposition of the Directive require verification at the earliest opportunity of the suitability of the action and fulfilment of all the requirements of the Directive and any transposing measures, most notably those requirements relating to qualifying entities and funding arrangements, if applicable.

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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:**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: Liberty Insurance would be in favour of Ireland introducing measures 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, for the following reasons:

1. Existing measures of EU and Irish law recognise alternative dispute resolution as an effective, time-efficient tool to resolve disputes between traders and consumers, for example the EU ADR and ODR Directives.
2. Such measures would reduce the number of injunctions brought before the Irish courts, thereby contributing to the efficient operation of the courts in Ireland.
3. Having regard to the cost of litigating through the courts in Ireland, such measures would represent a more cost-efficient alternative mechanism than traditional litigation.

We are not aware of any similar existing provisions in Irish law which require mandatory alternative dispute resolution procedures be undertaken in the context of consumer protection related disputes.

As regards the form of any such consultation, we would suggest that the parties should, in the first instance, be permitted to reach an agreement without the necessity for third party intervention or a mandated form of consultation. This would facilitate a quick, cost-effective resolution of the matter in circumstances where the trader does not seek to challenge the cessation or prohibition of the practice in question. A specific time period could be identified for this phase of consultation.

If the parties are unable to come to an agreement within that time period, a consultation process in which an independent third party, appropriately qualified in alternative dispute resolution assists the parties in coming to a mutually acceptable agreement would add structure and an impartial perspective which would benefit both parties. The identity of the third-party facilitator should be agreed to by the parties to ensure that both parties have full confidence in the third-party appointed.

Although we understand that a non-binding consultation is at issue here, for the avoidance of doubt, we would not favour a dispute resolution process where a third party would be empowered to issue a decision which would be legally binding on the parties or issue a decision which would not be subject to appeal, as the qualified entity must be free to act in the interests of consumers and seek the public intervention of the courts, if it chooses.

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

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 consider an opt-in, not opt-out mechanism. The right to opt out is simply the right to return a form and be excluded from both the benefits and the binding effect of the class litigation. In the United States, focussing on the federal class action regime, depending on which prong of Fed. R. Civ. P 23 is used by the court to certify the class, non-party class members may be bound on either a mandatory or opt-out basis. The U.S. experience with its “opt-out” approach to class actions clearly demonstrates that the best method for any type of alleged mass harm is to affirmatively “opt-in” for two key reasons.

First, opt-in better protects consumers. Specifically, very few class members opt-out of the class due to a lack of clear understanding about the litigation. As such, they are bound by the outcome and may have to pay a large portion on their award to class counsel. In a sense, they are unfairly aggregated as a mass group without regard to the discrete issue of each claimant/plaintiff.

Second, opt-out mechanisms encourage the swelling of the class, and can make cases which would not have otherwise been brought viable, in turn making companies feel pressured to settle unfounded cases to avoid reputational harm.

Additionally, the Commission Recommendation on paragraph 21 recognised the importance of maintaining an opt-in system and such an opt-in approach would be in line with the existing practice in Ireland relating to representative actions, whereby the court must be satisfied that each individual member of the class has authorised the named party to act in a representative capacity.

In respect of the question relating to what stage of the proceedings consumers should be allowed to exercise an opt-in, we would suggest that a deadline before which consumers must submit their opt-in be established relatively early on in the proceedings, as this would provide certainty and transparency to the benefit of all parties and also assist in streamlining the litigation. We acknowledge that there may be exceptional circumstances in which the operation of such a deadline relatively early in the proceedings could prejudice a consumer. As such, we would suggest that a consumer may be permitted to opt in after the expiry of the deadline, subject to the Statute of Limitations and an assessment, on a case by case

basis, of the prejudice caused to both consumer and trader by the opt in at that point in the proceedings.

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:

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

Article 11

Redress settlements

Question:

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

Response: Liberty Insurance would be in favour of allowing the court not to approve settlements that are unfair. Experience in numerous non-European jurisdictions has shown that many collective redress actions end in settlement, meaning that the settlement is beyond the objective scrutiny of the courts. Allowing the court to have competence in this area would ensure that settlements provide real benefits to and are in the best interests of the represented consumers. This is particularly important if there is a third-party litigation funder involved in the action (should such funding be permitted in Ireland, see below response on Article 10 of the Directive), as the objective oversight of the court would operate to ensure that the interests of such third-party funder are not prioritised in the settlement, over those of the consumers who have experienced mass harm.

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:

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: Liberty Insurance would suggest that Ireland avail of this option and allow for traders to provide this information only if requested by qualified entities. By the time of a final decision, qualified entities should have had extensive contact with consumers and should be best placed to judge whether the provision of this information is necessary and in the best interests of the consumers concerned.

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: While Liberty Insurance would, in principle, be in favour of such databases being established in the interests of allowing consumers to verify the identity of designated qualified entities and actions with affect them, we would submit that it is important that public information systems do not appear to give credibility to claims that have not yet been proven. Such publication could have a serious damaging effect on the business and reputation of a trader even though the facts of the action have not yet been determined or judgment issued. Such databases would need to be strictly controlled by public authorities.

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

Liberty Insurance supports Ireland in taking measures to ensure that the costs of proceedings related to representative actions do not constitute a barrier to justice.

As referred to above in the response submitted in respect of Article 4(7), Liberty would consider that public bodies are well suited to act as qualified entities, as being publicly funded they can act in the best interests of the consumer, free from the potential conflicts of interest which can arise from underlying relationships between a third party funder (should such funding be permitted in Ireland, see below response on Article 10 of the Directive) or law firm and a non-publicly funded qualified entity. In the context of Article 20 of the Directive, it could also be noted that the costs of proceedings will not prevent publicly funded qualified entities from effectively exercising their right to seek measures set out by the Directive, in the same manner in which the costs of proceedings might impact on a

privately funded qualified entity. This, we would suggest, is another indication that public bodies are well suited to act as qualified entities.

General comments on the Directive:

Article: 10 (Funding of representative actions for redress measures)

Comments:

We are aware that although a response is not sought in respect of Article 10 (Funding of representative actions for redress measures), the Directive may prompt legislation in Ireland relating to TPLF which would amend the common law position that TPLF is, with limited exceptions, prohibited in Ireland.

TPLF offers considerable financial incentives for unrelated parties to become involved in representative actions. As a result, representative actions can become driven by investors' profit-seeking behaviour rather than consumer concerns. The rise of TPLF has led to the U.S. launching attempts to curb the practice.

The Australian Parliamentary Joint Committee on Corporations and Financial Services recently released a report on TPLF¹. The report noted, in the context of litigation funding in Australia's lightly regulated class action industry: *"Participants in class actions are the biggest losers in this deal. When they finally get their day in court, it is the genuinely wronged class action members who are getting the raw deal of significantly diminished compensation for their loss, as bigger and bigger cuts are awarded to generously paid lawyers and funders"*.

These comments are particularly compelling given Australia is the birthplace of TPLF.

We would accordingly suggest that Ireland maintains the common law prohibition on TPLF and further considers expressly setting this prohibition out in the implementing measures of the Directive so that it is clear that no qualified entity participating in litigation before the Irish courts may be funded by a professional third party operating for profit.

However, acknowledging recent discussion in Ireland relating to TPLF, if Ireland were to consider permitting TPLF, Liberty Insurance suggests that the following safeguards in addition to those set out in Article 10 of the Directive are required to address the potential for adverse incentives to arise from the underlying relationships between a third party funder or law firm and the qualified entity:

¹ Parliamentary Joint Committee on Corporations and Financial Services, Litigation funding and the regulation of the class action industry, Commonwealth of Australia, December 2020.

<ul style="list-style-type: none"> • Prohibit TPLF (or other funding sources) on a commercial basis in exchange for a share in fees or awards; • Prohibit the third party from having a relationship with the qualified entity that would enable its direct or indirect control; • Prohibit the third party from agreeing to an arrangement where compensation to the third party would be prioritised over compensation of consumers; and • Prohibit third party funders charging excessive fees or compensation and as per the Commission Recommendation, prohibit third party funders charging excessive interest on the funds provided.
<p>Article: 12 (Allocation of costs of a representative action for redress measures)</p> <p>Comments: Liberty Insurance considers the inclusion of the ‘loser pays’ principle in Article 12 to be key to prevent frivolous and abusive litigation. In a collective redress context, a third-party funder must be obliged to pay for a lost case. Otherwise the incentives associated with TPLF would be further distorted. In this regard, if Ireland were to consider introducing legislation to permit TPLF, as referred to in our response on Article 10, Ireland should consider explicitly extending the application of the ‘loser pays’ principle to third parties funding representative actions and require a commitment from such third parties as part of third party funding disclosure, to pay legal fees in a lost case.</p>
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