An Roinn Fiontar,
Trádála agus Fostaíochta
Department of Enterprise,
Trade and Employment

Public Consultation on the Transposition of Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC

Response from the U.S. Chamber Institute for Legal Reform

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):	Scévole de Cazotte, Senior Vice President, International Initiatives
Organisation:	The U.S. Chamber Institute for Legal Reform (***ILR***)
Please briefly describe your interest in this Directive:	ILR is a not-for-profit public advocacy organisation affiliated with the U.S. Chamber of Commerce, the world's largest business federation, representing the interests of more than three million businesses of all sizes and sectors, as well as state and local chambers and industry associations. ILR's mission is to ensure a simple, efficient and fair legal system that promotes economic growth and opportunity. Many of the U.S. Chamber's members are companies that conduct substantial business in Europe, including in Ireland. ILR is therefore deeply interested in the orderly administration of justice in the EU and in Ireland. ILR has vast experience with the U.S. class action system, and other collective redress systems around the world, and is therefore well placed to offer insights on how to manage the risks associated with collective actions.

	For further information in ILR, please consult: https://instituteforlegalreform.com/
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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: Under the system established by 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 ('the Directive'), qualified entities will acquire privileged access to Irish courts on a wide range of matters, and will become entitled to represent the interests of a broad range of consumers.

In the wrong hands, the 'qualified entity' designation could be open to misuse. Specifically, the power to initiate and direct large value claims may present attractive opportunities to those seeking commercial opportunity. As such, the designation process must be handled with impartiality and great care.

The designation process will involve some process-related aspects (i.e., to determine whether applicants meet the relevant criteria or not). However, the more important part of the role is to determine which – and how many – entities should be granted the designation, in view of the profound policy implications that such designations may entail. For example, the designating body may be in a position to determine whether redress for consumers in Ireland will largely be pursued by statutory/public bodies, or by private concerns.

For this reason, ILR's view is that Ireland's implementing legislation should empower the relevant government Minister (whether of the Department of Justice, or the Department of Enterprise Trade and Employment) to make the necessary designations.

ILR believes that the Minister should deal with the application and designation process both for qualified entities ('QEs') bringing domestic actions and for QEs bringing cross-border actions to ensure consistency in the application of the qualification criteria.

Note that the Competition and Consumer Protection Commission (CCPC) would likely not be a suitable body to make the necessary designation as the CCPC itself may qualify for designation, and could not realistically assess and monitor its own compliance with the Directive's various safeguards.

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, it is imperative that Ireland apply the Directive's qualification criteria for QEs seeking to pursue cross-border actions also to QEs seeking to pursue domestic actions.

The criteria for cross-border actions are designed to be easily met by QEs with legitimate consumer protection objectives. They simultaneously limit the ability of bodies to establish as QEs for purely commercial reasons and seek to ensure that actions taken are genuinely pursued with consumers' interest in mind. Domestic cases should be no exception to this rule and should therefore meet the same qualification standards.

Note that the definition of a domestic action is one brought in the place where a QE is qualified. This means that 'domestic' actions will not necessarily be limited to domestic Irish issues only. For example, if a QE is registered in Ireland and sues in Ireland, the case will be domestic, even if it includes non-Irish defendants, or includes consumers from other countries, or relates to facts also involving other Member States, or is subject to the laws of another Member State.

As there is no necessary alignment between the Directive's concepts of 'domestic' and 'cross-border' on the one hand, and the Irish and EU rules governing which courts should have jurisdiction in a particular case on the other (including under the Recast Brussels Regualtion (EU) 1215/2012), many complex issues could arise if there were divergence in the eligibility criteria that QEs were required to meet.

All EU Member States, including Ireland, should take the same approach to their domestic qualification criteria by requiring sufficiently high standards to ensure that harmonized safeguards are established and adequately address the risks of unsuitable entities being empowered to pursue collective litigation.

Furthermore, if Ireland were to permit lower standards for 'domestic' QEs than the standards that will apply to cross-border QEs, those seeking to pursue actions may seek to structure actions as 'domestic' Irish cases to avail of the lower standards, even though their intentions are to include or address largely non-Irish interests in their claims (as is perfectly possible under the Brussels 1a Regulation).

To prevent this 'forum shopping', it is vital that Member States align qualification criteria to the extent possible. It is strongly recommended that Ireland applies the criteria identified for QEs seeking designation to bring cross-border actions to those seeking to bring domestic actions, for consistency, simplicity, and to limit jurisdictional arbitrage, or forum shopping.

Of the safeguards identified, the most essential are the requirements to:

- Demonstrate 12 months of consumer protection activity. This is important to deter 'ad hoc' litigation vehicles being established in the name of consumers, specifically

to take advantage of a litigation business opportunity. This is precisely the model favoured by specialist investors (*i.e.,* to create an organisation – likely under their direct control – to 'front' the litigation, which will then enter into a financial arrangement with its own creators for the distribution or proceeds from the litigation as fees). Indeed, a period of longer than 12 months would be preferable.

- Have a non-profit making character. Again, to deter the commercialisation of lawsuits, this is important. Note, a non-profit making character must involve a holistic assessment. It must not be permitted for a non-profit making entity to enter into arrangements which allow it to declare no profit simply because it empties its coffers to pay generous fees to its own backers, sponsors and creators.

- Be independent of its backers. For similar reasons, it is vital that entities permitted to protect the interests of consumers genuinely have that objective and are not simply fronts for commercial enterprises. Independence references structural independence (*i.e.,* they are not established by, and legally beholden to, an investor) but also functional independence, meaning they are free to take decisions which they judge to be in consumers' interests, without those decisions being influenced by investors' interests. A perfect example is a situation where a representative entity may wish to settle, but an investor refuses to agree because the settlement does not set aside enough in fees for the investor (and effectively gives 'too much' to consumers). QEs must be free to exercise their judgment independently without fear of legal or practical consequences.

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 – ad hoc litigation vehicles should not be permitted. Consistent with the above, the power to litigate on behalf of consumers creates potential opportunities for commercial entities to seek to exploit consumers' grievances for profit, as has happened in many other jurisdictions. It is essential that all QEs be appropriately vetted, and that they can demonstrate that they genuinely have consumers interests as their goal, including through demonstrating a track record of consumer protection activity.

Permitting ad hoc litigation entities would invite temporary, and potentially opportunistic entities without a proven track record to participate in collective litigation, leaving consumers vulnerable to potential exploitation.

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: ILR submits that the criteria set out for QEs bringing cross-border actions should apply to all QEs, including if the entities seeking the qualification are public bodies.

The CCPC may well be a suitable body for designation in principle, having already had a designation as a qualified entity under Directive 2009/22/EC. To the extent the CCPC does not meet any of the criteria set out in the Directive, adjustments should be made to meet such criteria, in order to ensure consistent application.

While other public bodies may also have consumer-related functions, it would likely create confusion and jurisdictional overlap to have multiple bodies perform the same role. ILR therefore recommends concentrating the ability to sue on behalf of consumers with just one, appropriately empowered, statutory body.

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

N/A

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 – combining applications for injunctive and redress measures in a single action is likely to be more efficient, and would save QE's, defendants, and courts the need to deal with successive cases.

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

Article 7 states that QEs must provide 'sufficient information' to the court on 'the consumers concerned by the action' (Article 7(2)). In addition, courts or administrative authorities must be able to dismiss 'manifestly unfounded cases at the earliest possible stage of the proceedings' (Article 7(7)).

Compliance with these criteria would be best achieved through the introduction of a collective action 'certification' phase or procedure. Certification means that the court has determined, before any action is permitted to proceed collectively, that a collective action in the most appropriate mechanism for resolving the claims in question.

This certification phase should be based on clear standards to allow courts only to select the cases which can fairly and efficiently be resolved on a collective basis. The purpose of this process is to ensure that common facts or issues of law predominate over individual

facts or issues of law, such that a single trial could fairly adjudicate the claims (or substantial issues within the claims) of every member of the claimant group.

Based on experience from other jurisdictions (notably the United States[1]), certification phases should include assessment of the following criteria:

- ***Predominance of common issues/cohesiveness***: A court must determine that all of the claims of the proposed group members can be adjudicated fairly in a single proceeding and established through common proof. In particular, the court must decide whether the relevant facts and law as to each class member's claim are such that adjudicating one group member's claim necessarily resolves the claims for the other group members.

- ***Adequacy****:* Any QE who seeks to be a representative claimant must be willing and able to represent the group adequately. This safeguard protects group members by ensuring that any QE who purports to speak for them and compromise their rights shares the same interests they do and is motivated and informed about theclaim.

- ***Typicality****:* The claims that the QE brings forward must be typical of the claims of the claimant group. This safeguard is intended to ensure that only those who advance the same factual arguments may be grouped together in a collective action.

- ***Numerosity****:* A collective action should not proceed unless there are so many potential consumers that no other form of dispute resolution would be practical. This safeguard requires courts to assess whether any purported collective action involves a sufficiently large number of potential claimants under the circumstances to make individual proceedings impractical.

Collective claims that cannot satisfy the court on these points are likely not well suited to collective resolution.

Experience from other jurisdictions has shown that a comprehensive certification phase at the beginning of an action greatly reduces wasted court time and costs for the parties, and provides early certainty and clarity with regard to the manner in which the claim may be resolved.

Certification therefore has advantages for all parties, as well as allowing an opportunity to eliminate unsuitable claims before they cause unnecessary costs and court time to be incurred.

[1] Note Rule 23(a) of the Federal Rules of Civil Procedure, see: https://www.uscourts.gov/rules-policies/current-rules-practice-procedure/federal-rules-civil-procedure

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: ILR believes that courts are already likely to have the powers necessary to take such actions in suitable cases. It should not be necessary to add a statutory provision permitting courts to establish that an infringement has occurred, or implying that any particular remedy (such as the publication of a corrective statement on the part of a defendant) may be more suitable than another remedy. The determination of remedies falls squarely within courts' existing jurisdiction and competence.

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: In ILR's view, litigation should always be a last resort. ILR notes a tendency in jurisdictions around the world to over-rely on litigation and the pursuit of damages. This over-reliance is often facilitated by intermediaries who may earn revenues through the initiation of cases through the legal process.

In ILR's experience, traders often have very strong incentives to provide redress to consumers where harm has arisen, and often have no motivation to continue practices that their customers are unhappy with. It happens often that the initiation of legal proceedings (in which claims are routinely inflated for tactical reasons) actually *prevents* traders from offering quick and consumer-friendly solutions. Instead traders, facing the great uncertainty of open-ended litigation, are incentivised to offer robust defenses to control their exposure, thereby polarising and prolonging a dispute that otherwise could be resolved quickly and amicably.

ILR therefore strongly endorses all measures which prioritize the achievement of practical solutions without the need for burdensome litigation.

ILR notes that the EU's ADR and ODR Directives already provide mechanisms which could be used more frequently in Ireland as templates for the facilitation of non-judicial dispute resolution.

At a minimum, claimant parties should be required to demonstrate good faith engagement in a dispute resolution process prior to being entitled to proceed with litigation. Good faith engagement as a concept should require more than the delivery of a 'letter before action' making demands, but should include a demonstration of realistic and genuine efforts to avoid litigation.

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

N/A

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 not make the mistake of permitting opt-out actions in any form. Such actions are at the root of many of the most severe forms of litigation abuse internationally, and – most importantly – while they greatly benefit intermediaries, they rarely deliver for consumers.[2]

Consumers who are not aware of and directly involved in lawsuits in their name are especially vulnerable to having their grievances (if they even have a grievance) exploited by those who are involved and who have the most to gain: those directing the action. Opt-out collective actions are invariably led not by and for consumers, but by and for lawyers, funders and other backers with a financial stake in the action.

In opt-out scenarios, the only individuals excluded from the case are those who hear about the litigation and affirmatively submit a form saying they do not wish to participate. Individuals who do not know about the proceeding and individuals who have no interest in asserting claims – but, for one reason or another, do not opt out – are included. The ability of a representative party to assert claims on behalf of consumers without their authorisation robs the potential group members of their legal autonomy because individuals can become participants in litigation that they do not support – or that they outright oppose. Opt-out systems also hurt consumers because they put representatives in charge of very large cases involving groups of often apathetic claimants, with no real client accountability. By contrast, in opt-in proceedings, the groups tend to include only claimants who are personally and actively interested in pursuing their rights. Thus, the likelihood of representatives acting against the group's interest is greatly diminished.

[2] See, for example, Andrew Pincus, Assessing The Value of Class Actions, Law360, Aug. 22, 2017, https://www.law360.com/articles/956215; Mayer Brown, Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions, U.S. Chamber Institute for Legal Reform, at 1-2 (Dec. 11, 2013); and evidence submitted by ILR's representative John H. Beisner to the Committee of the Judiciary of the United States Senate at https://www.judiciary.senate.gov/imo/media/doc/11-08-17%20Beisner%20Testimony.pdf;

In the context of the age of mass communication, becoming informed and expressing one's wishes online has become vastly easier, and therefore much of the rationale for opt-out actions (which has traditionally relied on a notion of it being too difficult or inconvenient for consumers to become informed and express their wishes) has fallen away.

Ireland should exercise great caution with regard to any forms of action that permits money claims to be made on behalf of consumers without their knowledge or consent. Ireland should therefore insist on opt-in mechanisms only.

Individual consumers should be able to join an action at any stage until certification has been granted, or until the QE has provided sufficient information to the court on the consumers concerned by the action pursuant to Article 7(2).

Defendants should be able to know sufficiently ahead of time how many consumers are potentially involved.

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: In some jurisdictions, mechanisms exist for any 'excess' or 'unclaimed' damages to be distributed among representatives, lawyers, funders or even entirely unrelated third parties (as a form of so-called *cy près* award). This presumes that part of the objective of a requirement to pay damages is to punish and deter wrongdoing, leading to the conclusion that defendants should still be required to pay, even if the money exceeds the harm suffered, or will *not* compensate anyone for any loss, but will instead provide a bonus payment to a third party (possibly a claimant representative).

Where there is a possibility for undistributed damages to fall into the hands of claimants' representatives or other outside parties, an incentive exists to inflate claims (in terms of the number of persons represented or the scope of the claims) even where there is no realistic prospect of every delivering compensation to such persons, in the hope of having a larger 'undistributed' damages pot available at the end of the case to claim. These features on their own encourage abusive litigation and should be avoided.

Ireland should ensure that no system exists which can require defendants to pay redress amounts (*e.g.,* 'undistributed' damages) to persons who have in fact suffered no damage and merit no redress. Such awards are punitive damages by another name and should be prohibited in any system that purports to pursue consumer redress.

It should be noted in particular that in opt-in systems, where consumers are - by definition – known, contactable and engaged in the litigation, amounts of any undistributed damages should not be material in any event. Undistributed damages mainly arise where opt-out litigation is pursued, as awards can be made to offer 'redress' to whole categories of consumers who – if they exist at all – may have no knowledge or interest in the claim (or who may even oppose the claim, but were simply not motivated to take the steps necessary to opt-out).

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

N/A

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: Courts should be permitted to refuse to approve settlements that are unfair. However, the parties to a representative action should be incentivised to settle, and such an incentive may diminish in circumstances where the outcome of good faith and successful negotiations may always be 'second-guessed'. For this reason the power to refuse to approve settlements must be limited, and designed to eliminate genuine injustice only.

For this reason, Ireland's implementing legislation should specify the outcomes that will be deemed unfair. Among the most critical of such unfair outcomes is the risk of settlements in which QE's, legal representatives, funders, claims managers or persons *other than* consumers are the beneficiaries to a degree that cannot be justified in the circumstances.

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 in which QEs are properly vetted, and exist to represent the interests of consumers, and in circumstances where genuinely unfair settlements can be refused approval by the Court, it should not be necessary or desirable to allow consumers to refuse to be bound by a settlement reached on their behalf.

It is important for the proper administration of justice that settlements be encouraged. Among the main incentives a defendant has to reach a settlement is finality with regard to the issue at hand. In circumstances where some consumers might accept a settlement and some might not, the advantage of finality would be lost, and it could be expected that far fewer settlements would be offered and reached (thereby increasing the costs of litigation generally, and increasing the burden on courts and parties).

Also, such an outcome would undermine the very purpose of permitting collective litigation in the first place: to facilitate the resolution of similar claims at the same time, thereby avoiding the inefficiency of resolving them individually.

Furthermore, in circumstances where a large majority are satisfied with a settlement but one or more may hold out, such hold-out consumers can be placed in a position to cause a full trial of the issues (with all the expense and inefficiency that involves). This could lead to those consumers having leverage to demand a disproportionate settlement for

themselves (even if not justified by the facts), leading to likely discontent for those that have settled, and a potential for disputes to be re-opened. For these reasons, fair settlements (agreed by duly authorized QEs and confirmed as fair by the courts) should bind all relevant consumers.
Please indicate any other general comments or recommendations you may have on Article 11: N/A

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: As stated in Directive, Article 13(3), the obligation for traders to inform consumers directly 'shall not apply if the consumers concerned are informed of the final decision or approved settlement in another manner'.

Consistent with this provision, traders should not automatically and systematically be required to inform consumers of any final decisions or any approved settlements. There will be cases in which such contact is entirely unnecessary (or even unwelcome). QEs will, by definition, be best placed to have contact with the consumers they represent in the action. The requirement for traders to contact consumers should be limited to cases where this is necessary and appropriate for the proper resolution of the case, which can be fairly determined by courts on a case-by-case basis.

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

N/A

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: ILR believes that Ireland should be cautious regarding the establishment of public databases regarding pending actions. If such databases need to be set up at all, it is important that they be under close public control.

Clearly, information is essential if consumers are to be adequately informed of actions of importance to them. However, it is important also not to allow a public information system to become a platform to level unsubstantiated allegations. Claimants could instrumentalise these national registers to pressure defendants with the threat of public campaigns.

Often, the media coverage attending a collective action results in immediate and lasting damage to the defendants concerned even though no facts have been determined and no judgment has been rendered. The threat, or even the simple announcement, of a future collective action can have important consequences for share price, for public reputation or perception, for customer loyalty, for relations with trading partners, *etc*. In other jurisdictions, the threat of negative public campaigns are used to try to obtain settlements from defendants, independent of the real merits of claims.

It would be important for Ireland not to appear to give public credibility to claims that by definition have not been proven.

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

N/A

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: Where a private profit motive remains a feature of collective litigation, problems are certain to arise. Because of the role they play, QEs can be in a position either to facilitate genuine consumer redress *or* to exploit the consumers they are supposed to be representing.

The best way to ensure that representative actions are taken for the right reasons is to remove the opportunity and need for QEs to be compensated. This is *not* achieved simply by requiring that QEs are not for profit organisations. Some not for profit organisations are large well-funded organisations, with very significant balance sheets. Also, being not for profit does not mean that partner intermediaries or others could not be paid enormous fees and expenses for bringing litigation. Instead, limiting QE eligibility to organisations that are already publicly funded (and have no financial motive) is most likely to reduce the risk of abuse.

Most importantly, Ireland should supplement the Supreme Court's findings with regard to third party litigation funding by enacting a statutory prohibition, as well plainly prohibiting any financing by actors with a financial stake in the outcome of litigation they support (including lawyers). In this regard, please see below the comments under Article 10.

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: QEs should be allowed to require consumers to pay a modest entry fee. Requiring the payment of a modest entry fee would efficiently guarantee the consumer's consent and engagement in the collective action. Furthermore, the payment of such a fee may enable the QE to cover part of the costs of the action, to supplement any public resources, while maintaining its independence from funding entities that have financial interests in the outcome of the action and are likely to divert the action from the protection of the interests of consumers.

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 should be implemented in a way that achieves its objectives while minimising the risk of litigation abuse. Ireland should consider these recommendations as the minimum necessary for any collective consumer action, whether domestic or cross border, and whether inspired by the Directive, or in a pre-existing or subsequent regime.

European collective redress mechanisms will be tested both by those pursuing due and rightful justice for consumers and by entrepreneurs hoping to turn consumer grievances into a business opportunity. Some cases might have elements of both.

The policy choices available are therefore highly consequential. Ireland must find an appropriate balance between facilitating just litigation and safeguarding against opportunism.

Article: Article 10 Funding of representative actions for redress measures

Comments:

Because litigation abuse is predominantly driven by financial interests, Ireland should take additional steps to curtail the financial incentives that might encourage investments in lawsuits, whether it is in the form of (a) contingency fees, or (b) third party funding.

Contingency Fees

A contingency fee is one based on the outcome of the case. The most common form is 'no-win, no-fee' arrangement, in which a lawyer takes no fee (or a low fee) if the case is lost, and is paid a share of any award if the case succeeds. Such fees can appear attractive to claimants, as they are not required to put their own resources at risk. However, they create very significant ethical and fiduciary issues, in that lawyers acquire a direct, personal financial stake in the outcome of the litigation, immediately compromising their incentives and independence.

These issues are already well recognised in Irish law and Section 68(2) of the Solicitors (Amendment) Act 1994 prohibits solicitors from agreeing that 'all or any part of the charges

to the client are to be calculated as a specified percentage or proportion of any damages or other moneys that may be or may become payable to the client'. Although 'classic' contingency fees are prohibited for cases other than debt collection matters, other types of arrangement – such as no-win, no-fee arrangements are commonplace.

ILR recommends that Ireland's implementing legislation for the Directive set out in clear terms that novel fee arrangements which may create incentives to litigate may never be used in relation to representative actions.

Additional safeguards for third party litigation funding should be considered

Internationally, third party litigation funding presents an even greater risk.

While the Supreme Court has made it clear (*e.g.,* in Persona Digital Telephony Limited v the Minister for Public Enterprise) that third party litigation funding is not permitted in Irish litigation, it would be advantageous to set this out clearly in the Directive's implementing measures to leave no doubt whatsoever (and to put the issue outside the realm of judicial interpretation) that litigation funding may never be used in relation to representative actions in Irish courts, by Irish QEs or in ways impacting Irish consumers or companies.

A specific legislative recognition is required because of the possibility of QE's authorised in other Member States pursuing 'cross-border' litigation in Irish courts. If such a QE had concluded a funding agreement in another Member State, the prohibition in *Persona* might not apply at all, or might be complex to apply. Equally, Irish QE's might pursue litigation in the courts of other Member States, or Irish consumers may opt-in to cases taken by QEs in other Member States which permit funding, thereby putting Irish consumers at direct risk. It remains unclear how the Supreme Court's decision in *Persona* would apply to such cases.

The Directive already identifies certain issues and safeguards in relation to litigation funding. However, it also makes clear that the Directive applies safeguards to funding arrangements only insofar as those arrangements are allowed in accordance with national law (Directive, Article 10(1)). Thus, it is clear that the Directive was never intended to encourage more litigation funding, but rather to place limits on the funding that some Member States might allow. It remains a sound domestic policy choice for it to be prohibited altogether in light of its danger to consumers.

Irish legislation should make clear that (a) no QE participating in litigation before the Irish courts may be third party funded, (b) no Irish authorised QE may enter into a third party funding agreement, (c) QEs offering participation in litigation to any Irish consumers (whether the litigation is in Ireland or elsewhere) may not do so on the basis of a litigation funding arrangement, and (d) as third party funding is confirmed as contrary to public policy in Ireland, Irish courts should refuse to recognise and enforce judgments arising from cases in other Member States in which third party funding has featured (in accordance with the Brussels Regulation (recast), Article 45(1)(a)).

Absent an outright ban on all of the situations in which Irish courts, Irish QEs or Irish consumers might be impacted by third party funding, the following minimum safeguards should apply to those residual situations in addition to the safeguards in the Directive.

- ***Funding safeguards should apply to all collective actions*:** The Directive requires safeguards to apply to all 'representative actions for redress' which might be interpreted by some Member States as including only those representative actions created or adapted to comply with the minimum terms of the Directive. However, in light of the risks of litigation funding, these minimum safeguards should be made to apply to all collective actions, including any pre-existing or new collective

or group redress mechanisms introduced outside the Directive. This is vital, because if 'investment opportunities' abound in mechanisms outside the Directive but are curtailed for the mechanisms that conform to the Directive, then actions will be steered by investors towards the former, and consumers will not – in the end – be safeguarded.

- QEs and funders themselves must be obliged to **disclose the existence of agreements**, and the terms of those agreements, to courts and defendants. Too often, Courts make awards to claimants without realising that some – or even the majority – of awards will be diverted to a secret funder, and will not go to the consumers the court may have been intending to provide redress to.

- **Funders must be required to demonstrate to courts that they have access to sufficient funds to meet their obligations related to the case and are legally committed to see the case through**. It is an unfortunate reality that funders can abandon cases at the first sign of adversity if they fear their profits are no longer sufficiently high, and otherwise good consumer cases can be dropped, leaving consumers with no remedy.

- **Mechanisms should be in place to ensure that funders are actually within the legal jurisdiction of the relevant courts and can be required to follow court's directions.** It is a common feature that funding agreements involve global or foreign networks of opaque offshore funds, precisely to avoid being subjected to courts authority.

- In addition to vetting funding arrangements at the outset of a case**, Member State courts should be empowered and required in every case to verify the amounts actually delivered to consumers.** The opportunities for funders to divert, delay, obfuscate and otherwise manage any awards for their own benefit are manifold. Actual delivery of redress to consumers should be the primary measure of whether a funding arrangement is in the consumers' interest or not (and not merely whether the agreement initially appeared to protect consumers).

- **Domestic systems must specifically require litigation funders to take responsibility for the cases they fund by requiring them, in the normal way, to pay adverse costs in the event the litigation they sponsor fails.** Funders routinely argue that they should not be exposed to risk exceeding their investment (the UK courts refer to this as the 'Arkin cap'), so – in effect – they can never lose despite potentially causing vast costs for a QE or a defendant by sponsoring the litigation in the first place.

- **The Directive prevents 'undue influence' by funders, but the concept of 'influence' requires careful definition.** Practical experience already shows that even where third party funders do not reserve formal veto rights over case decisions (and may instead – for example – reserve rights merely to advise or be consulted), they wield enormous indirect influence. For example, where qualified entities or lawyers are wholly dependent on funders to be paid in one case, or as a source of future cases, they are unlikely to displease their financial backers.

Article: Article 18 Disclosure of evidence

Comments: Disclosure (or discovery) systems ensure the delivery of vital evidence allowing parties to a dispute to prove their arguments.

Both sides can bear heavy burdens in responding to discovery requests, particularly in the age of electronic documents and email.

The Directive contains a provision requiring that requests by plaintiffs for disclosure of evidence by a defendant should be subject to rules on 'confidentiality and proportionality'. However, the Directive does not elaborate further.

In some jurisdictions, discovery requests can be so vast and burdensome that they become a settlement-forcing weapon on their own (regardless of the underlying merits of cases). Excessive requests can become an accelerator for unmeritorious claims, because claimants often do not need to get as far as proving their case if they can already extract a settlement by threatening vast discovery burdens.

The ability to make very broad requests can be a significant draw factor for litigants hoping to put their opponents at the maximum strategic disadvantage (including by seeking to obtain information through disclosure in one Member State for potential use in another). In this way discovery can be a factor in causing forum shopping.

Ireland should set out clear discovery rules applicable to representative actions which limit discovery to necessary and identified records, plainly within the control of the opposing party, and clearly necessary for the resolution of the case.

Note that Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of competition law already contains useful model provisions (at Chapter II). For example, to address the legitimate interests of both parties in making disclosure orders, courts should circumscribe orders 'as precisely and narrowly as possible on the basis of reasonably available facts' and they must consider 'the scope and cost of disclosure … including preventing non-specific searches for information which is unlikely to be of relevance…'.

Article: N/A – Alternative to Court Action

Comments: The Directive focusses on the creation of a court-based mechanism for the collective resolution of disputes, but the fundamental purpose of the Directive is redress, not litigation.

Alternatives to court action must not be overlooked. There are proven better, cheaper, fairer and faster methods to provide consumers with redress than litigation, particularly in collective scenarios. Such methods are typically far less susceptible to abuse and opportunism than litigation and yield considerably more redress to consumers. Indeed, litigation should be seen as a method of last resort. The process of implementing the Directive provides Ireland with a fresh opportunity to consider the benefits of ADR mechanisms, including those described in the EU's ADR and Online Dispute Resolution (ODR) Directives.