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SUBMISSION OF THE COUNCIL OF THE BAR OF IRELAND

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

May 2021

INTRODUCTION

The Council of The Bar of Ireland ("the Council") is the accredited representative body of the independent referral Bar in Ireland, which consists of members of the Law Library and has a current membership of approximately 2,150 practising barristers. The Bar of Ireland is long established, and its members have acquired a reputation amongst solicitors, clients and members of the public at large as providing representation and advices of the highest professional standards. The principles that barristers are independent, owe an overriding duty to the proper administration of justice and that the interests of their clients are defended fearlessly in accordance with ethical duties are at the heart of the independent referral bar.

This submission is made in response to the 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.

RESPONSES TO CONSULTATION

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:

It is submitted that whatever body is chosen to deal with these applications, it must be independent of the State. This is because the Directive envisages actions against publicly owned traders, so it cannot be the case that the State can be seen to be stymieing actions against public bodies by controlling the designation process, particularly in relation to *ad hoc* qualified entities. The independence of the body should also limit the likelihood of allegations of such conduct, however unfounded.

It is also important to ensure that the body dealing with these applications is sufficiently resourced, and the system of reviewing the applications is sufficiently straightforward, that there are no delays in the process. There must also be a degree of flexibility built into the system so that applications can be permitted on an urgent basis, such as where there is an imminent risk of an otherwise legitimate claim

becoming statute barred. This is particularly important in the context of an application for the approval of a qualified entity on an *ad hoc* basis.

Furthermore, it is submitted that the applicant ought to be entitled to appeal a refusal to designate it as a qualified entity. This appeal should be an appeal in relation to the substantive question of eligibility, rather than taking the form of a judicial review.

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:

It is submitted that, in principle, it is not necessary to apply all of the eligibility criteria contained in Article 4(3) to entities applying for designation only in relation to domestic actions.

It will be recalled that, unlike most other member states, Ireland does not at present have any real system for collective redress. It is imperative, therefore, that any new system that is adopted is not unduly prescriptive and does not unnecessarily hinder consumers' access to justice.

It is submitted that it is preferable to require that qualified entities be incorporated as a legal person and that the form of company limited by guarantee, which is used generally by charities, would seem to be the most appropriate option. This approach means that there are well-established systems already in place to deal with many aspects of the operation of the qualified entity, including matters such as incorporation, financial statements, corporate governance, publication of returns and, ultimately, liquidation. However, this will have unwanted repercussions in relation to the requirement for security for costs, discussed below.

It is submitted that the requirement for 12 months actual public activity in the protection of consumer interests is overly prescriptive. This may be appropriate for larger member states, where there is likely to be a significant number of such entities in existence, but there may not be so many in Ireland. In this regard it will be recalled that there are 65 separate enactments listed in Annex I, so there is unlikely to be Irish entities already in existence whose work covers all of these areas. This is discussed further below, in relation to Article 4(6).

It is further submitted that a requirement that qualified entities should have a non-

profit-making character is certainly appropriate, but care will have to be taken in the drafting of the requirement so as to ensure that it is effective and that it does not prevent the involvement of suitable people. While it may be relatively straightforward to ensure that the qualified entity does not pay dividends to its members, it may be that income derived from a representative action could be paid to others in different forms, such as the payment of bonuses related to the outcome of litigation.

Conversely, for qualified entities to operate effectively, they cannot rely exclusively on the work of volunteers. As a consequence, it would appear to be counterproductive to require that qualified entities register as charities. This would have the unnecessary effect of prohibiting the directors thereof from receiving any salary at all in relation to that work. Such a prohibition would likely reduce the number of people willing so to act and, therefore, the number of qualified entities that would be available to consumers.

It is submitted that a requirement to demonstrate solvency at the application stage is unnecessary. The real question is whether the qualified entity is sufficiently funded to bring a representative action, which will instead be determined either at the commencement of that action or, subject to the submission below, at the security for costs stage.

If, despite the above, the solvency requirement is to be retained, it is submitted that the transposing legislation should refer to *bona fide* insolvency proceedings, so as not to allow for unscrupulous defendants to prevent the designation of a qualified entity by the simple step of commencing unfounded winding up proceedings.

In relation to the independence requirement, this is a proper matter to be considered, but of course there is no need for rules regarding independence from third party funders for so long as this is prohibited in Ireland.

Lastly, the publicity requirement is overly broad in the context of domestic actions. Insofar as the requirements under points (a) to (e) are relaxed, and it is submitted that they should be, there is no need to publish details of compliance. Furthermore, the apparently separate requirement to publicise information about its statutory purpose and its activities is not necessary if the criterion at point (a) in respect thereof is not applied to domestic qualified entities. It would appear sufficient for the other aspects of point (f) that, as a company limited by guarantee, a qualified entity shall comply with its filing obligations in respect of the Companies Registration Office. Such filings would include its constitution, its annual accounts, and details of its directors.

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:
It is submitted that availing of the option to permit *ad hoc* designation would be an essential step in the best interests of consumers in Ireland, without which there is a real risk that the new collective redress procedure will be entirely ineffective.

Fundamentally, the purpose of the Directive is to provide for a procedure to effectively manage claims for collective redress. An essentially subordinate purpose is to ensure that the entities that bring these claims are properly regulated, and a history of activity in the consumer sphere is merely a way of establishing the *bona fides* of an entity. It does not provide conclusive evidence that the entity will always be well run, nor is it the only basis for the making of such an assessment. It is, of course, essential that mechanisms exist for the ongoing oversight of qualified entities, particularly in relation to any settlement of the action that may be agreed. This is discussed below in relation to Article 11.

As noted above, Ireland is a smaller member state and, as such, will have fewer eligible candidates for designation as qualified entities than might otherwise be the case. The broad scope of Annex I of the Directive suggests that there may not be qualified entities with an interest in every enactment. The limited number of existing qualified entities will also mean reduced capacity to commence representative actions, forcing those entities to choose which of several infringements it will seek to challenge. This will result in infringements occurring for which no qualified entity has been designated in Ireland.

It would appear self-evident, therefore, that the efficacy and the overall purpose of the legislation should not be undermined by an unwavering application of one subordinate element of the mechanism that exists only to ensure that the procedure is well run. A situation cannot be allowed to develop whereby the system to ensure that qualified entities are properly managed results in there being no qualified entities to manage, properly or otherwise.

A provision permitting *ad hoc* designation will also have significant procedural benefits. If an infringement has caused significant loss to groups of consumers in differing ways, it may be necessary to divide those groups into separate subgroups. It is of course possible that their interests can be represented by one qualified entity, but it would be

preferable if they were to be separately represented. Otherwise, each qualified entity will be faced with the potentially impossible task of having to balance conflicting interests. Allowing those consumers to be separately represented is only possible if qualified entities can be designated on an *ad hoc* basis.

To the extent that there may be concern that a lack of prior activity in consumer protection may somehow mean that an *ad hoc* qualified entity may not be as dedicated to the consumers it represents, this can be monitored as part of the independence requirement of the designation process and when any settlement is brought before the court for approval. As noted below in relation to Article 11, it is submitted that the courts should be empowered to assess the fairness of any settlement agreement that may be reached. This will constitute an important preventative tool in relation to potential misconduct by a qualified entity.

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:

It is not proposed to make a submission in respect of this Article.

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:
It is submitted that it would be an important element of flexibility in this procedure to permit qualified entities to seek both injunctive relief and redress measures in the same action.

If it is intended that an action for redress can only be brought after injunctive redress has been obtained, this will result in significant and needless delays in securing compensation for consumers. It could also create an improper incentive for defendants, who may seek to exacerbate the delay in order to stymie any subsequent claim for redress.

If, however, it is intended that the separate actions can be progressed concurrently, then this restriction will result in an entirely unnecessary duplication of legal costs and inefficient use of limited court resources.

One potential reason for separating the claims into separate actions may be that the system for opting into the representative action may differ, by reference to Article 8(3) and Article 9(2). However, a single action seeking both types of redress can, of course, be instituted on behalf of the more limited cohort of consumers applicable to the action for redress measures. In such circumstances, any injunctive redress obtained that results in the cessation of an infringement will, by its nature, benefit all consumers concerned, not just those consumers who had agreed to take part in the action.

If, somehow, it is not possible to overcome this difficulty, then as a last resort separate actions can be issued. However, this does not undermine the argument for permitting a joint action in other cases.

Conversely, it is submitted that the inclusion of a requirement for a single final decision in relation to injunctive and redress measures appears to be an unnecessary fetter on the court's entitlement to manage its own processes. While both injunctive and redress measures require the demonstration of the infringement of a relevant provision, only redress measures require a quantification of the loss suffered by consumers. Also, injunctive measures are essentially forward looking, so the sooner the relief is

obtained, the better from the point of view of all consumers affected.

It therefore seems entirely inappropriate that the court's ability to provide for interim or interlocutory injunctive relief is effectively removed, by reason of having to include such an order together with the final redress measures. It also seems unnecessary to require that the court cannot give final injunctive relief, after a full plenary hearing on the merits at which an infringement has been proven, until a further hearing takes place to assess the extent of the losses suffered.

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:
It is submitted that the courts ought to be specifically permitted to make orders declaring that a practice constitutes an infringement and directing publication of the decision or a corrective statement.

In terms of declaratory relief, this is a well-established aspect of the Irish judicial system. Indeed, Order 19, rule 29 of the Rules of the Superior Courts specifically envisages not only that such relief can be sought, but also that it can be sought as a standalone relief.

The power to make such declarations would be of considerable benefit to those consumers who have not opted to take part in a representative action, as they will be entitled to rely on the declaration to issue their own proceedings seeking compensation for their loss. Often, the primary barrier to such consumers' access to justice is that the cost, complexity and risk involved in establishing an infringement far outweighs the extent of their loss, even where that loss is substantial.

It is submitted that a direction regarding the publication of the decision is a vital step in the vindication of the consumers' right of access to justice, as individual consumers may not be aware of the determination or even, in some cases, of the infringement itself. The form of the publication and the media by which it is published, with attendant questions of the cost involved, ought to be determined by the court in the context of each action, at its own discretion. This will allow the judge concerned to consider all matters, including the notoriety of the infringement, the likely extent of the loss suffered, the potential number of consumers affected and other issues that might not at present be foreseeable. However, the transposing legislation ought to emphasise that any requirement to publicise the decision is in the context of the overarching obligation on the part of the trader to ensure that affected consumers are aware of the infringement of their rights.

A further benefit of such publication is that it will contribute to public awareness of the fact that the conduct concerned is impermissible. This will have a deterrent effect on other traders that are involved in similar conduct and will enable consumers dealing with those traders to demand higher standards without having to resort to litigation.

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:

It is submitted that the imposition of such a restriction would be unnecessarily prescriptive and that the question of whether a qualified entity ought to have formally called upon a trader to cease an infringement would better be dealt with by the courts in the context of costs.

There may undoubtedly be circumstances in which it will not be possible for a trader to be given an opportunity to consult with a qualified entity, particularly where there is a mandatory minimum duration of the consultation, e.g. where there is an urgent need to avoid irreparable harm. The Irish courts are well used to circumstances where interim injunctions are sought on an *ex parte* basis, or where interlocutory injunctions are sought on an *inter partes* basis, but with comparatively short notice periods.

It may also be the case that there may be no necessity to engage in consultation with a qualified entity, as the opportunity may have already been afforded to the trader to cease the infringement in question and thereby avoid litigation. A trader may have already publicly indicated an intention not to cease the infringement or a consultation may have already occurred between the trader and a party other than that qualified entity, e.g. the Central Bank, the Data Protection Commissioner, the Competition and Consumer Protection Commission or, indeed, another qualified entity.

Lastly, if a trader were to engage in a consultation otherwise than in a *bona fide* manner, it could use the process to alter its behaviour in a way which, on a strict interpretation, results in a cessation of the infringement complained of, but effectively continues it unabated. This could have the unintended outcome of either (i) subsequent technical disputes between the parties as to whether the court has jurisdiction to award redress that would otherwise be available or (ii) unnecessary delays as the parties engage in successive consultations so as to avoid this jurisdictional issue.

The factors to be taken into account by a court in making a determination in relation

to costs are already set out in section 169 of the Legal Services Regulation Act 2015. This is a more comprehensive analysis of the circumstances that might pertain to a costs adjudication, rather than merely focussing on the one aspect envisaged by Article 8(4) of the Directive, and it is therefore submitted that this section provides a more nuanced solution to the concerns raised by Article 8(4).

ARTICLE 9 – REDRESS MEASURES

Question 2:

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:

It is submitted that a combination of opt-in and opt-out mechanisms should be introduced. Effectively, the qualified entity should be free to determine whether it commences an action on behalf of identified consumers or on behalf of an identifiable group of consumers.

This is subject, however, to the question of the constitutionality of the opt-out mechanism. The Law Reform Commission in its 2005 report at paragraph 2.14 indicated its concern that an opt-out system would not be constitutional, on the basis that the constitutional right of access to the court implied a corresponding right of non-access. Also, insofar as a cause of action represents private property, it may be constitutionally protected as such. However, this analysis seems to be related exclusively to the US-style class action, rather than the representative action procedure at issue. Similarly, the Report of the Review of the Administration of Civil Justice recognised at paragraph 6.2.2 the "possible constitutional difficulties" of an opt-out mechanism.

Accordingly, it appears necessary to carry out a thorough investigation of the constitutionality of an opt-out mechanism before it can be included in the transposing legislation.

It is submitted that there are clear procedural benefits of an opt-out mechanism that would justify such an investigation.

The main benefit of an opt-out system is that, in many cases, the cost and effort required in obtaining the individual mandate of every affected consumer is oppressive and vastly outweighs the cost and effort in delineating the affected class of consumers and making them aware of the action through mass media, such as advertising and social media. Indeed, in cases where there are a very significant number of consumers, a strict opt-in system would effectively render the procedure inoperable. This is

particularly so where the loss suffered by individual consumers is small, even though the total loss suffered is considerable.

In that regard, both the Law Reform Commission and the Report of the Review of the Administration of Civil Justice expressed the view that a deficiency of the procedure under Order 15, rule 9 of the Rules of the Superior Courts is the requirement to provide evidence of that each claimant has authorised the representative to act on their behalf. The Law Reform Commission, in its 2003 Consultation Paper at paragraph 4.71, also recognised further inclusive benefits, such as avoiding the risk of inadvertently excluding affected consumers and promoting the access to justice for disadvantaged litigants.

From the defendant traders' perspective, the Law Reform Commission and the Report of the Review of the Administration of Civil Justice have recognised that an opt-out system provides the benefit of finality, as all potential claims are determined together. This means that, once the claim has been determined or settled, the trader will be left dealing with only those consumers who have decided to opt out of the representative action. There will therefore be no potential for unexpected claims to arise.

Accordingly, the availability of an opt-out mechanism for certain categories of claim is essential to ensure that consumers' rights are fully vindicated and that defendant traders cannot commit widespread infringements of those rights, in reliance on the reluctance of the affected consumers to litigate, either due to natural reluctance or because the individual loss is small.

It is further submitted that the court be enabled to make directions as to the method of notification of potentially affected consumers of the existence of the action, together with a provision enabling the court to convert the action to an opt-in procedure, on foot of a determination that contacting consumers individually would be more cost effective.

In terms of timing, it is submitted that consumers should be entitled to opt in or out of proceedings at almost any point, subject only to requirements that (i) doing so does not prejudice the interests of existing consumers and (ii) there is a relatively short period before the application to approve a settlement or the hearing of the proceedings, so that preparations for same are not unduly compromised.

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:

It would appear important to lay down rules on the destination of any outstanding redress funds that are not recovered within the established time limits, subject to an overarching jurisdiction of the court either hearing the action or approving the settlement to direct payment to a recipient, which would be a public body or a charity, more closely connected to the issues the subject of the action. However, in order to protect the procedure from any suggestion of impropriety, where it is proposed that the court may make such a direction, the Charities Regulator should be put on notice and be entitled to appear and be heard on the matter.

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:
It is submitted that it is not appropriate for a court's consideration of a proposed settlement to be limited only to questions of legality and enforceability, such that an assessment of fairness would also be essential to protect the interests of consumers. Questions of fairness can arise:

(i) among the claimants taking part in the action,
(ii) between the qualified entity and the consumers it represents; and
(iii) between the plaintiff and the defendant.

By opting to take part in a form of collective redress, the individual claimants surrender a degree of autonomy in the proceedings in return for the benefits of bringing the claim together with others. In this context, that means that each claimant does not decide in his or her sole discretion whether to settle a claim. It is therefore necessary to ensure that, where a settlement has been reached, it is fair as between all of the claimants and does not unduly prefer any subgroup thereof. While the claimants are entitled to opt out of the settlement, their interests will not necessarily be adequately protected thereby, as the defendant may not have the resources to meet a subsequent redress measure or, simply, the claimant may not be able to establish a new representative action.

The very nature of a representative action, where an entity brings proceedings on behalf of a group of consumers and takes on the costs risk on their behalf, is that a structural conflict of interest is created. This is particularly so where *ad hoc* qualified entities are not permitted, but it applies to them also, if to a lesser extent. Although the qualified entity will not profit from the settlement, it will have legal and administrative costs which will have to be defrayed. The US Class Action Fairness Act 2005, as noted in the Report of the Review of the Administration of Civil Justice, was aimed, *inter alia*, at resolving the perceived issue of excessive costs outweighing the awards made to class members. The legal costs are not likely to be a significant problem in Ireland given our comprehensive system of costs adjudication and prohibition on percentage-based fees, but it may nonetheless be appropriate to permit the court assessing a settlement to refer the costs to adjudication. In addition, the court should be empowered to direct a payment of an interim amount in respect of costs, on the

basis of an undertaking by the lawyers to return any part of the payment ultimately found not to be due.

In a related manner, the balance struck by a proposed settlement as between the qualified entity and the defendant must also be assessed. A qualified entity may be required, in assessing a settlement proposal, to take into account the risk of financial repercussions on its other activities and, indeed, any other representative actions that may be planned or already in being. A judge assessing the fairness of a settlement between the qualified entity and the defendant should ameliorate the risk of these outside considerations unduly influencing the extent of redress obtained in the settlement.

It will be recalled that courts have ample experience of assessing settlement agreements, including, e.g. in relation to infant rulings under section 35 of the Personal Injuries Assessment Board Act and claims conducted by liquidators of companies in liquidation under section 631 of the Companies Act 2014.

These applications are usually heard in the absence of other side, but are nonetheless heard in public. As was held by Laffoy J in *Re Greendale Developments Ltd (in liquidation) (No. 1) [1997] 3 IR 540,* this is necessary even though the nature of the application requires a candid admission of the weaknesses in the case. It is submitted that a provision should be included in the transposing legislation permitting the court to hear such applications otherwise than in public. This will increase the likelihood of a settlement being approved, as it promotes candour on the part of the qualified entity, and it reduces the risk of an unfair litigation advantage being obtained, where the court rejects a settlement, by an unscrupulous defendant who might take advantage of the hearing being in public.

If there are no dissenting consumers, it may not be possible to identify a *legitimus contradictor* for the application. However, even where this is the case, the court should nonetheless be well capable of assessing the settlement, as courts regularly do on an *ex parte* basis for infant rulings.

Lastly, it is submitted that the transposing legislation should clarify that the obligation to seek the approval of the court should apply regardless of whether proceedings are in being. It should not be possible for a qualified entity and a trader to avoid the scrutiny of the court by compromising a claim before the representative action has commenced.

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:

It is submitted that, subject to the following point, this should not be dealt with in legislation, but rather in the Rules of the Superior Courts. This will allow the court to ensure that dissenting consumers and consumers who have not opted into the action are fairly treated, but without prescriptive directions that cannot easily be amended. In principle, the position of dissenting consumers ought to be considered in the terms of the settlement agreement itself and, if not, the court can make directions consequent on the application to have the settlement approved. Those consumers who have not yet opted into the action should also have the opportunity to be heard by ensuring that the fact of the application for approval of the settlement is publicised through appropriate channels. However, it should be for the court to assess whether sufficient steps have been taken to do so.

However, it is submitted that some legislative control should be exercised in this regard, namely an express prohibition on the receipt by a dissenting consumer of any consideration in return for withdrawing his or her objection. This prohibition, which applies in the US, is intended to prevent a consumer from undermining the fairness of a settlement as between the consumers.

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:
It is submitted that this option should not be availed of as, otherwise, defendant traders may put qualified entities under pressure as part of a settlement arrangement to agree that publication is not necessary, possibly by suggesting that negative publicity might impact its financial position and, therefore, its ability to meet any agreed settlement sum. The qualified entity may then be placed in the difficult position of having to balance its obligation to achieve the most effective redress it can for its consumers with its interest in promoting consumer rights generally. This would not, of course, be conducive to the underlying purpose of the Directive.

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:
It is submitted that such databases would be eminently desirable for the purposes of ensuring that consumers are made aware of existing actions that might affect them and, where no action has been commenced, finding a qualified entity that would be in a position to vindicate their rights.

It is not, however, proposed to make a submission in respect of the form of the databases, other than to suggest that they should free to access and designed in a manner that is as simple to navigate as possible.

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:

It is well understood that collective redress litigation, due to its complexity and the number of parties involved, almost invariably requires considerable financial resources from the outset. This can therefore constitute a significant restriction on parties' right of access to the courts.

The structure of the mechanism provided for in the Directive, whereby the consumers can be asked to contribute only a modest sum and the qualified entities are not-for-profit companies, means that the only potential sources of funding are third party litigation funders or the State.

It will be recalled that, however, that in *Persona Digital Telephony Ltd v. Minister for Public Enterprise [2017] IESC 27* and in *SPV Osus Ltd v. HSBC Institutional Trust Services (Ire) Ltd [2019] 1 IR 1*, the Supreme Court has held that litigation funding arrangements with a third party that does not have a sufficient connection with the claimant, either through an investment agreement or by the assignment of a claim, were illegal as a form of champerty.

Therefore, for so long as third party funding is effectively prohibited in Ireland, the only realistic option open to the State to comply with its obligation under Article 20(1) is to assume a general obligation to fund all representative actions. Given that Article 20(1) does not distinguish between them, it would appear that this obligation would apply both to domestic actions commenced by Irish qualified entities and to cross-border actions commenced by qualified entities that have been designated in another member state.

In addition, the requirement that a qualified entity be a legal person will allow for a defendant trader to apply for security for costs under section 52 of the Companies Act 2014. The breadth of Article 20(1) would seem to place an obligation on the State, in effect, to provide an indemnity in respect of these costs as otherwise qualified entities would be prevented from effectively seeking the redress to which the consumers they represent are entitled.

The extent of this burden might, however, be limited by the application of certain eligibility requirements, such as:

(i) the proposed action must be arguable;
(ii) there is no other identical action in being; and
(iii) the qualified entity agrees that the legal aid provided shall be defrayed from the proceeds of any costs order ultimately obtained.

In cases where the proposed defendant is a publicly owned trader, as per the definition in Article 3(2), it will be necessary to have the question of whether the action is arguable determined by an independent party.

Of course, should the prohibition on third party funding be lifted, the State's obligation in this regard can be restricted to those actions where it has not been possible to obtain such funding.

In that regard, the comments of Clarke CJ in *Persona Digital* and in *SPV Osus* are apposite. In the latter case, the Chief Justice noted that the problem of the inability of some victims of wrongdoing to vindicate their rights because of the cost of going to court is "an issue to which the legislature should give urgent consideration".

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:
It would appear reasonable to allow for a modest entry fee to be charged, particularly in circumstances where third party funding is not permitted. However, such a fee cannot be permissible where the action is commenced on an "opt-out" basis unless the consumer has specifically agreed to pay the fee.

The amount of the fee will depend on the extent of the loss suffered by each consumer and his or her ability to pay. Accordingly, it is submitted that the fee should be limited to a percentage of the estimated average loss of the consumers, subject to an overall cap. Fundamentally, whatever limit is applied must not constitute a barrier consumers' right of access to the courts.

It is submitted that, rather than a waiver system for consumers unable to pay the entry fee, the existing means test under the legal aid system could be applied, in which case the entry fee will be paid on behalf of the consumer by the State.

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

It is submitted that third party litigation funding ought to be permitted for representative actions. As noted above, it is likely to be the only source of funding to finance such actions other than the State. If neither third party funding nor substantial legal aid are available, it is inevitable that the system of representative actions will ultimately fail, with serious repercussions for consumers' right of access to the courts and for the State's obligation under Article 20(1) of the Directive.

It may be deemed more appropriate to provide for third party funding in a more general sense in separate legislation, i.e. not limited to representative actions as this will allow a more detailed consideration of all of the issues involved. It will be recalled that Ireland is almost unique among common law jurisdictions in not providing for third party funding, it being permitted by, among other countries, the United States, Canada, Australia and New Zealand.

However, if the approach of enacting separate legislation is to be taken, this is likely to take some time, such that third party funding should in the interim be provided for in the transposing legislation of this Directive. It is submitted that the substantial safeguards in the Directive will ensure that this interim facility will not be abused, and any additional requirements in the standalone legislation can subsequently be applied to third party funding under the Directive. It will be recalled, as noted above, the Chief Justice has recognised the urgent need for the consideration of this issue by the legislature.

GENERAL COMMENTS ON THE DIRECTIVE OR ON OTHER SPECIFIC ARTICLES OF THE DIRECTIVE

Article: Recitals 10 and 42

Comments:
It is submitted that the transposing legislation should expressly permit aggravated and exemplary damages.

It should first be noted that the Directive does not define the term "punitive damages". It therefore cannot be assumed that it is conterminous with punitive damages under Irish law. Accordingly, the inclusion in the transposing legislation of a provision setting out the position as regards so-called punitive damages would be an important clarification.

It is noted that recitals 10 and 42 indicate that punitive damages should be avoided. However, the indication contained in recital 42 is expressly restricted by reference to national law. The recital also states that the Directive does not affect the rules establishing the substantive rights of consumers to contractual and non-contractual remedies under Union law and national law. It is submitted that the Directive, therefore, provides no new structure to impose punitive damages, but it also does not remove any prior entitlement to same under national law.

However, since both recital 10 and recital 42 appear to describe punitive damages in relatively negative terms, it would be important to expressly retain the court's entitlement to award aggravated and exemplary damages in order to obviate any suggestion that the Directive or the transposing legislation had curtailed this option in any way.

It is further submitted that, insofar as Irish law provides for damages in excess of mere compensation, it does so for valid reasons and, accordingly, should be retained. In Irish law, there are two categories of damages that might be considered within the scope of "punitive damages" as the term is used in the Directive: aggravated damages and exemplary (or, sometimes, punitive) damages.

Aggravated damages, in effect, refer to awards relating to the conduct of a defendant that exacerbates the wrong committed. They are, as noted by the authors of Dorgan & McKenna on Damages and by Finlay CJ in *Conway v Irish National Teachers' Organisation [1991] 2 IR 305*, compensatory. Accordingly, on one understanding, the

term “punitive damages” as used in the Directive does not encompass aggravated damages under Irish law.

Even if aggravated damages are included under the rubric of punitive damages, it is submitted that they should nonetheless be retained as an important tool available to the courts. As noted by the Supreme Court in *Conway*, aggravated damages can be awarded in respect of conduct by the defendant up to and including the trial of the action. This has important practical consequences, as it allows judges to financially penalise misconduct by defendants and, thereby, has an important deterrent effect in respect of such misconduct. Therefore, by expressly removing the option of aggravated damages from the courts, or indeed, by not expressly reaffirming the availability of the option, there is a risk that this important deterrent will be undermined.

The other category of damages that may be included is exemplary damages, which are an important facet of consumer protection law, as has already been recognised in section 74 of the Consumer Protection Act 2007. In particular, the second category of exemplary damages recognised by the House of Lords in *Rookes v Barnard [1964] AC 1129* is especially important, which provides that exemplary damages ought to be awarded where the defendant has calculated that the cost of paying compensation will be less than the cost of complying with the legislative requirement. This behaviour is not only to be deprecated for the prejudice caused to consumers, it also allows the unscrupulous trader to compete unfairly with his law-abiding competitor.

It may also be worth noting in this context that the concerns that pertain within the European Union in relation to punitive damages are largely based on perceptions of excessive awards by juries in the United States. Of course, in this jurisdiction, and given the scope of the Directive, it is most unlikely that a jury will be involved in the process. Instead, any award of punitive damages will almost certainly be determined by the trial judge, which determination is, of course, subject to appeal.

Article: Article 1(2) and recitals 7 and 42

Comments:
As is clear from the terms of Article 1(2) and recitals 7 and 42, the Directive is entirely procedural in nature and does not involve the creation of any new rights or obligations between consumers and traders.

In addition, the views expressed by the Law Reform Commission and the Report of the Review of the Administration of Civil Justice demonstrate that a system for collective redress is beneficial to consumers, traders and the court system generally. Ireland is

one of very few member states that does not currently have such a system in place. Accordingly, it is submitted that the transitional provisions of the transposing legislation should provide that it applies to actions commenced after the enactment of the legislation, even where the infringement to which the action relates occurred before that date.

General Comments:

It is submitted that careful consideration will have to be given to the question of the protection of the process by which qualified entities engage in the process of identifying consumers who may have been affected by an infringement the subject of the Directive. It cannot be allowed that a trader against whom an action is being contemplated could interfere with this process by threatening defamation proceedings. This would have a dangerous chilling effect on the commencement of such litigation and, therefore, would tend to impair those consumers' right of access to the courts. As qualified entities are required to have a not-for-profit character, they are unlikely to have the financial resources to defend a defamation action and so must be seen as being particularly vulnerable to threats of this type.

It will also be recalled that, once litigation has commenced, statements made in the course proceedings have the benefit of the defence of absolute privilege under the Defamation Act 2009. However, it may not be appropriate to allow entirely unfettered licence to a qualified entity to make wide-ranging allegations against a trader that it does not subsequently attempt to litigate.

Accordingly, it is submitted that the transposing legislation should expressly recognise that any communication by a qualified entity, directly or indirectly, to consumers in relation to any conduct that the qualified entity reasonably suspects may constitute an infringement, is entitled to the defence of qualified privilege under section 18 of the Defamation Act 2009.