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

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

Response Template

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):	
Organisation:	Dublin Solicitors Bar Association ['DSBA']
Please briefly describe your interest in this Directive:	The DSBA is a representational body which advocates on behalf of solicitors practicing primarily in the Dublin area. Our members will be advising clients on the nature of the Directive and implications of its transposition into Irish law.
Email address:	maura@dsba.ie
Telephone number:	01 670 6089

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:

Although Consumer Protection traditionally comes under the remit of the Department for Enterprise, Trade and Employment the DSBA believes that the application and designation process should be undertaken by another body to avoid criticism of the Department and accusations of bias which may otherwise damage the legitimacy of the representative action mechanism in this jurisdiction.

In its mission statement the Department of Enterprise, Trade and Employment lists two goals, the goal of ensuring high standards of consumer protection and the goal of creating and sustaining high-quality enterprise and employment across all regions of the country. These two competing goals could be considered to create a conflict in matters concerning consumers and traders.

Part of the role of the Department of Enterprise, Trade and Employment is to be visible in its engagement with large national and multinational traders, for example pharmaceutical manufacturers that may ultimately be the subject of representative actions. The Department would invariably face accusations of a perceived conflict bias by bodies refused designated entity status which could undermine public trust in the selection process and poison subsequent representative actions.

Furthermore, a qualified entity, once designated, may be required to actively engage with the Department of Trade and Employment or one of its umbrella organisations (e.g. the Health and Safety Authority, National Standards Authority of Ireland, Competition and Consumer Protection Commission). An independent selection process would eliminate any scope for allegations of pre-selection, favoured entities status, political interference or lobbying.

The DSBA therefore believes that the objectives of the Directive would be best served if the application and designation process were handled by an independent body away from the Department of Enterprise, Trade and Employment.

The DSBA believes that the Department of Justice is best placed to consider applications and designations for qualified entities bringing domestic representative actions. The Department of Justice does not directly engage in the promoting of manufacturing or

service provider entities and any such engagement is usually restricted to an oversight or regulatory function. The Department of Justice is already tasked with co-operating in relevant EU and international matters and has therefore established a competence that would be called upon to ensure that the designated entity meets the requirement set out in Chapter 2, Article 4, Section 3 of Directive.

The staff at the Department of Justice has the collective knowledge and aptitude to identify and refuse applicants seeking qualified entity status for the purpose of engaging in abusive litigation, a primary concern repeatedly identified in the Directive. As it lacks direct relationships with traders the Department of Justice would have greater standing concerning determinations that intended litigation was deemed to be abusive.

The vesting of responsibility for the application and designation process with the Department of Justice negates the need for any distinction in procedure in considering appropriate entities for domestic representative actions and cross border representative actions as the Department of Justice's responsibilities and competence already spans both jurisdictions.

Finally, where necessary, the Department of Justice may seek the counsel of other Departments and/or Statutory Bodies (e.g. Department of Health, Health Products Regulatory Authority, Department of Foreign Affairs Trade Division) including the Department of Enterprise, Trade and Employment but still maintain arm's length approach in considering qualified entities which adds independence and legitimacy to the procedure.

It should be emphasised that the Department of Justice should be involved in the application and designation process only. Once qualified entities are designated the intervention of the Department should end and further engagement with the state, if necessary, should be passed to another state entity with greater understanding and competence in the area that forms the subject matter of the representative action.

This transferral of responsibility, if required, serves a further function protection the independence of the Department of Justice's function which may need to be called upon to mediate future claims that a representative action commenced by a qualified entity initially in good faith has evolved into abusive litigation which may indeed require revocation of qualified entity status.

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:

The DSBA is broadly in agreement with the criteria set out in paragraph 3 of Article 4 regarding qualified entities in this jurisdiction.

Criteria (a), (b), (d) and (e) safeguard the legitimacy of the procedure by ensuring that commercial interests, whether domestic, EU based or based outside the EU, cannot abuse the procedure by seeking to institute frivolous consumer actions or influence otherwise existing legitimate actions on false pretences with the intention of damaging the reputation, development or supply of competing traders or their products.

However, the DSBA believes that an exemption mechanism should be considered to allow an entity in extreme circumstances to seek designation to facilitate a quick application and receive quick designation to allow it to instigate a domestic action without the need to establish 12 months of public activity where the roll out of a particularly novel and innovative product, for instance a pandemic vaccine, may call for urgent consumer intervention.

With respect to restricting qualified entities to those able to demonstrate non-profit characteristics the DSBA believes this requires particularly careful consideration given the unique characteristics of the Irish consumer and commercial environment. Such restriction could ultimately be detrimental to consumer interests.

Representative actions can generate significant costs which must be borne by some party. Ireland has a population of 5 million people from which it draws its consumer pool, much smaller than other EU countries (United Kingdom 68 million, France 65 million, Germany 84 million). For products such as shoes or common foodstuffs, even a small population provides a sufficient pool of consumers with a vested interest in such products to generate sufficient interest to directly fund a representative action or attract the interest of a consumer rights organisation that will.

For other products such as specialist medication for children with a rare condition the funding pool can be miniscule, rendering a representative action unattractive or unfeasible. In such circumstances for-profit entities can sometimes provide an otherwise unavailable funding mechanism whereby representative action can be privately subsidised by a third party on the understanding of payment will be forthcoming if the action is ultimately successful. In this way, such funding enables access to justice for causes that otherwise cannot be litigated.

One must also consider the dichotomy between the size and relevant strength of the Irish consumer and consumer organisations against the size and sophistication of some of the manufacturers located here, particularly in technology and pharmaceuticals.

The DSBA is cognisant of concerns that facilitating for-profit entities may incentivise opportunist litigation but feels that such concerns are unjustified especially where safeguards are enacted by virtue of the designation procedure and the Directive's emphasis on avoiding 'abusive litigation' and the funding party has a clear commercial interest in only funding meritorious litigation.

Some of the most far reaching and effective consumer representative actions in other jurisdictions such as the United States were only possible due to the involvement of third-party for-profit entities adopting a long term view to complex litigation and providing services on contingency.

Aside from considerations relating to the Directive such arrangements remain prohibited under Irish law as was most recently confirmed in the 2018 case of Persona Digital Telephony Limited v The Minister for Public Enterprise where the Irish Supreme Court confirmed that professional "for profit" third party litigation funding remains unlawful in Ireland and that any change would require the enactment of legislation by the Irish Parliament. Any transposition of the Directive into Irish Law should consider such a future change by the Oireachtas concerning third party funding of litigation and should be drafted to facilitate such a change should it transpire.

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:

The DSBA believes that the designation of qualified entities on an ad hoc basis to bring specific domestic actions would ultimately serve the consumer as it would allow representative actions to be litigated by specialist interested parties instead of general consumer protection agencies who may lack the resources or expertise in a particular area to properly litigate on behalf of the consumer.

The exponential growth in consumer products in recent years and their increasing complexity means that many umbrella consumer organisations are stretched in their attempts to remain informed of an ever-expanding categories of consumer goods ranging from online streaming services to luxury cosmetics. At a European Level, attempts to legislate for these growing multitude of industries across the Union has resulted in dramatic expansion in both the volume and complication of associated consumer law that proves increasingly challenging for consumer advocates to maintain competence.

The automobile industry provides a useful example. Recent technological advances have led to diversification into different fuel alternatives that was once dominated by the internal combustion engine. Bodies with expertise in consumer automotive issues built around the internal combustion engine may struggle to address consumer issues that arise regarding hydrogen fuel cells or electric batteries which are dramatically different technologies that follow different production and supply chains. Indeed, the question arises whether certain consumer issues regarding battery life of such vehicles would be categorised as

automotive issue or power unit issue given the battery technology is being utilised in a multitude of settings including domestic power supply.

In addition, growth of social media and modern communications allow people with common interests and specialised knowledge to collate their efforts together in pursuit of a common purpose a mechanism that can often give rise to a specialised consumer grouping concerned with a particular product line or service whose collective knowledge and expertise exceeds any consumer protection agency.

One such Irish group concerned with Digital Rights is currently calling upon victims of the recent major data breach to join a mass action against a prominent social media company. The group has attracted individuals with specialist knowledge and interest in this growing area. The group could meet the eligibility criteria to be nominated a designated entity for a representative action. If such groups cannot be designated on an ad-hoc basis, consumers would lose the opportunity for their rights to be litigated by dedicated parties with specialist knowledge and would instead be represented by generalists whose resources are split over multiple actions that may distract from one another.

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:

There already exist a number of statutory public bodies who are tasked with consumer protection relating to their particular area of expertise. Examples include National Standards Authority of Ireland's Legal Metrology Service, the Food Safety Authority of Ireland and Central Bank Consumer Protection Directorate.

Many such statutory bodies are vested with power that allow them to criminally prosecute traders under legislation such as the European Communities (General Product Safety) Regulations 2004 or pursue civil proceedings against a trader under the Liability for Defective Products Act 1991.These statutory bodies are not only well funded but actively participate in the regulation of traders and develop significant knowledge base and expertise to their regulatory actions and could be designated as qualified entities for domestic and/or cross border actions if required.

The DSBA does not consider it either necessary or beneficial for Ireland to designate specific bodies for the purpose of bringing both domestic and cross border actions if this would be to the exclusion of other qualified entities which could be designated on an ad hoc basis.

Allowing the largest possible net from within which a designated entity can be selected would result in the maximum protection for the consumer and should be encouraged.
Please indicate any other general comments or recommendations you may have on Article 4:

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:

Allowing qualified entities to seek injunctive measures and redress measures would provide said entities with powers to facilitate their function which would ultimately benefit the consumer. To deny the entities the opportunity to seek such measures would essentially remove from them a vital tool in seeking to remedy injustices against consumers.

Without these powers the qualified entity would essentially be reduced to public information campaigns in which it would be able to identify infractions by traders but not be in a position to take any remedial action. This would result in individual consumers being forced to institute their own proceedings to seek relief or to lobby state agencies to intervene on their behalf. This would undermine the 'strength in numbers' principle that underlies representative actions and significantly dilute the Directive's efficacy.

Concerning a single final decision, provided that the registration procedure is sufficiently wide and all consumers are given a reasonable period within which to learn of and seek to participate in a representative action through a qualified entity, any prejudice that may result from a single final decision could be minimised.

Although admittedly restrictive, a single final decision provides focus and reliability for all parties, consumer and trader alike. Multiple actions brought by multiple parties of different strengths and with different resources available can distract from the consumer issue and can result in the overburdening of the trader's resources who is called upon to defend multiple actions instead of one collective action.

Provided the consumer issue can be isolated and properly defined (e.g. a faulty widget) one overreaching single decision with respect to liability for said fault and resulting redress

would provide relief to the majority of consumers of said product and presumably lead to changes that would prevent further infractions by the trader.

Inevitably there would be consumers who would feel that their individual rights had not been vindicated under such a process but the alternative multi-party approach risks dividing resources to such an extent that the matter never becomes resolved and neither the consumer nor the trader receives any resolution.

Ultimately, a unitary representative action for a single final decision will save resources, time and costs for all parties concerned.

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

Article 8

Injunction measures

Question:

2. Should Ireland avail of the options in paragraph 2? Please provide reasons for your answer in each case.

Response:

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:

Introducing a pre-requisite that a qualified entity must first attempt to achieve the cessation of infringement in consultation with the trader prior to the seeking of injunctive measures presents significant drawbacks for the consumer and could arguable be tantamount to imposing a regulatory function on the qualified entity which would presumably exceed both its mandate and purpose.

Engagement and consultation with the trader could result in the early cessation of the infringing behaviour provided that the trader was acting in good faith. However, it will be equally open to the trader to seek to frustrate such consultation to allow the infringing behaviour to continue for a further period of time.

Furthermore, any such requirement in national law could be utilised by the trader to delay or otherwise defeat a later injunction application if there was some perceived or arguable technical flaw in how the consultation procedure was conducted.

If Ireland was to introduce such provisions of national law it is likely that a third-party arbiter would be required to facilitate the process and to determine what constituted a valid “consultation” process and when attempts at such a process could be said to have genuinely been exhausted.

There is the additional risk that a trader could seek to further hamper matters by calling into question the behaviour of the third party facilitating the procedure by way of judicial review resulting in matters reverting to the Courts for adjudication. There is therefore the risk such provision in national law may simply add further complexity and increase the burden on the qualified entity trying to champion consumer rights.

If the infringement was particular abhorrent or problematic it is presumed that one of the many state bodies with competence in the traders industry would intervene to demand that the trader immediately cease the practice thereby allowing the qualified entity to focus on redress rather than enforcement.

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

Article 9

Redress measures

Question:

2. and Recital (43) Should Ireland introduce an opt-in or opt-out mechanism, or a combination of both bearing in mind that an opt-in system automatically applies to individual consumers who are not habitually resident in the Member State of the court or administrative authority before which a representative action has been brought?

At what stage of the proceedings should individual consumers be able to exercise their right to opt in to or out of a representative action?

Please provide reasons for your answers.

Response:

The DSBA agrees with the contention of the Law Reform Commission in its consultation paper on multi party litigation [LRC 76-2005] that an "*opt-out regime would require a dramatic shift away from the traditionally voluntary method of instituting litigation in this jurisdiction*". The Commission considered the 'opt-in' regime to be more attractive due to its 'familiarity' in other word similarity to the procedural culture currently in place in this jurisdiction.

The opt-in regime presents further benefits in this respect as it harmonises the requirements for domestic and cross border actions, the latter being subject to an automatic opt-in system under the Directive applicable to individual consumers not habitually resident in the jurisdiction.

The 'Opt out' ,regime, observed primarily in the United States, is championed on the basis that it improves access to justice by automatically including those who do not have the means or ability to pursue an individual action or who lack the awareness to actively participate in a collective action. It is also considered effective in ensuring that consumers in larger countries with remote populations (for example a consumer in Anchorage, Alaska) are not prejudiced as a result of being unable to communicate with an entity bringing an action based elsewhere in the same jurisdiction (for example Miami Florida, 6444 kilometres away).

The DSBA agrees with the Commission's recognition of Ireland as a relatively small geographical area with a small population who are bound together by well established lines of communication that enjoy widespread reach within the Country. These factors allow for confidence that a properly conducted public awareness campaign would likely inform all possible members of a consumer group thereby negating the primary consideration justifying the adoption of an opt out regime.

Furthermore, Ireland's legal system is recognised as enjoying a high percentage of people who feel highly informed about legal procedures (European Commission (2013), Justice in the EU, Flash Eurobarometer 385, European Commission Publishing Brussels)

suggesting that the risk of consumers being unable or unaware of their right to litigate on a consumer issue is low.

The DSBA therefore believes that an 'opt in' regime is preferable.

With respect to the question of what stage of the proceedings should individual consumers be able to exercise their right to opt into a representative action the DSBA believes that given the wide range of possible consumer actions and the particular intricacies regarding each possible action it would be preferable for the designated entity to be able to determine an appropriate schedule. It is however acknowledged that the entity would lack any contractual or statutory power to set time periods and could thus be challenged resulting in uncertainty and likely further delay and costs.

Consumer contracts are ordinarily subject to a limitation period of 6 years, a time period most familiar to consumers and practitioners which has which has stood the test of time in contract litigation. This would superficially appear to be the most appropriate time period. However, this 'moving target' could potentially present difficulties for the qualified entity is seeking to set down proceedings or calculating future losses where one would have to consider the possibility of additional participants joining the action up to six years into the future from when the product is removed from the market or longer if one considers that some consumers may only become aware of faults in the consumer product well into the future (e.g. breast implants or hip replacements).

The DSBA believes considerable consideration would need to be given to the imposition of a universal time period which could defeat the intended benefits of the Directive by rendering such actions unviable or overburdensome.

Imposing too short a period would risk excluding many consumers and may place undue pressure on the qualified entity to communicate the action in too short a period of time while allowing too long a period may test the patience of all parties and result in the procedure failing to be able to deliver redress in a suitably timely manner.

Consideration must also be given to the possible impact of the trader (and by extension their insurer) who must be able to determine with some certainty both the extent of financial redress required and/or the time period within which sufficient funds will have to be set aside to meet redress costs. Ambiguity may at first glance appear to benefit the consumer but if no certainty can be provided it may be simpler and cheaper for the trader and/or its insurer to simply wind down in which circumstances the consumer is ultimately harmed as the opportunity to seek redress is reduced if not lost.

Question:

7. Should Ireland avail of this option and, if so, where should such outstanding funds be directed? Please provide reasons for your answer.

If an option is implemented to divert outstanding redress funds not recovered within the established time limits to a third party, there are three traditional possibilities:

1. The outstanding funds would be payable to the state.
2. The outstanding funds would be distributed amongst the existing pool of consumers. or
3. Outstanding funds would be returned to the trader.

All three scenarios are problematic and would lead to objection but the DSBA believes that paying the funds to the state would at least benefit both the consumer and trader, both of whom are likely citizens and consumers themselves through increased tax revenue for spending in society.

If the funds could in some way be directed towards a consumer agency it would preferable as it could then be established that the funds would be used for future consumer protection issues providing a benefit, albeit immeasurable, to the consumers who did not come forward within the time limit.

Response:

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

Article 11

Redress settlements

Question:

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

Response:

The DSBA recognises that representative actions brought by qualified entities are somewhat compromised by their 'representative' nature i.e. an action brought by a few that represents the interests of many.

It is recognised that there is a risk that the interests of the few could prejudice the wider consumer class and that the interests of the narrower entity members and wider consumer grouping may diverge, especially during negotiations where the trader may try to entice a settlement more favourable to it by providing undertakings that skew to benefit the members of the entity alone. An example may be a shoe manufacturer agreeing changes to materials in a running shoe that would benefit athletes who regularly change shoes who would benefit from increased performance, but which may penalise casual wearers who would instead be seeking longevity and robustness.

However, introducing a procedure whereby a court ultimately acts as arbiter over whether settlements are fair would be inconsistent with the principle of finality of settlements. Furthermore, it could potentially open further waves of litigation which may discourage settlements where the trader lives in fear of settlements being challenged on grounds of fairness.

The DSBA would favour granting autonomy to the designated entity to make the best decision on behalf of the consumer group noting that it likely had to prove its bona fides and capacity to act impartially and justly in the application process. The DSBA feels the consumer would be better served if measures were imposed requiring greater transparency on the part of the qualified entity analogous to those required of registered companies in the Companies Act (e.g. regular audits of accounts, annual general meetings etc.) that would allow for consumer participation and instil confidence in the procedure affording disgruntled consumers the opportunity to conduct oversight and air grievances in an appropriate venue.

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:

Further clarification is required before the utility of such rules can be commented upon. A procedure whereby consumers may refuse to be bound by settlements recognises the autonomy of the individual and their individual consumer rights, but it also dilutes the effectiveness of the qualified entity which relies on a 'strength in numbers' effect in its engagement with the trader.

Similarly, the trader is more likely to concede to a settlement if there is confidence that said settlement will dispose of an issue in its entirety and provide an element of closure which represents a value to trader who can reference the settlement as a positive development when engaging with investors and seeking to improve market sentiment.

The fear that further litigation may result after a settlement from consumers refusing the outcome of the representative action diminishes the value of said settlement to the trader thereby undermining the representative action procedure.

In consumer actions there will always be contrarian factions who, for a variety of reasons not always connected to the consumer issue at hand, break off to pursue independent actions. In many cases the schism can divide resources and undermine both efforts resulting in a loss for each side and a lost opportunity to the wider consumer group who are denied representation.

Binding all consumers to a settlement reached through the efforts of a defined entity, though not a perfect process, concentrates and strengthens the collective resources of the wider consumer group into an entity with viable size and resources to take on a trader which ultimately serves a greater purpose for consumers in general but can come at a cost to the individual consumer.

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

Article 13

Information on representative actions

Question:

3. Should Ireland avail of this option and allow for traders to provide this information only if requested by qualified entities? Please provide reasons for your answer.

Response:

Vesting qualified entities with the authority to determine what information must be provided by the trader empowers the consumer, affirms the consumer centric nature of process and provides parity between the parties.

The vesting of said power provides the qualified entities with an important negotiating tool when litigating matters. Information regarding the representative action will include information pertaining to the nature and extent of the traders' infractions and how the matter was resolved in favour of consumers.

The publishing of this information can be detrimental to the trader's brand (otherwise they would likely publish the information voluntarily) and would likely be viewed as a cost both in terms of reputation and a fiscal loss as it would increase public awareness not only of the outcome of the proceedings / settlements but also the possibility of compensation to a greater pool of litigants.

The trader would likely prefer to minimise such exposure and may seek to negotiate a settlement with the qualified entity that was more favourable to consumers in return for minimised publication.

In circumstances where product replacement costs would be relatively low due to traders' economies of scale it threatens the trader with an additional penalty of reputational damage which may be persuasive in encouraging early settlement reducing the qualified entities costs making such actions more viable.

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

Article 14

Electronic databases

Question:

1. Should Ireland set up such databases and what form should they take? Please provide reasons for your answer.

Response:

The DSBA supports the setting up of a publicly accessible national electronic database to provide information on ongoing and concluded representative actions and the qualified entities tasked with their progression. Transparency strengthens such proceedings by providing the public with an opportunity to not only be informed of their existence but also to participate in their progression. Over time such information sharing provides workable templates for future actions and contributes to more efficient and coherent procedures through collaborative efforts. The DSBA believes that a central database should be set up and administered by Competition & Consumer Protection Commission being the state body with the greatest competence in providing consumer information to the public.

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

Article 20

Assistance for qualified entities

Question:

1., 2. And Recital (70) What measures should Ireland take to implement these provisions and in what circumstances do you think a qualified entity should merit consideration for these measures?

Which measures do you think would be most appropriate for a qualified entity seeking to launch a representative action in Ireland and should there be distinctions made between a domestic qualified entity and a cross border qualified entity seeking to launch a representative action in relation to what type and level of support they could seek?

What conditions should be placed on such an organisation to ensure it acts in the best interests of its clients and fulfils its duties?

Please provide reasons for your answers.

Response:

Representative Actions require significant outlay to properly administer and fund. Challenging industries' players who have developed and documented product knowledge and expertise over many years can be extremely challenging and expensive.

Establishing the existence of safety issues or product defects that endanger the consumer requires expert evidence and in many cases product testing and/or other scientific evidence to rebut manufacturers assurances and warranties about their products.

Often an industry or manufacturer relies upon an inequality of arms as a defensive measure seeking to smother a plaintiff in costs until their resources are expended. Public funding can be particularly vulnerable in such cases where defendants campaign against actions against them on the basis of the cost to the public purse.

The limiting of applicable court or administrative fees would be of little assistance if implemented in isolation. Such fees in the Irish jurisdiction are reasonable but represent a fraction of the costs associated with litigation.

It is difficult to envisage a political environment in which legal aid would be granted to fund complex and lengthy consumer actions without calling into question the fairness and adequacy of the entire legal aid system into question. At present, the provision of legal aid to defend criminal prosecutions, support those involved in family law disputes and fund certain civil actions is already viewed with scepticism by the public. Partially expending already strained public budgets to pursue industry on behalf of a limited group of consumers would likely prove politically unappetising and funding would likely be inadequate if given at all which would defeat the purpose of said actions.

As the state already funds statutory bodies tasked with ensuring consumer safety and protection (e.g. Competition and Consumer Protection Commission ['CCPC'] the Food

Safety Authority of Ireland ['FSAI'] the Central Bank Consumer Protection Directorate, it is presumed that the implementation of the directive through designated entities will only be considered necessary if the multitude of statutory agencies are unwilling, unable or deem it unviable to pursue a particular consumer issue. State funding for third parties to pursue objectives rejected by statutory bodies would prove extremely challenging.

In light of these challenges the DSBA believes that the consumer would be best served if private, for profit, entities were permitted to partially or fully fund actions of public interest. Such measures would ensure that qualified entities would have sufficient funding to match that of industry and encourage industry to properly consider the implications of representative actions under this Directive fearing an equality of arms.

The DSBA believes that any designated entity should be required to make periodic confidential disclosures to a state body nominated by the Department of Justice as part of the designation process. Said state body should be selected on the basis of its own proficiency in the product area (e.g. The Irish Medicines Board for representative actions involving pharmaceuticals, The Road Safety Authority for representative actions involving combustion engines). The bodies should exercise oversight function only but reserve the authority to refer the designated entity back to the Department of Justice for reconsideration of its designated entity status if it was suspected the interests of consumers were not being served. The Department of Justice should also reserve the right to audit the designated entity and/or periodically refer designated entities to the legal costs adjudicator to ensure that proper cost controls are in place.

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:

The qualified entities application and designation procedure exists on the presumption that an appropriately qualified, interested and capable body would be entrusted with the responsibility of pursuing action on behalf of a group of consumers.

Once selected through this process it is preferable that the qualified entity would be permitted to proceed in a manner that it determines most appropriate given the unique attributes of the consumer issue being contested. As such, qualified entities should be allowed the opportunity to require consumers to pay a modest entry fee for the purpose of either partially or fully funding the action or to act as a litmus test to determine the interest amongst consumers who would have to front said fee in order to participate in the action.

The qualified entity should not be penalised in a manner that would prohibit it from enacting such a mechanism if it was deemed appropriate in the circumstances. With respect to the amount that should be charged and in what circumstances, given the broad range of consumer issues that may arise this would be best left to the qualified entity to determine. With respect to waivers for consumers, again this is an issue that should be left for the qualified entity to determine. *In summary, if a qualified entity is successful in being nominated into a position of trust, trust should be afforded to it subject to the oversight safeguards mentioned above.*
Please indicate any other general comments or recommendations you may have on Article 20:

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

General comments on the Directive:
Article: **Comments:**
Article: **Comments:**
Article: **Comments:**
Article: **Comments:**
Article: **Comments:**

Additional rows may be inserted, if required.