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

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

Response Template

March 2021

As set out in the consultation, the Department of Enterprise, Trade and Employment is specifically seeking views on the Member State options in the Directive.

Respondents have the opportunity to comment generally on the Directive at the end of the template and express any views on other specific articles of the Directive should they wish.

Please include your response in the space underneath the relevant option, to set out/ explain your views on each. Completing the template will assist with achieving a consistent approach in responses returned and facilitate collation of responses.

When responding please indicate whether you are providing views as an individual or representing the views of an organisation.

Respondents are requested to return their completed templates by email to conspol@enterprise.gov.ie by the closing date of **Friday 7 May 2021**. Hardcopy submissions are not being received at this time due to remote working. Please clearly mark your submission as 'Public Consultation on the Transposition of Directive (EU) 2020/1828'.

Any queries in relation to the consultation can be directed to the Competition and Consumer Policy Section of the Department at the following contact points:

- Aedín Doyle at Tel. 087 1489785 (or at Aedin.Doyle@enterprise.gov.ie)
- Paul Brennan at Tel. 087 7434526 (or at Paul.Brennan@enterprise.gov.ie).

Name(s):	Ekkart Kaske, EJF Executive Director Dr. Herbert Woopen, EJF Director Legal Policy
Organisation:	European Justice Forum (EJF)
Please briefly describe your interest in this Directive:	European Justice Forum ("EJF") is a non-profit organisation formed in 2005 to promote balanced, transparent and efficient access to civil justice for consumers and enterprises in Europe without incurring the damage that would arise from the adoption of class actions. EJF has significantly engaged in the debate during the legislative process of the Representative Actions Directive and wishes to contribute its experience with all Member States during the transposition phase of this directive. For more information please refer to www.europeanjusticeforum.org EU Transparency register identification no: 624428510438-55
Email address:	secretariat@europeanjusticeforum.org
Telephone number:	[redacted] (Ekkart Kaske) [redacted] (Herbert Woopen)

Note:
While answers to your questions are given below in the boxes you provided as desired, the guiding ideas can be found in an **Executive Summary at the end of this document (Annex)**.

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:

Responsibility for designating a Qualified Entity ("QE") should lie with a statutory body with comprehensive expertise in the area of consumer protection law.

We strongly suggest that the most appropriate body to fulfil this role is the Competition and Consumer Protection Commission (the "CCPC"). The CCPC is an established, independent, statutory body with a dual mandate to enforce competition and consumer protection law in Ireland.

One of the main purposes of the Directive is to ensure better enforcement of EU law across member states. The role of the CCPC is, at present, to use its statutory powers to increase compliance with competition and consumer protection law. It follows, therefore, that the CCPC is the most appropriate statutory body to fulfil the role of dealing with the application and designation process, given the depth of its expertise, knowledge and experience in the area of competition and consumer protection law.

The intended scope of the Directive is broad and covers a number of specialized areas (set out at Annex 1 to the Directive). We suggest that, where appropriate, the CCPC should seek advice in relation to specific issues, where necessary, from other statutory bodies or regulators with expertise in sector specific areas. For example, when dealing with issues presented under the medical device directives, advice should be sought from the Health Products Regulatory Authority ("HPRA"). The HPRA's function is to carry out market surveillance and oversee regulatory compliance in the area. The HPRA would therefore be best placed to make recommendations on the sector specific QE to be designated in that specialized area.

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

The CCPC/nominated body should put in place a transparent system for monitoring QEs' actions. Such a proposed system would require the CCPC or nominated body

to update and communicate information regarding actions taken to the sector specific competent authorities (such as the HPRA) and involved ombuds entities.

Should Ireland consider it useful to concentrate the initiative for representative actions in the hands of the CCPC itself to the maximum possible, as EJF would deem useful in the interest of structural simplicity, our response to Art. 4 (7) below may help to achieve this.

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.

Ireland should avail of the option of applying the same criteria as specified in Article 4(3) for cross-border QEs to QEs seeking designation to bring domestic actions.

The aim of the Directive is to provide a single, effective and efficient procedural mechanism by which a QE can bring representative actions on behalf of consumers. There is no logical basis for setting different criteria for a domestic QE to that of a cross-border QE.

The criteria set out in Article 4 (3) provide certain safeguards for both consumers and traders, ensuring the QE is an appropriate body to be designated. It seeks to ensure that the QE has a genuine and legitimate interest in representing consumers' interests and bringing representative actions on consumers' behalf. Using the criteria set out in Article 4(3) for domestic QEs would ensure uniformity across both domestic and cross-border actions which would be in line with the objectives of the Directive.

In anticipation of parallel proceedings across Member States, the Directive provides that where the alleged infringement affects consumers in different Member States, several QEs from different Member States can join forces to bring a single representative action in a single forum, subject to relevant rules on jurisdiction. If domestic QEs are not designated under the same criteria as cross-border QEs, then this would result in an anomaly to the criteria for cross-border QEs.

Furthermore, if the domestic QE is not subject to the same criteria as cross-border QEs (as set out in Article 4(3)), an unregulated or under-regulated QE could seek to set up in Ireland, resulting in ill-founded litigation and a multiplicity of outcomes, contrary to the objective of the Directive.

If Member States do not impose the same, or similar, criteria for domestic QEs as it must for cross-border QEs, the possibility arises for an ill-qualified QE to seek to be designated in a Member State with limited restrictions on their designation and then bring multi-jurisdictional Representative Actions.

The Directive does not specifically prohibit a domestic QE bringing a cross-border action. It says that cross-border QEs in the Commission's list under Article 5 (1) *must* be accepted by Member States courts as having the necessary legal standing to bring a cross-border action. A domestic QE will have legal standing in its own jurisdiction, but if it purports to represent consumers in the foreign jurisdiction in which it is attempting to bring an action, the foreign court may well be disposed to allow it to sue under its purely national rules. For that reason, the criteria for designating domestic and cross-border QEs should be uniform and where Ireland should ensure compliance with the criteria under Article 4(3) for all QEs seeking designation in Ireland, it should extend the requirement to include domestic QEs designated in other Member States seeking to bring an action in Ireland.

Question:

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

Response: No

Ireland should not allow QEs to be designated on an ad hoc basis to bring a specific domestic actions.

The logic behind the designation of an organisation or a public body as a QE is that such designation is made in advance of legal proceedings. The safeguards for designating a QE would therefore be completely undermined if the process were not strictly and uniformly adhered to. It is important, therefore, that the legitimacy of a QE is safeguarded to protect both traders and consumers, regardless of whether they are a domestic or cross-border QE.

Recital 28 of the Directive reflects the confusion regarding designating ad hoc QEs which is why Article 4(6) permits Member States' discretion. On the one hand the Recital states the Directive is explicitly not encouraging ad-hoc designation and on the other it contemplates that such designation "by the court of administrative authority seized", should be possible. As an aside, designation of a QE by a court (as suggested in the Recital), in our view, confuses the designation process of a QE, which is administrative, with the admissibility (or certification) process, which is judicial.

Article 7(6) requires Member States to ensure that QEs "*have the rights and obligations of a claimant party in the proceedings".* To avoid any abuses of process, it is imperative that the QE is appropriately designated and qualified first and that the QE cannot be designated on an ad hoc basis.

While our view is that QEs should not be permitted to be designated on an ad hoc basis, should Ireland avail of this option and allow such designation of a QE to bring a specific domestic action, it should be subject to strict criteria being met. Criteria along the lines of, or similar to that required for QEs bringing cross border representative actions (Article 4(3)) should be the standard imposed.

Question:

7. Should Ireland avail of this option and as part of the transposition process designate specific public bodies for the purposes of bringing both domestic and cross border actions? Please provide the name of such bodies and the reasons for your answer.

Response: Yes

Ireland should avail of this option and as part of the transposition process designate specific public bodies for the purposes of bringing both domestic and cross border actions.

We suggest the CCPC is the most suitable body to fulfil this role. The CCPC is already a "Qualified Entity" under the Injunctions Directive, albeit that it does not necessarily comply with all of the criteria set out under Article 4(3), but this is not required according to Art. 4 (7) ("Nothwithstanding paragraphs 3 and 4").

If the CCPC is to be the body responsible for designating other Irish QEs (as we have suggested in response to the question on Article 4(1)), there is no reason the CCPC cannot discharge this function also, although it is likely to have to establish a division within it to perform the designation approval process. Alternatively, an entirely separate public body could be established for the purpose of approving designated domestic QEs.

To keep the expansion of collective actions focused on maintaining law enforcement in the public interest, rather than encouraging privatisation of justice by letting mass litigation become an "asset class" for private actors for profit, applications by entities seeking designation should satisfy the CCPC that it cannot tackle the issue in a more credible way than litigation, which could and should include the involvement of ombuds solutions and regulatory redress which the CCPC could orchestrate. Enforcement of EU consumer law infringements are principally a public task.

The CCPC could secure the funding of such broader activity and in particular provisioning for potential adverse cost orders it might face when taking on the role of claiming as a QE itself, by following the model of the Canadian province of Québec (references below in our response to Art. 20): there, a fund for supporting collective actions with decision making bodies under the supervision of the provincial ministry of justice has been built up over the past four decades by skimming off small amounts from any collective action taking place in that province. While the Québec fund does not itself initiate legal proceedings, and any person can start a collective action under local law, the Québec fund nevertheless ensures its funding of potential collective litigation is tested against the public interest. This supports its supervisory role in complementing private litigation funding.

Thus, even if the CCPC is, on top of having designated status as a QE, to be the body responsible for designating other Irish QEs as we have suggested in answer to the question on Art 4 (1), there is no reason it cannot discharge both the functions of starting and steering representative actions itself.

We recommend keeping the task of enforcing consumer law also by way of collective actions fully in the hands of the state as described in the previous

paragraphs and not create or support creation of a multiplicity of actors. This would be too harsh a change from the reasonable traditional Common Law doctrines, i.e. the prohibition of barratry, champerty and maintenance.
Please indicate any other general comments or recommendations you may have on Article 4: **The European Commission's Internal Market Information System ("IMI System") should oversee and govern disputes relating to the recognition of designated QEs. This would ensure a central, multilingual and standardized platform for communication and conflict resolution across all Member States in this regard.**

Article 7

Representative actions

Question:

5. Should Ireland take the option to allow qualified entities to seek these measures within a single representative action and for a single final decision? Please provide reasons for your answer.

Response: Yes.

Ireland should enable QEs to seek the measures referred to in Article 7(4), i.e. injunctive measures and redress measures, within a single representative action, where appropriate.

While there is currently no legislative framework or legal procedure in Ireland to allow for collective redress or class actions, analogous procedures by way of representative actions and test cases exist. The current form of a representative action in Ireland is most akin to a representative action under the Directive, albeit with the former being far more stringent, and as a result under-utilised, than the latter. One such example is that remedies available under Ireland's current representative action regime are limited to injunctive and declaratory relief only. Damages cannot be awarded.

When providing its comments on the proposed Directive in 2018, the Law Society of Ireland noted a key criticism of the Injunctions Directive (now being repealed) whereby it did not explicitly provide for damages as a remedy (rather it allowed for injunctive relief, or cease and desist-type orders only). As the Collective Redress Directive gives Member States the option for QEs to seek, and therefore be awarded, both injunctive and redress measures within a single representative action (where appropriate) it would seem in line with the aforementioned criticism of the Injunctions Directive, that these measures would be welcomed and should be adopted/availed of.

When transposing the Directive, for Ireland to allow QEs to seek both injunctive measures and redress measures (damages) within a single representative action for a single decision, guidance should be taken from Mr. Justice Peter Kelly and his review group's (the "Kelly Review Group") report entitled "Review of the Administration of Civil Justice Report" (the "Kelly Review Group Report") published in October 2020. The Kelly Review Group Report shares the Law Reform Commission's[1] preference for a multi-party action model along the lines of the Group Litigation Order ("GLO") procedure in England and Wales, which allows for both injunctive relief and redress measures to be awarded within a single action. The Kelly Review Group Report found, however, that even if a form of the GLO model is adopted, to comply with the Directive there would be a need to legislate

[1] See Consultation paper on Multi-Party Litigation (Class Actions), LRC CP 25-2003.

discretely, whether by adapting the existing representative action for that purpose or by providing separately for such an action.

While this holds true for purely domestic procedures, cross-border issues require further special attention. This is because the Directive introduces provisions into domestic law, relating to the cross-border effects of representative actions, which conflict with the application of the Brussels Ia Regulation. This is notwithstanding the two instruments are supposed to be free-standing (Article 2 (3)).

Brussels Ia has been acknowledged by the European Court of Justice to work for two-party actions with the subject of an injunction based on the rules for two-party tort rules[2], i.e. in that narrow context, an effect of *res iudicata* could be assumed were one to consider only the Brussels Ia Regulation. But looking at Brussels Ia in isolation and assuming it solves that issue is not sufficient for two reasons:

1) The Representative Actions Directive has three specific provisions dealing explicitly with such cross-border issues which need to be put into perspective with the full context, and their contents need to be reconciled as between themselves, and with Brussels Ia; these provisons being: Art. 2 (3), Art. 15 and Art. 9 (4).

2) It is furthermore a wide-spread conviction in the legal community and explicit opinion of the Advocate General of the European Court of Justice that the rules of Brussels Ia are not fit to cover all the questions raised by multi-party or multi-beneficiary actions for redress in a cross-border context[3], and most relevantly for the current purposes, specifically not for the effects regarding beneficiaries who are not parties to an action. Given these differences in international law of civil procedure between injunctive relief and compensatory redress, Ireland will be alive to the potential for judicial confusion.

We propose that confusion can be kept to a minimum by a close review of the Directive itself. When the Directive's Art. 9 (4) and Recital 22 (for decisions by public authorities) ask Member States to establish rules against the collision of conflicting decisions and against double participation by consumers in collective procedures in Ireland and abroad, while its Art. 2 (3) at the same time purports not to change the rules regarding jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Brussels Ia Regulation), this contradiction can – at least temporarily, without a new legislative proposal by the Commission to change Brussel Ia – be resolved by the following interpretation:

Art. 15 and Art. 9 (4) as such have already modified the Brussels Ia rules about the effects of foreign collective actions. Regarding cross-border effects, Article 15

[2] ECJ Case Henkel C-167/00, judgment of 1st October 2002, no. 50.
[3] Advocate General Bobek in ECLI:EU:C:2017:863 on C-498/16 no. 119-123.

provides for a court's or administrative authority's final decision[4] about the existence or non-existence of an infringement harming collective interests of consumers having a strictly limited value, namely value limited to the element of proof (of the fact of the finding of infringement) according to the domestic rules for evaluation of evidence. That can and should be read in two ways:

a) If such final decision has *only* the value of an element of proof, it cannot at the same time have the value that Brussel Ia would usually attach cross-border to a judgment. In other words, in the context of representative actions there is no cross-border *res iudicata* effect *(argumentum e contrario),* i.e. no automatic recognition of such judgment in Ireland.

b) Furthermore, if a final decision with the usual *res iudicata* effects from a foreign jurisdiction is not to be automatically recognized in the context of representative actions, any other effects of foreign procedures will not have to be respected by Irish courts, either *(argumentum a maiore ad minus,* or *argumentum a fortiori)*.

The Irish legislator can and should acknowledge this change by confirming that Irish courts will not consider relevant to their deliberation what beneficiaries and claimants may have done to obtain redress, before or in parallel, in other, foreign jurisdictions.

In that respect, the multiplicity of persons and issues involved with representative actions for redress reinforces the need to ensure Member States' autonomy. In the broader EU context therefore, following their obligation to avoid conflicting claims - Art. 9 (4) -, Member States can clarify in their national rules of civil procedure that they interpret the Representative Actions Directive in that sense and explicitly reject any further binding effects of foreign collective procedures for redress except for this one effect, explicitly regulated in the Directive's Art. 15, being an element of proof, and nothing more. An additional provision in Irish law could state:

> **"Foreign collective procedures for redress will be treated in Irish procedural law as not having any effect in Ireland except for being an element of proof as specified in Art. 15 of the Representative Actions Directive. Applications in Irish courts for *exequatur* of foreign representative actions for redress or injunctions shall be rejected. The same will apply for anti-suit injunctions directed against representative actions in Ireland."**

If all or at least a considerable number of Member States apply such approach in implementing the Directive, they act fully in line with Member States' concerns for their procedural autonomy. They would, at the same time, put political pressure on the Commission which in the end should procure an explicit endorsement of this solution by the EU legislator according to Art. 67 Brussels Ia Regulation, a provision which ensures that such national rules of civil procedure, harmonized

[4] Art. 3.9 defines this as a decision by a court or administrative authority of a Member State that cannot or can no longer be reviewed by ordinary means of appeal.

according to an EU legislative instrument, have a legally binding, determinative, effect as a complement to the rules of the Brussels Ia Regulation.

This result appears to be in line with the current Austrian Government's coalition program which in its section on consumer protection explicitly seeks to limit, in the interest of consumers, binding cross-border effects of foreign court judgments ("… Ausschlusses der Bindungswirkung ausländischer Urteile").

To the extent the Commission might not see in the interpretation given above the result it actually desired to achieve, it must come up with a Union instrument more comprehensively able to resolve the intricate questions of conflicting representative and collective actions including their potential conflicts with public authorities' competencies in the respective contexts (see Recital 22).

All considerations of how injunctions and actions for redress are juxtaposed beg the question which is virtually absent from anything in the Directive, but which the transposition affords an opportunity to address, which is the huge advantages in linkage between QEs, Regulators and Ombuds entities, to create feedback loops which can efficiently capture a record of trading behaviour, assist in regulating the aftermath of any industry wide infringement, create an early warning system for the possibility of similar infringements, and resolve them without recourse to mass litigation. This linkage can and should be created by integrating it into the Court certification process following the template of the pre-action protocol under the Civil Procedural Rules of England and Wales - see in more detail the subsequent comments and recommendations on Article 7 (3).

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

Article 7(3) requires Member State courts to assess the "admissibility" of each specific representative action. This acknowledges the need for a filtering system, leaving it up to Member States to decide their own filtering criteria. This is a crucial safeguard which Ireland should adopt robustly in the transposition process, by adopting meaningful certification standards to be applied by the court at the "gatekeeper" stage. Certification requirements (together with the need for a reasonable cause of action) could include, for example, predominance of common issues of fact and law, commonality in the objectives sought, cohesiveness, adequacy of the representative's qualification including personnel and financial resources, typicality for the definition of subgroups and sufficient numerosity for that purpose, and a requirement that use of a collective instrument truly appears to be the best or only instrument available to restore justice.

There is an abundance of common law precedents which Ireland could draw from; all class action and multi-party action procedures across the common law jurisdictions (except Australia) have a certification stage, and specific criteria have to be met by the claimant in order to have the litigation certified by the court, and be permitted to proceed, as class or group litigation. In Australia, although there is no

certification process, a defendant can challenge the validity of the class action procedure at any time by reference to compliance with fairly limited entry criteria.

The GLO model, a form of which, as noted above, is recommended in the Kelly Review Group Report for multi-party litigation in Ireland, has a certification stage where the court considers whether to make the GLO by reference to set criteria which are broadly expressed as being the aggregation of claims "which give rise to common or related issues of fact or law (the 'GLO Criteria')". Such a test is, in our view, a good starting point.

Although the Kelly Review Group Report addresses a multi-party action model, rather than a QE/Representative Action model, as mandated by the Directive, the fact that Article 7 (3) of the Directive requires Member State courts to assess the admissibility of the intended litigation in each case means that the GLO Criteria, at the very least, could function equally well for both models.

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

Furthermore, under Article 7, domestic admission rules for representative actions are free to, and therefore should, require the representative action to be the most economical and speedy means to relieve consumer grief. Should there be a means for consumer redress hitherto not seriously tried (e.g. regulatory or ombuds redress), the court should be empowered to refrain from admitting the collective action and request that these other steps be taken first, before it admits a costly and lengthy collective procedure.

By way of final comment on Article 7, in a cross-border Representative Action brought in Ireland by a QE designated outside Ireland, in addition to facing the scrutiny of the Irish court "to examine whether the statutory purpose of the qualified entity justifies its taking action in a specific case" (Article 6 (3)), the Irish legislator is free to require, and should require, just as for the admission of a domestic representative action in Ireland, that consumers wishing to opt into such action taking place in an Irish court show:

(a) that there is no other suitable Representative Action in the respective consumer's home jurisdiction (Ireland for the Irish and their respective home Member State for consumers from other Member States); and

(b) what attempts such consumer has made to submit his claim to the ombudsman/ regulatory redress bodies in its own jurisdiction.

Article 8

Injunction measures

Question:

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

Response: Yes

Ireland should avail of the options in Article 8(2). It seems sensible for Ireland to allow a court which grants a final injunction defined under the Directive as "a definitive measure to cease a practice" to also include as part of its decision:

- **a declaratory judgment under Article 8 (2)(a), provided one has been sought; and**
- **an obligation, in such form as the court considers appropriate, upon the trader to publish the "decision" (presumably the injunction, and/or further information) under Article 8 (2)(b).**

While there would be no requirement to change Ireland's laws to allow such measures, the obligation on the infringing party to publish the court's decision should be subject to careful scrutiny and be proportionate to the nature of the infringement. The court should be the arbiter to determine such proportionality.

By way of example, if the injunctive measure were to be that the trader must cease the manufacture and supply of a medicinal product on prescription in Ireland, quite apart from the practicalities of ceasing manufacture, ensuring the effect of unwinding the product within the complexities of the supply chain, as well as taking into account the doctor/patient relationship, would require a considerable amount of time for the information to be imparted by the trader.

Question:

4. Should Ireland introduce or maintain provisions of national law where the qualified entity is only able to seek the injunction measures in paragraph 1(b) after it has attempted to achieve the cessation of the infringement in consultation with the trader?

If Ireland was to introduce such provisions what form should they take and should a third party be required to facilitate it?

If applicable, indicate any such provisions currently in national law?

Please provide reasons for your answers.

Response: Yes

Ireland should introduce provisions of national law where the QE is only able to seek the injunction measures in Article 8(1)(b) (i.e. definitive measure to cease a practice or, where appropriate, to prohibit a practice, where that practice has been found to constitute an infringement as referred to in Article 2(1)) after it has attempted to achieve the cessation of the infringement in consultation with the trader.

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

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

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

None.

Article 9

Redress measures

Question:

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

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

Please provide reasons for your answers.

Response: Ireland should introduce an "opt-in" procedure at the outset of an action.

This topic has been the subject of reform discussion in Ireland for the past 18 years. Most recently, a comprehensive analysis of various comparative jurisdictions was carried out by the Kelly Review Group and set out in the Kelly Review Group Report.

The Kelly Review Group Report recommended that an "opt-in" model for multi-party litigation, if introduced into Ireland, be adopted. The rationale for the "opt-in" model as set out in the Kelly Review Group Report would therefore also apply to representative actions under the Directive.

In relation to the American class action model which adopts an "opt-out" procedure, the Kelly Review Group stated that "it does not consider it either realistic or legally safe to adopt such a model in this jurisdiction given the lack of familiarity with it here and possible Constitutional difficulties …".

The constitutional difficulties with an opt-out mechanism relate to Article 40.3.1 of the Constitution and the implied right of access to the courts protected under the Constitution. The corollary of this personal right is that an individual should not be 'passively bound' by proceedings they did not institute or have control over.

In practice, compared with an opt-out system, the discipline inherent in an "opt in" system (whereby every claimant issuing proceedings and signing onto a Register and, in a costs-follow-the-event regime, being in part on risk as to costs) discourages abuse of the litigation process. Thus, the likelihood of representatives (and funders) acting against the group's interest is greatly diminished.

It should also be noted that the "opt-in" mechanism has been very successful in England since the GLO model was established (under CPR Rule 19). In England, the "opt-in" mechanism has been a successful mechanism for dealing with over 100 group actions since the commencement of CPR Rule 19. On that basis, there should be no reason to depart from the use of a proven successful "opt-in" mechanism.

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

Question:

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

Response: Yes

Ireland should lay down rules on the destination of any outstanding redress funds that are not recovered within the established time limits.

In an opt-in procedure, the risk of excess undistributed funds is negligible. In such a system, any award, whether by judgment or settlement, should have been arrived at by applying some form of triage assessment on a case-by-case basis, across categories and sub-categories of the group on the register, and approved by the Judge in charge of case managing the action. If the triage assessment concludes that a consumer wishing to benefit suffered no loss, nothing is paid for the benefit of that applicant. In an opt in procedure, the group (of applicants) is identifiable and finite so, therefore, following the triage system, there should be no surplus funds. (Surplus funds are an outcome normally only possible in an opt-out system).

However, given that the concept of a QE driven Representative Action necessarily involves layers of communication with uninvolved, if not totally detached, opt-in consumers via a third-party intermediary, and the Directive mandates to define time limits for individual opt-in claimants to benefit from a damages award or settlement, it is possible to envisage some opt-in consumers failing to claim their share in time after receiving notice from the QE. This might lead to surplus funds in which case there needs to be a specified destination for such surplus.

In the first instance, it should be established from the outset, the extent to which beneficiaries entitled to compensation will actually claim their share of compensation. For example, if beneficiaries were to submit their bank account number in the court file or in an EU-wide standardised IT system to capture all persons involved, thus going beyond Art. 14 of the Directive, and do so from the start of participating in a collective action, the amount of excess funds would be limited, if at all.

To prevent the risk of unallocated funds not having a destination to go to, however, the EJF calls for an intermediate solution for those undistributed proceeds/funds of a compensatory character by channeling them towards neutral institutions serving dispute resolution as recognized by the ADR Directive or by re-investing them into a public (or quasi-public) fund (similar to the Canadian province of Québec model (discussed further below under Article 20). Alternatively, the prime, or even sole recipient of such excess funds could become a public support fund for representative actions at Union level.

As an aside, it should be noted that to the extent a company has already paid a fine to a regulator for the same behavior that is the subject of the litigation, an award of damages (with limited distribution) is akin to punitive damages and potentially offends the "*ne bis in idem*" principle (restriction on prosecution of the same offence twice).

Also as an aside, regarding the balance between a QE's real costs and a QEs recoverable party costs, the legislature should ensure that the recoverable costs are always considered a surplus separate to the amount actually due to the consumers having opted in.

Finally, there are strong voices globally who advocate that undistributed funds should revert to the defendant in the first instance. This scenario arises where court procedures are considered too cumbersome to decide a case on the merits and so parties are pushed towards settlement under circumstances which ignore the merits of the case. Where the merits, however, have been scrutinized and funds been left undistributed only for reasons of rational apathy, returning the entirety of the undistributed funds to the defendant may look like acting in bad faith – particularly to beneficiaries and the public. On the other hand, such funds can neither go to the QE (unless this were the CCPC as a public entity) nor to consumer associations, for the simple reason that avoiding unhelpful incentives for QEs to use awards for their own budgets is very important. Additionally, such an approach – following the US idea of a "cy-près" settlement (medieval French spelling for "aussi près que possible") must be rejected because it would disincentivise efforts to distribute proceeds to the affected individuals. A further problem with undistributed funds is that they do not serve any compensatory purpose, which is a key principle of European civil litigation. Therefore, our view is that a portion of residual sums could go, under the circumstances described above, to a truly neutral body with the remainder returned to the defendant.

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

Much of the conceptual muddle in the Directive which besets transposition, and much of the direction transposition will take, flows from the opt-in vs opt-out discretion afforded to Member States. Article 9 of the Directive is the pivot in this regard.

Article 9 is unclear in some of its wording.

For example, in paragraph 2, the use of the words "..tacitly express" in relation to a claimant's wish to be represented, is not clear.

In the same paragraph, it is also unclear what the Directive's intention is behind allowing consumers who expressly opt-in (to be represented in the specific representative action), may also express a wish "to be bound or not by the outcome of the representative action".

Finally, in relation to Article 9, the EJF questions how paragraphs 5 and 6 sit with an opt-in system and how, in paragraph 6, consumers who have not opted in are entitled to "benefit from the remedies provided by that redress measure". The mechanics of this are unclear, but a solution could consist (as proposed in EJF's Key Messages Paper, Message #2, second bullet) in empowering the Competent Authority created by Art. 5 of the Consumer Protection Cooperation Regulation (for Ireland: the CCPC), and / or Ombuds entities to issue enforceable documents to participate in the distribution of the award or settlement, after checking and certifying that the applying consumer is eligible to compensation based on, and strictly confined to, the provisions of the judgment or settlement.

Article 11

Redress settlements

Question:

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

Response: Yes

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

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

Further, where in accordance with Article 11 (1)(b) a court has the power to invite the parties to reach a settlement regarding redress, it seems sensible that that court's inherent jurisdiction would include sanctioning a settlement between the parties and refusing to do so where it considers there to be unfairness within the proposed terms.

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

Question:

4. Should Ireland lay down rules that allow for consumers who are part of the representative action to accept or refuse to be bound by settlements referred to in paragraph 1? Please provide reasons for your answer.

Response: No

Ireland should not 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 Article 11 (1).

If there is to be a fully operational and exclusively opt-in system for all Representative Actions, then consumers who have opted into the action ("the individual consumers concerned by a representative action and by the subsequent settlement") should not be allowed to opt-out of the court approved settlement. Any other result would hinder reaching finality, which must be the desired outcome to

ensure a timely end to disputes once a court has been seized, and indeed charged with reviewing and approving settlements.
Please indicate any other general comments or recommendations you may have on Article 11: **None.**

Article 13

Information on representative actions

Question:

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

Response: Yes

Ireland should lay down rules under which the trader would only be required to provide such information as set out under Article 13 (3), i.e. information of any final decisions providing for the measures referred to in Article 7 (injunctive relief and/or damages) and any approved settlements as referred to in Article 11, to consumers if requested to do so by the qualified entity. The court should be the arbiter to determine such proportionality.

Rules should be laid down, as the obligation to inform consumers of such information could be a very onerous one for traders. Depending on the number of consumers involved, and particularly if there is a blurred or muddled version of an opt-in Representative Action, whereby (a) individual opt-in consumers can opt-out of the outcome (not recommended by the authors of this paper); and (b) if the court only "describes" the group of consumers entitled to benefit from the remedies provided by the redress measure, rather than specifying the individual consumers entitled to so benefit (pursuant to Article 9 (5)), the obligations on the trader could be extremely burdensome and disproportionate.

The practicality of obligating the QE and/or the trader to communicate such information will depend on who holds the most precise data. If the action is an opt-in regime, sufficient data for the trader to notify all concerned should be relatively easy to access. If on the other hand the trader does not know who outside those opting in (and staying in) may have some claim to the outcome (as postulated in the blurred situation above) the trader would be ill-placed to fulfil its obligations.

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

None.

Article 14

Electronic databases

Question:

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

Response: Yes

Ireland should set up a national electronic database that is publicly accessible through websites and that provides information on QEs designated in advance for the purpose of bringing domestic and cross-border representative actions and general information on ongoing and concluded representative actions.

Publicly available, useful, sufficiently detailed, and independently produced information about QEs is crucial for the public interest. Consumers and traders should be entitled to information surrounding those entities who have been legitimised by an independent designation system and who are facilitating access to justice.

The national electronic database should include the website links of relevant Irish regulators and Ombudsmen and direct consumers to them, where appropriate. Such an interface would be a good means of encouraging alternatives to mass litigation, namely regulatory oversight and ADR uptake. It should also link up, separately, with the EU's IMI (Internal Market Information System) to allow sharing of information about domestic and cross-border Representative Actions and QEs across the EU's regulatory authorities.

A database of this kind would naturally sit within the website of the Department of Enterprise Trade and Employment and/or the Ministry of Justice.

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

Article 14 (4)(c) - The database that is referred to under Article 14 (3), which would be for the purposes of all communications between Member States and the Commission as referred to in Articles 5 (1), 5 (4), 5 (5), and 23 (2), should NOT be opened to "designated" ad hoc QEs but only to those which are designated in advance/established designated QEs, and only on the basis of confidentiality. Restricting access to the database on that basis would avoid opportunistic litigation, taking its inception from the very registry that is only intended to coordinate, and not to instigate, litigation.

To improve cross-border coordination as requested by Art. 20 (4), QEs should be empowered to make use of their connection to the Commission system as per Art. 14.3 of the Directive also with a view to identifying similar actions in other

Member States (this being a further contribution to solving the cross-border conundrum together with the solution provided along the lines of Art 67 Brussels Ia and explained in our comment to Art. 7 (5) above).

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:

Any measures introduced to ensure that the costs of the proceedings related to representative actions do not prevent QEs from exercising their right to seek injunctive relief and/or damages (pursuant to Article 7) must be considered carefully, as it is widely recognized that Ireland is one of the most costly jurisdictions to pursue a claim by means of litigation.

In the first instance, we contend that all QEs should have to comply with the criteria set out under Article 4 (3), which includes the QE having a non-profit making character. It should be noted, however, that while private benefactors or crowd funding might claim to have a non-profit making character (to the extent they do not wish to make a profit), neither form of funding is likely to pass the common law doctrine and resultant Irish prohibition of maintenance, as they would, by definition, not be parties to the action and therefore would have no direct or legitimate interest in it.

In relation to the question on funding proper, there are two other potential sources of funding for a QE to pursue a Representative Action (in addition to private benefactors or crowd funding). These are (i) third-party funding or (ii) public funding of some description. As third-party funding by private actors for profit is currently prohibited under Irish law (due to the operation of the common law doctrines of maintenance and champerty) the focus, at the moment, can only be on public funding.

Public funding will need to be permitted by specific legislative order and design. As there is very limited capacity for extra public funding of litigation, however, the solution could be found in the Canadian province of Québec where public funding for multi-party litigation has successfully been in operation for the last four decades. The funding effectively comes from a central justice fund, which is fed by

very limited contributions from each and every collective action that takes place in that Canadian province[5] and the way of operating has been briefly described above in our response regarding Art. 4 (7).

The "modest entry fee or similar charge" envisaged as a condition of individual consumers participating in a Representative Action, is a sensible disincentive to reckless opt-in (even though it will not pay for the costs of litigating a multiparty action).

Accordingly, the provisions of Article 20 requiring Member States to ensure that the costs of Representative Actions do not prevent QEs from "effectively" exercising their right to litigate, can only be dealt with by amending the litigation costs regime in Ireland to make the litigation much less expensive. Fortunately, this has been addressed in some detail in the Kelly Review Group Report.

Although consensus on how litigation costs should be reduced in Ireland was not achieved by the Kelly Review Group, in line with the Review Group's remit to review ways of reducing costs, the Report provides for two sets of proposals/recommendations, (i) a set of majority recommendations (including non-binding guidelines as to costs levels) and (ii) a set of minority recommendations (including the employment of tariffs and tables of costs)[6]. A thorough analysis in this regard has, therefore, already (very recently) been completed, albeit that there is no uniformity as to how to proceed.

This is where the EU debate about class litigation could have grasped the bigger picture, i.e. the obviously better, cheaper and more efficient alternatives that already exist to private litigation. Instead, the Directive limits its proposed measures relating to the "costs of proceedings", rather than transferring the costs of litigating to the public sector by means of ADR, Ombudsmen and Regulatory redress.

Furthermore, a European Ombudsman for cross-border representative actions (only) potentially being introduced in 2028 is merely briefly mentioned in the Directive's Article 23 (3). Instead we advocate the joining up of a much bigger consumer redress landscape, which makes these alternative pathways an integral part of the administration of justice by virtue of the measures proposed above in our comments on Art. 4 (1), (5), (7), Art.7 (5), Art. 9 (7) and Art. 14.

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[5] See the publicly supervised and supported model of a public "Justice Fund", often recommended in the Australian discussions which has been existing in the Canadian province of Québec for the last four decades: Australian Parliamentary Joint Committee on Corporations and Financial Services, Litigation funding and the regulation of the class action industry, 22 December 2020, Executive Summary, p. xiii, and the annual report by the Québec Fund for Assisting Collective Actions itself at http://www.faac.justice.gouv.qc.ca/doc/RapportAnnuel2019-2020.pdf.

[6] Chapter 9, pp. 265-325, and the Minority Report pp. 425-435, of the Report.

Question:

3. Should Ireland avail of this option and allow for qualified entities to require consumers to pay a modest entry fee?

If so, what amount should be charged and in what circumstances?

Should there be a waiver for consumers in certain circumstances?

Please provide reasons for your answers.

Response: Yes.

Ireland should lay down rules to allow QEs to require consumers who have expressed their wish to be represented by a QE in a specific representative action for redress measures to pay a modest entry fee or similar charge in order to participate in that representative action.

One of the many premises of an opt-in regime is that claimants "own" their claims and, at least share some of the responsibility of providing instructions and assisting with the initial administrative costs associated with any representative action. A "modest fee" for each opt-in claimant would be the claimant's *ad valorem* court fee for commencing proceedings.

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

None.

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

General comments on the Directive:
Article 18: Disclosure of Evidence **Comments: Many civil code jurisdictions have extremely limited disclosure obligations, and this Article seems designed to address the disclosure deficit in those jurisdictions, rather than the common law systems which already have extensive disclosure obligations.** **Nonetheless, transposition of the Directive into Irish law needs to ensure that fishing expeditions are not permitted. As judges will be the gatekeepers of representative actions brought, strong judicial control will be required. The Kelly Review Group Report considered the disclosure/discovery process in Ireland in detail. It confirmed that discovery in Irish litigation is frequently disproportionate to the objectives of the litigation and the interests of one or both parties. It recommended radical changes to the basis of discovery under Irish procedural rules (including primary legislation to replace the 'Peruvian Guano' dictum on relevance with much more limited criteria), changes which are designed to reduce its scope, and therefore its cost, and reduce the potential for major disruption of, and imbalance between the parties in the litigation process.** **Until those changes materialise, the model adopted by the Irish government to give effect to this Directive should ensure that the relevant procedures reflect those intended changes and that discovery in any representative action is proportionate in all the circumstances of the case.** **The Irish legislator will be alive to the risk of Irish disclosure being used in the context of foreign pending, or intended, actions for redress to obtain, for use in such different foreign collective procedure, elements of proof not available in the jurisdiction where the main action is to be decided. Particularly in collective actions funded by third-party litigation funders, the Irish courts would thus be invited to assist in procedures which in Ireland would be considered as being against the prohibition of maintenance and champerty.**

Public Consultation on the Transposition of Directive (EU) 2020/1828 ("the Directive")

Executive Summary of European Justice Forum's Response to the Department of Enterprise, Trade and Employment ("DETE") 's Response Template

DETE's Questionnaire covers a wide range of provisions within the Directive and invites a correspondingly broad and at times very detailed series of views on the possibilities for transposition into Irish law[7]. This summary highlights 8 (eight) fundamental messages distilled from our Response, itself informed by wide and long experience of the potentials for abuse in collective litigation. They should be read in conjunction with our Response.

A. Ireland should ensure that all Qualified Entities ("QE") are designated by reference to the criteria in Article 4 (3), adopting the option envisaged under Article 4 (5). So, regardless of whether the organization seeking QE designation in Ireland is doing so for the purpose of domestic or cross-border representative actions, the compliance criteria are the same. Ad-hoc entities should *not* be given designated status, but public bodies should be capable of being designated, provided, as in the case of any entity already designated under the Injunctions Directive (which is being repealed), that it fulfils the Article 4 (3) criteria. Going further, and ideally, the Competition and Consumer Protection Commission (the "CCPC") would not only take on the task of designating QEs, but simply be the only body in Ireland to be entitled to introduce a representative action. This would alleviate the need to designate any other QEs. To mitigate the risk of the CCPC being liable to an adverse costs order in the event of it losing a case, a Public Justice Fund modelled on the solution found in the Canadian province of Québec could be set up (as referenced in detail in our Response under Article 20).

B. There should be stringent rules applied by the court when certifying a case (termed "admissibility" in Article 7 (3)) as a Representative Action. These rules should be part of a framework which gives predictability to both sides but endows the court with strong management powers. They should be formulated to allow the court adequate discretion at the earliest possible stage (Article 7.7), as "gatekeeper", to investigate the suitability of the issues alleged to arise for a Representative Action to proceed, (e.g. common issues of fact or law must be a condition precedent), and decide how best, in the circumstances of the particular case, to manage the action (e.g. test cases, definition of generic issues, the Register, cut-off dates). Other certification requirements and considerations should include, but should not be limited to:

(a) compliance by the QE with the Article 4 (3) criteria (on the basis that all QEs, including foreign-designated QEs, must meet identical criteria);

[7] Articles referred to are those within the Directive.

(b) taking into account any objections raised by the proposed defendant trader;

(c) the QE's ability to adequately represent the concerned consumers;

(d) that there is sufficient funding to see the case through;

(e) that the funding of the litigation is sufficiently transparent to allow the court to check whether such funding infringes Ireland's rules against maintenance and champerty; and

(f) that there is an ability to pay the defendant's costs where the representative action proves unsuccessful.

C. Transposition affords a parallel opportunity to incentivize ADR and other non-court forms of collective consumer redress, which would be controlled through the court certification process. The intrinsic high costs of litigation in Ireland militate towards alternative, less costly, more efficient forms of resolving mass consumer disputes. One practical step to steer the dispute to ADR is to have the representative action procedure include a similar step to the pre-action protocol under the Civil Procedural Rules of England & Wales. Such a protocol could require that at the certification stage, the QE must confirm what information about the claim has been shared with the relevant regulator and where that process has gone and, where the regulator has not pursued the claim, invite the prospective parties (the QE and the defendant trader) to have undertaken, prior to the application for certification, private ADR or voluntary regulatory redress (where such an option exists), or to explain to the court why such a step was not feasible, with cost sanctions available to the court where appropriate.

D. All Representative Actions for redress measures should be exclusively opt-in, as opposed to partly or wholly opt-out (Articles 9.2 and 11.4). This is consistent with the conclusions of the two exhaustive reviews[8] into the pros and cons of a multi-party litigation ("MPL") procedure in Ireland over the last 18 years, culminating in the Kelly Review Group's Report of October 2020. The Kelly Review Group report recommended opt-in as the appropriate civil procedure for any form of MPL model in Ireland[9]. The mechanics of opt-in are a tried and tested feature of the English Group Litigation Order procedure, which the Kelly Review Group Report suggests should form the basis of any Irish MPL framework. There should be no possibility of an "opt-in-consumer" opting out of the Representative Action at any stage other than by discontinuing his/her claim. Nor should it be possible to opt out of a court-approved redress settlement. Opt-in should be part of the admission phase to allow the court settlement be reached or an order for redress made) once certification has taken place. In this age of mass communication, much of the rationale for opt-out actions (which has traditionally relied on a notion of it being too difficult or

[8] The Law Reform Commission report (See Consultation paper on Multi-Party Litigation (Class Actions), LRC CP 25-2003) and Mr Justice Peter Kelly and his review group's report 'Review of the Administration of Civil Justice' (the "**Kelly Review Group Report**"), dated October 2020.
[9] Representative Actions as proposed by the Directive are merely a type of MPL. The Private Member's Bill of 2017 (An Bille Um Chaingne Ilphairti, 2017) also proposed opt-in.

inconvenient for consumers to become informed and express their wishes) has fallen away. Furthermore, and as highlighted by the Kelly Review Group, if the opt-out model were to be adopted in Ireland, inherent constitutional difficulties would arise (discussed in more detail in our response to Article 9, Question 2).

E. The restriction which the Irish law imposes on third party litigation funding ("TPLF") agreements[10] should be retained and the prohibition against contingency fees should continue to apply (Directive Article 10). These safeguards are fundamental to the prevention of abuse of the collective action mechanism, which could otherwise make Irish representative actions, as envisaged by the Directive, the focus of a new investment market, and (as the Kelly Review Group Report puts it) risks "the imposition of a 'litigation culture' on a courts system which is already heavily burdened", and in the event contingency fees were permitted, "tend to encourage speculative claims and contribute to a 'claims culture'". This is entirely consistent with the underlying intention of the Directive which is to ensure throughout the EU that, in so far as TPLF is permitted by national law, conflicts of interest are prevented and that it does not "divert the litigation away from the protection of the collective interests of consumers". Those premises apply all the more forcefully where national law does not permit TPLF. If any form of litigation funding were to be permitted, therefore, it would need to be strictly regulated by statute. The safest option in such a scenario would be to adopt the 'Québec solution' as proposed in our Response (under Article 20).

F. Undistributed funds ("outstanding redress funds" Article 9 (7)) should pass to an entirely independent, neutral, third party. One of the benefits of an opt-in procedural mechanism is that surplus damages in the sense of unclaimed amounts should be negligible. This is because any award whether by judgment or settlement should have been arrived at by applying some form of triage assessment on a case-by-case basis, across categories and sub-categories of the consumers concerned as determined by the case management judge. If the triage concludes that a consumer wishing to benefit suffered no loss, nothing is paid for the benefit of that applicant. And the Group is finite so there should be no surplus funds. However, to avoid any unclaimed funds being channelled to the QE, the consumers who have already benefited, or to any other third party in any way connected with the litigation, a portion of such funds should be passed on to the sector regulator or similarly accountable neutral public (or quasi-public) body/fund, with the remainder being returned to the defendant.

G. Discovery (Article 18): **Disclosure must be relevant, necessary and proportionate.** As the only wholly common law jurisdiction within the EU, Ireland has a tradition and practice of extensive, and expensive, disclosure characteristics enhanced by digitalization. Unless it is carefully

[10] Affirmed in the Supreme court decision in *Persona Digital Telephony Ltd v Minister for Public Enterprise and Others* [2017] IESC 27.

controlled, discovery is one of several factors[11] which could incentivise opportunistic claims tactics, particularly from outside the jurisdiction, so transposition into Irish law needs to ensure that fishing expeditions - to be expected also in support of foreign collective actions - are not permitted. As judges will be the gatekeepers, strong judicial control will be required. The Kelly Review Group Report took a long hard look at the discovery process in Ireland and recommended radical changes to the basis of discovery under Irish procedural rules. The proposed changes to the discovery procedure would reduce its scope, and therefore its cost, and reduce the potential for major disruption of, and imbalance between, the parties in the litigation process.

Unless those changes materialise earlier than transposition of the Directive, the model adopted by the Irish government to give effect to this Directive should ensure that the relevant procedure reflects those intended changes, with proportionality at the forefront of any implemented change.

H. Art 7 - Injunction and action for redress in light of Brussels I (Recast). It is important for a consistent implementation of the Directive and for the protection of Irish judicial autonomy that the Irish Government does not accept any domestic effects of foreign representative actions, at least not of those ***for redress*** (court competence, *lis pendens, res iudicata*). This would be in line with Member States' intentions to protect their judicial autonomy. **Art 15** addresses the issue of the cross-border effect of a **court's or administrative authority's *final*[12] decision** in limiting its effect to **evidential** value **only;** in other words the effect is limited to being an element of proof of the existence of an infringement to be evaluated by the Irish court. Ireland should therefore clarify its national rules of civil procedure accordingly and provide that no foreign judgment in a representative action (for redress or possibly even for an injunction, bearing the potential of being later combined with redress) will be recognized in Ireland. Applications to recognize them in Ireland (applications for *exequatur)* shall be rejected by Irish courts. This will assist the uniform transposition across the EU of Article 9 (4) requiring Member States to prevent **conflicting claims** in different jurisdictions. In the end, such view should be confirmed by the EU legislator as a complementary rule according to Art 67 Brussels Ia, at least for the interim time until the Commission comes up with a Union instrument more comprehensively able to resolve the intricate questions of conflicting representative and collective actions including their potential conflicts with public authorities' competencies in the respective contexts (see Recital 22).

[11] Another factor being the relatively higher level of damages awarded in the Irish jurisdiction, comparable to others, for certain types of tort.
[12] Article 3(9) defines this as a decision by a court or administrative authority of a Member State that cannot or can no longer be reviewed by ordinary means of appeal.