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):	Luke Handley, Public Affairs Executive Andrew Mills, Legal Director UK & Ireland
Organisation:	Experian
Please briefly describe your interest in this Directive:	Experian is a leading global information services company, providing data and analytical tools to clients in more than 80 countries. The company helps businesses to manage credit risk, prevent fraud, and automate decision making. Experian plc is listed on the London Stock Exchange (EXPN) and is a constituent of the FTSE 100 index. Experian employs approximately 16,000 people in 41 countries and has its corporate headquarters in Dublin, Ireland, with operational headquarters in Nottingham, UK; California, US; and São Paulo, Brazil. Experian Ireland Ltd the group's trading entity in Ireland. Experian has real world experience of "mass litigation" through its activities in several countries, including the USA and Brazil.
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Article 4

Qualified entities

Question:

1. Which body(ies)/organisation(s) in your view should deal with the application and designation process for:

- qualified entities bringing domestic representative actions, and

- qualified entities bringing cross border representative actions?

Please provide reasons for your answer.

Response:

In our view, the Government should minimise the risk of abuse by:

- **Ensuring that the compliance criteria for QEs is the same irrespective of whether the QE is seeking designation or domestic or cross-border actions. In other words, the Government should ensure that QEs are designated by reference to the Article 4(3) criteria and through the further adoption of the Article 4(5) provisions**
- **The Government should prohibit the designation of ad-hoc or special-purpose entities from obtaining designated status as QEs**
- **Authorizing one or more public bodies as QEs, rather than private sector organizations, provided that such public bodies meet the Article 4(3)/4(5) criteria**
- **Considering the designation of the Competition and Consumer Protection Commission ("CPCC") as the sole body in Ireland with QE designation authority**

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 apply the same criteria as set out 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 sound reason for having different criteria for a foreign QE to that of a domestic one.

Article 4 (3) sets out safeguards for both consumers and traders, ensuring that only appropriate bodies can achieve designation as a QE.

Uniformity of requirements for domestic and foreign entities is fair and reduces the risks of other complications. For example, in the event of a situation that drives multiple QEs from different states to join forces in a single action in one jurisdiction, if domestic and foreign QEs have different criteria there could be anomalies.

Having different criteria also risks organizations driven to bring profit-motivated or speculative claims to seek to exploit those differences to their advantage.

The Directive does not prohibit a domestic QE bringing a cross-border action; it provides that Member States' courts *must* accept that cross-border QEs in the Commission's list under Article 5 (1) 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 allow it to sue under its purely national rules. For that reason, the criteria for designating domestic and cross-border QEs should be uniform. Ireland should ensure compliance with the criteria under Article 4(3) for all QEs seeking designation in Ireland and 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, because this risks opening up the procedure to abuse by parties driven to bring profit-motivated claims.

The process of requiring designation as QE is an important safeguard and should be applied uniformly to protect both traders and consumers. We believe that a consistent, pre-litigation approach to the administrative approval of QEs removes the inherent risk and confusion that would arise in allowing for judicial designation once litigation is underway. It also risks different criteria applying and would likely undermine the entire safeguard of pre-approved QEs because no entity would bother seeking such approval if it could do it as part of the litigation process.

In our view, Recital 28 is confusing and hence Article 4(6) allow for discretion by Member States in transposing.

Given that article 7(6) requires Member States to ensure that QEs "*have the rights and obligations of a claimant party in the proceedings",* the Government must prohibit ad-hoc entities to minimize the risks of abuse.

If Ireland were to allow ad-hoc entities to bring a domestic action, the Court should be required to apply strict and consistent criteria based on Article 4(3).

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** **In our view, the CCPC is the most suitable body for this role. It is already a "Qualified Entity" under the Injunctions Directive, albeit that it does not necessarily comply with all the criteria set out under Article 4(3). Accordingly, the Government out to make statutory adjustments to allow its designation.**
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: Yes.

We believe the Government should give weight to the views of Mr. Justice Peter Kelly and his review group's (the "Kelly Review Group") report, "Review of the Administration of Civil Justice Report" (the "Kelly Review Group Report"), published in October 2020[1].

We also note that the Kelly Review Group Report supports the Law Reform Commission's[2] preference for a multi-party action modelled along the lines of the Group Litigation Order ("GLO") procedure in England & Wales. That GLO procedure allows the court to provide both injunctive relief and redress measures a single action, which must also go to helping minimising costs.

The Kelly Review Group Report identified the Government will need to legislate specifically for a form of the GLO model to comply with the Directive, which is could do by adapting the existing Irish representative action or separately.

Lastly in this section, we note the conflicting provisions of the Brussel 1a Regulation. This is a very complex problem that is not easy to solve and we defer to considerably greater though put to this problem by the European Justice Forum, which we understand has already submitted a representation to you.

We believe Member States' seek to preserve their own country's judicial autonomy. Article 15 of the Directive provides that the cross-border effect of another Member State's court's or administrative authority's final decision is evidential value only.

We recommend to the Government that it should expressly provide in its transposition that Ireland will not recognize any foreign judgment in a representative action (in whatever form, injunctive or otherwise) and that the Irish courts must reject any application for recognition. This is essential to help in transposing Article 9(4) by helping reduce the risk of conflicting claims in different jurisdictions.

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[1] http://www.justice.ie/en/JELR/Review_of_the_Administration_of_Civil_Justice_-_Review_Group_Report.pdf/Files/Review_of_the_Administration_of_Civil_Justice_-_Review_Group_Report.pdf

[2] The Law Reform Commission report (See Consultation paper on Multi-Party Litigation (Class Actions), LRC CP 25-2003) at https://www.lawreform.ie/_fileupload/consultation%20papers/cp25.htm.

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

The nature of Article 7(3) acknowledges the need to triage or filter representative claims and leaves it to Member State to define the criteria that their courts should apply.

The Government must set out a clear framework to provide clarity to all involved. It must also ensure that the Court has good case management authority in such a new environment. We strongly suggest that the Court has a suitable discretion to properly consider the appropriateness of a representative action at early stages of the case to avoid wasting costs for all parties.

We urge the Government to ensure that requirements and relevant factors to be considered at the admissibility stage include:

- **A requirement for a reasonable cause of action together with common issues of fact and law to be present**
- **The Court's ability to determine the most suitable method of taking a case forward, such as through test cases or practical issues such as setting time limitations**
- **The need for the QE to comply with the Article 4(3)/4(5) criteria**
- **The realistic ability of the QE to adequately and properly represent the interests of the consumers on whose behalf it seeks to bring the action**
- **Representations of the defendant**
- **That the QE has sufficient funds at its disposal to run the claim and that it can cover the defendant's costs if the claim is unsuccessful**
- **That where there is third party litigation funding, it is sufficiently transparent to all and does not fall foul of the prohibitions against champerty and maintenance.**

This is a vital safeguard to prevent abuse and which we urge Ireland to adopt robustly in transposition.

Note that apart from Australia, every common law jurisdiction with a class action or multi-party action procedure has a certification stage. That stage requires the claimant to satisfy specific criteria before the Court will certify the case as once that can go ahead as a class or multi-party one. By contract, in Australia, despite no certification stage as such, at any time a defendant can object to the use of the class action procedure by reference to specific criteria.

The GLO model from England & Wales, 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')*". We commend this to the Government as a good starting point.

Given the strong similarity in the court systems of Ireland and England & Wales, we believe that Ireland could adopt the GLO model along with the strong judicial control and case management powers that this procedure features.

Litigation is rarely a quick or cheap way to resolve a problem whereas there is mass of academic research and practical experience that demonstrates that different forms of alternative dispute resolution are less costly and more efficient in resolving disputes involving many consumers.

We encourage the Government to think of this transposition as an opportunity to strengthen and encourage non-court resolution of disputes in the broader context of the relevant regulatory environment. For example, the Government could:

- **Introduce a pre-action protocol requirement, similar to that concept in the civil procedure rules in England & Wales**
- **Require the parties to have actively explored alternative dispute resolution before the certification/admissibility stage or justify why it was not possible**
- **Only allow a QE to begin an action where, if there is a relevant regulator, it has decided not to take appropriate actions**
- **Ensure that, for claimants outside Ireland, there is not another more appropriate action in which they can participate and that they have exhausted any local regulatory/redress options first.**

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, this seems sensible but 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 and the circumstances generally. The court should be the arbiter to determine the nature of such publication and the proportionality because individual cases will inevitably be fact-specific.

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, because this is just common sense and discourages unnecessary litigation.

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 most cases will be completely unworkable. Such a time period will depend heavily upon the circumstances of the trader, many of which the QE will be unaware.

The QE ought only be able to start injunctive proceedings after exhausting all reasonable attempts to achieve a resolution with the trader, and this should include consideration of the use of alternative dispute resolution.

A period of three months, rather than two weeks, within which to do this may be more appropriate as a general rule but even then this is likely to be unrealistic in many circumstances.

We believe that only in the most exceptional situation would two weeks be an reasonable timeframe. For example, where there is a sudden and imminent danger to life or a risk of serious personal injury. Bearing in mind the massively disruptive nature of an injunction application to a trader, but allowing for such extenuating

situations, we suggest that the fair balance would be to allow a QE to be able to seek an interim injunction and only to do on notice to the trader.
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:

Our Group's experiences of the USA, in particular, highlight significant dangers in opt-out collective litigation, which rarely delivers for consumers but pays handsomely well for lawyers and third-party litigation funders.

We believe that not only is an opt-in approach the most fair and appropriate manner of transposition but it also the most consistent with Irish culture and legal traditions. We note that the views of the Law Commission in 2003 and those of the Kelly Review Group in October 2020 are consistent with an opt-in approach to representative actions.

Our further submissions are:

- **The Group Litigation Order feature of the civil procedure rules in England & Wales is known system and could readily form the basis of any Irish framework for transposition of the Directive (see our earlier reference to the Kelly Review Group Report)**
- **Any court-approved settlement should be binding, and no individual consumer should be able to opt-out of that settlement (otherwise there will never be any certainty for a defendant)**
- **Any opt-out procedure raises potential constitutional issues in that 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 over which they have no control**
- **Many of the arguments for the difficulty of building "opt-in" cases advanced by law firms or funders simply do not apply in the modern age of email, social media and television**
- **The loser-pays rule must remain to discourage speculative and abusive litigation**

Further, we note that Articles 16 and 22(3) contain complicated limitation provisions that will be difficult enough to implement in any event but which, we content, will be

ineffective an in opt-out mechanism. This is an additional point in support of the argument that Ireland should introduce a wholly opt-in 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

In an opt-out mass claim, experience in the USA and other jurisdictions shows that there is normally an "undistributed fund" because only a small proportion of individuals claim their particular loss against the fund. Frequently, these undistributed funds are given to charitable organisations under a cy-près approach but they are not used for compensatory purposes. Of course, it is a key feature of European legal tradition that damages are compensatory in nature, not punitive.

However, this has the practical effect of acting as a fine against the defendant – it has paid damages and undistributed funds do not, by their nature, ended up compensating anyone and become vindicatory or punitive in nature.

In our view, in order for undistributed to not act as a fine, we would urge two points:

- **Firstly, reduce the risk of unclaimed funds in the first place by only allowing an opt-in procedure. Opt-in procedures should result only in damages being paid, whether by judgment or settlement, in compensation determined on a case-by-case basis. In other words, a consumer who suffers no loss ought, rightly, to receive no compensation**
- **Secondly, to the extent that unclaimed funds do arise, they should not be available to the QE, its lawyers or litigation funders as "profit" from the litigation; they should be returned to the defendants**

We make some further observations:

- **If the facts giving rise the action have already been addressed by a regulator which has fined the trader, then an award of damages that contains undistributed elements is, as we suggest, punitive damages in effect and ought to be prohibited under the principle that restricts "*prosecution of the same offence twice*"**
- **Costs that a QE may be able to recover in the litigation ought to be considered separate to compensation due to those consumers who actually opted in**

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

We believe that there is an internal inconsistency within the Directive and this flows from the discretion for Members States on the opt-in/opt-out models. Article 9 is unclear, for example:

- **in paragraph 2, the words "*..tacitly express*" in relation to a claimant's wish to be represented, are unclear, as is the Directive's intention in allowing for consumers who expressly opt-in (to be represented in the specific representative action) where they may also express a wish "*to be bound or not by the outcome of the representative action*"**
- **Finally, we struggle to understand how paragraphs 5 & 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*"**

These will be challenges for all Member States in transposition but we reiterate our view that the most appropriate implementation in Ireland is an opt-in model based on the GLO procedure from England & Wales.

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, of course!

If the intention is for mass claimant actions to be an efficient means of access to justice, then it follows that fairness and transparency must be paramount. It follows that the Court managing and handling the case ought to be required to approve any settlement after proper scrutiny and the exercise of judicial discretion. If the Court's involvement is not mere to be rubber stamp of the parties' resolution, it must have to power to deny approval and require the parties to go away and address the Court's concerns as to fairness (or any other matter).

Only once the Court is satisfied should approve the settlement and bring the action to an end.

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

This would make no sense. If there is to be a fully operational and exclusively opt-in system for all representative actions in Ireland, as we suggest, 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. To give this right to consumers will substantially interfere with the final resolution of the dispute, which surely must be the point of a Court-approved settlement.

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: Yes, because a lack of rules will allow uncertainty to grow and give an opportunity for abuse.

An obligation to notify consumers could be complicated an onerous beyond the theoretical concept.

Depending on the number of consumers involved, and particularly if there is a blurred or muddled version of an opt-in representative action the obligations on the trader could be extremely burdensome and disproportionate such as where (a) individual opt-in consumers can opt-out of the outcome (we do not recommended this as we have mentioned already); 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)).

Further, by way of example, assuming identified individuals, would the trader be required to seek to verify or update its contact details for them? Doing so may necessarily be complicated and costly, assuming it is possible to do so at all. If not, it must be expressly sufficient for the trader to use whatever contact information that it has, accepting that some individuals will have moved address since that time and may not get the notification and that there is an increased risk of identity theft in the circumstances.

The QE and trader will need to have a practical and sensible discussion and, in the absence of agreement as the approach, either party ought to be able to ask the Court to be the arbiter of the approach and whether it is reasonable and proportionate in all the circumstances.

The Government ought to provide express legislative authority for parties to process personal data for such purposes.

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: Yes, absolutely, if there is to be more than a single public QE.

We urge the Government to ensure that Ireland has a national database that is publicly accessible through websites. It should provide information on QEs designated in advance for the purpose of bringing domestic and cross-border representative actions. In addition, it should contain and general information on ongoing and concluded representative actions relating to each QE on the database.

Having transparent information is vital for the public interest. Consumers and traders must be able to verify the authenticity of QE entities.

We urge that the website for such a database should also contain details of and links to relevant regulators and ombudsmen. It should seek to promote ADR (which is often quicker, cheaper and more effective than litigation) and emphasis that going to Court should be a last resort.

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) – Care must be taken that the database is one for providing transparency and public support, not as a means of driving or encouraging litigation.

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:

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. Note 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), either form of funding is likely to amount to maintenance.

There are two other potential sources of funding for a QE to pursue a representative action. These are:

- **third party funding – Irish law prohibits this through the common law doctrines of maintenance and champerty**
- **public funding of some description.**

We urge the Government to keep its existing rules against maintenance & champerty in litigation funding and retain the prohibition against contingency fees. These existing rules are well established in Ireland and will act as crucial safeguards in the prevention of abuse. Removing these rules will risk opening Ireland as a new investment market for a toxic litigation culture that the already overburdened court system would struggle to handle. Allowing contingency fees will encourage speculative claims and feed a claims culture.

We remind the Government that the intention of the Directive is also to ensure that self-interested lawyers and litigation funders cannot hijack the new provisions away from the collective interests of consumers. Any move to allow third-party litigation funding or contingency fees, needs careful and detailed statutory provisions to minimize the potential abuses.

Public funding will need to be permitted by specific legislative order and design and may well represent a practical challenge.

We see the "*modest entry fee or similar charge*" envisaged as sensible disincentive to reckless opt-in (accepting that collection of such fees is unlikely to pay for the costs of litigating).

The Government must take its obligations to ensure that QEs can effectively exercise their rights as an opportunity to look at the costs of litigation more generally.

Helpfully, the Kelly Review Group Report looks at this in some detail and produces two sets of guidelines, although we accept that there is still much work to be done in this field. Tackling the costs of litigation will be of wider benefit to Irish society at the same time as addressing transposition concerns.

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, for two reasons and as we have mentioned in our response to the previous question.

Firstly, it will discourage reckless and/or speculative claims and be a brake on abuse of the system.

Secondly, it will help ensure that claimants have a genuine claim and take some element of "ownership" of their claim.

The amount of such might need linking to the amount claimed with, perhaps, a minimum of, say, €50. We suggest any waiver for consumers in certain circumstances be considered in the same way as Ireland approaches the requirement to pay court fees.

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 18: Disclosure of Evidence **Comments:** **Ireland is now the only common law jurisdiction in the EU and has an established practice and tradition of the disclosure of materials between parties in litigation.** **Our experience in the USA suggests that there is a real risk that the discovery aspect of Irish litigation procedure could be an incentive for speculative and opportunistic claims tactics, particularly for actions driven by foreign interested stakeholders. We urge the Government to ensure that in transposing the Directive (Article 18) it restricts the ability of speculative claimants to carry out "fishing expeditions" through discovery. We note again the relevance of the Kelly Review Group Report and its recommendations about discovery and the importance of proportionality.**
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