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):	Dr Caitríona M Fisher
Organisation:	Health Products Regulatory Authority
Please briefly describe your interest in this Directive:	The HPRA is the regulator of entities which may have a representative action brought against them. It is also possible that someone taking representative action against a regulated entity could seek to have the HPRA joined as a defendant.
Email address:	Caitriona.fisher@hpra.ie
Telephone number:	01 634 3420 / [redacted]

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: We have no particular view on this but the role of the CCPC would seem compatible with this designation.

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: No views

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 views

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: No views

Please indicate any other general comments or recommendations you may have on Article 4: No other comments

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: While we don't have a particular view, we note that the legislation states "where appropriate" and this would need to be defined. A single action / decision seems only to be appropriate in circumstances where there is little dispute in relation to facts and individual consumer behaviour is not relevant to liability.**
Please indicate any other general comments or recommendations you may have on Article 7: None

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: No view**
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: We would support any 3rd party process such as mediation which would be put in place to achieve cessation prior to seeking an injunction. In general an approach of seeking compliance in the first instance is always preferable.**
Please indicate any other general comments or recommendations you may have on Article 8: None noted

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: In general we would support an opt in process.**
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: No view**
Please indicate any other general comments or recommendations you may have on Article 9: **None noted**

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: No view**
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: For legal certainty, it is desirable these actions are binding.**
Please indicate any other general comments or recommendations you may have on Article 11: None noted.

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.**
Please indicate any other general comments or recommendations you may have on Article 13: None noted

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: No view.**
Please indicate any other general comments or recommendations you may have on Article 14:

Article 20

Assistance for qualified entities

Question:

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

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

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

Please provide reasons for your answers.

Response: No view

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: A modest fee and a waiver system seems practical.

Please indicate any other general comments or recommendations you may have on Article 20: None noted

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

General comments on the Directive:

Article: 3

Comments: Article 3 defines 'Trader' in broad terms as:

> '***any natural person, or any legal person*** *irrespective of whether privately or publicly owned,* ***that acts****, including through another person acting in that person's name or on that person's behalf,* ***for purposes relating to that person's trade, business, craft or profession'***[1]

While it is clear that the purpose of the Directive is provide a system to resolve issues between consumers and those who provide goods and services, the HPRA notes that a regulatory or competent authority overseeing regulatory framework(s) could fall within the definition of 'trader' as there appears to be nothing in the Directive which expressly excludes regulators/competent authorities from its scope. Indeed, the definition refers to publicly owned persons. Therefore, it is possible that an action may be taken against a regulator/competent authority, arguing that the body in question is a 'trader' within the meaning of this definition.

Despite this, on the face of it the Directive appears to aim to provide a framework for representative actions to be taken primarily against traders such as the economic operators regulated by competent authorities. See, for example, Article 8 ' … *consultations with the trader concerned with the aim of having that trader cease the infringement as referred to in Article 2* [i.e., infringement of EU law listed in Annex I]…' .

We request that the transposing Irish legislation clarifies the definition in relation to statutory regulators/competent authorities.

Article: 8 and 9

Comments: If public sector regulators/competent authorities may be the subject of representative actions under the proposed legislation, this also leaves them open to injunctions and punitive damages under its provisions.

In relation to injunctions, it is not clear how the granting of an injunction, e.g. to take an urgent regulatory action such as suspension of marketing or recall of batches, may impact on the statutory role of the HPRA as regulator to protect public health under EU Regulations 2001/83 EC, 1223/2009, 2017/745, and 2017/746. As an example, it is not clear how injunctions or redress for infringements involving a consumer-trader relationship links in with the obligations in Chapter VII of 2017/745 which already provides for an established vigilance/ market

[1] RAD, art 3(2)

surveillance system. In the case of general EU legislation with a wide remit, it is normal that specific EU legislation takes precedence. We do not think that there can be any intention that this Directive would override legislation where the Competent Authority has a specific responsibility derived from EU law, but clarity should be provided in the implementing SI.

In relation to punitive damages, the Directive states at Article 12 that the individual consumers, the constituent parties of the representative action, should not, no matter what the outcome of the action, have to bear the costs of the trader. Where an action could be taken against a regulatory authority as a 'trader', or a regulatory authority is joined as a defendant, the imposition of damages or redress settlements should take account of the regulatory powers and actions taken by the HPRA in the matter concerned.

Article: Annex 1

Comments: EU Regulations 2001/83 EC, 1223/2009, 2017/745, and 2017/746 relate to the regulation of medicines for human use, medical devices, *in vitro* diagnostics and cosmetics. While the specific articles included in relation to these health products relate to the responsibilities of the economic operators involved, some also include references to the responsibilities of competent authorities/member states.

For example, in Cosmetics Regulation (EC) No 1223/2009, Articles 5 (Obligations of the responsible person), 6 (Obligations of distributors) and 7 (Identification within the supply chain), competent authorities/member states are mentioned, in that the responsible person or distributor must cooperate with the competent authority and take the actions requested by the competent authority e.g. to eliminate risks or provide information. Therefore there is the possibility that the regulatory actions required by the HPRA in the performance of its statutory duties would be affected by an action taken under the RAD. A further complication is that, for these particular articles of the cosmetic regulation 1223/2009, the HSE may also carry out these functions under SI 440/2013. Also of relevance is that in Regulation 14 (Emergency Measures) of SI 440/2013, it is outlined that the HPRA with the assistance of the HSE will "*take all appropriate emergency measures to prohibit or restrict the making available on the market of the cosmetic product concerned or to withdraw or to recall the product from the market in the State*" (where the responsible person or distributor does not take appropriate measures in line with Art 25 or Art 6).

The same arguments apply to the other mentioned Regulations as they apply to the statutory remit of the HPRA.

Other comments:

If on transposition it is not possible to exclude the potential for a representative action to be taken against a regulatory authority or for them to be joined in an action, admissibility criteria should be included which would allow for the role of the regulator to be taken into account by the presiding judge.

Additional rows may be inserted, if required.