Representative actions & Wider Civil Justice Reform

Response to the Public Consultation on the Transposition of Directive EU 2020/1828

May 2021

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Summary

1. Summary: Transposition of EU Directive 2020/1828 and Wider Civil Justice Reform

The Representative Actions Directive (EU 2020/1828) has significant implications for businesses right across the economy, operating domestically and on a cross-border basis. The national transposition process must reflect the impact that EU 2020/1828 could have on Ireland's attractiveness as a location to do business.

The consultation is primarily focussed on areas of national discretion. Specific observations on these areas have been included at the end of this submission. Respondents were also given the option to provide general comments on the Directive. Due to the nature of our comments, Ibec has opted to provide these upfront. It is felt that these must be addressed with urgency, ahead of the legislative drafting process.

Each Member State has been given a large degree of autonomy over setting specific national procedural requirements and rules. These have been set out in the Directive through a series of options and areas for adopting national derogations. For Ireland, however, this transposition process is not a simple, relatively straight-forward endeavour. It is not simply the case of deciding between "gold-platting" the national legislation or not. There are more fundamental issues that must be addressed.

The consultation document does not contain analysis on how EU Directive 2020/1828 can be transposed under our current legal system. Certain aspects of the Directive have far wider implications for Ireland's common law-based legal system. Specific measures being transposed are not currently compatible with Irish law and established legal procedures. These include representative class actions (domestic and cross-border), collective redress, injunctive relief, disclosure of evidence, and third-party litigation funding.

Ireland does not have an established mechanism for collective redress or class actions. For example, the Directive will require Ireland to introduce at least one representative action procedure for injunction and redress actions, brought by designated qualified entities. Implementing this and other supporting areas in the Directive will require fundamental changes to the general administration of civil law in Ireland. These have been considered as part of national efforts to improve access to civil justice over the past two decades. For example, the Law Reform Commission examined and recommended the introduction of collective actions in 2005. This followed its own consultation on multi-party actions.

More recently, the Review of the Administration of Civil Justice: Review Group, chaired by Mr Justice Peter Kelly, considered in detail the introduction of multi-party litigation in Ireland. The consultation document does not reference the Review Group's report published in October 2020. It has made 8 specific recommendations on multi-party litigation, in addition to highlighting areas that may be incompatible or incongruous with our legal system.

Decisions on how Ireland transposes EU 2020/1828 should be informed by the forthcoming Civil Justice Reform Plan, which will be the key mechanism for implementing the recommendations of the Review Group. This would avoid potential pitfalls and inconsistencies that could arise during the legislative drafting phase.

The Department of Enterprise, Trade and Employment should convene a specialist working group involving representatives from the Department of Justice, Office of the Attorney General, Office of the Chief State Solicitor, the Courts Service, the Judiciary, the Law Society, and the Bar Council. Special sessions should also be held with industry and consumer groups to identify and work through specific procedural issues.

It is clear how Ireland transposes the Directive could be problematic from a legal perspective. However, it could also have significant implications for Ireland's business model. The national legislation implementing EU 2020/1828 must not undermine Ireland's attractiveness as a location for foreign direct investment and particularly as a choice for global or regional company headquarters.

An effective collective redress system is required, one that strikes a balance between access to justice and procedural safeguards against abusive litigation. The Directive concerns both domestic and cross-border cases. Ireland has a unique clustering of companies and industry sectors operating on a cross-border basis from Ireland, covering activities listed under Annex I. How Ireland transposes the directive must avoid undermining our attractiveness as a place to do business. It should not unjustifiably hinder the ability of businesses located here from operating effectively across the EU Single Market. This can be achieved through a properly structured system.

As set out above, the risks are simply too great from not making provision for adequate examination, scrutiny, and assessment of the potential consequences and effects EU 2020/1828 could have on the economy and society. A full Regulatory Impact Assessment (RIA) on the proposals to be considered in the national transposition process should be immediately conducted. The results of the RIA should be published, and stakeholder feedback requested. The current consultation process will not be sufficient due to technical complexities of the directive.

Transposing the directive into national law must result in procedures that are fair, transparent, and proportionate. They must also be workable. The legislation transposing EU 2020/1828 must be put on a sound, legal footing. It must be consistent with wider reforms of the administration of civil justice in Ireland. This will take time. The current transposition schedule should be reassessed to allow adequate time to address the wider implications first. This would allow better informed judgements to be made on the areas open to national discretion. This approach would be in line with the better regulation agenda.

Key recommendations:

- The transposition approach and schedule should be informed by the wider civil justice reform strategy.
- Convene a specialist working group to inform and guide the transposition of EU 2020/1828 in national law.
- Conduct a full Regulatory Impact Assessment (RIA) on EU 2020/1828, which must allow for analysis on how it can be transposed under our current legal system, and it should also address the economic impact of the proposal on businesses.
- Publish the results of the RIA, and request stakeholder feedback.
- Ensure the national transposition of EU 2020/1828 does not undermine Ireland's attractiveness as a place to do business, especially cross-border within the EU Single Market.

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Discussion

2. General observations

Qualified Entities (Article 4)

Application and designation process

Responsibility for designating a Qualified Entity (QE) should lie with a body or bodies established by statute. It could be a role that the Department of Enterprise, Trade and Employment could take on itself, with support from other statutory bodies. It is likely that the Competition and Consumer Protection Commission (CCPC) will be appointed under the legislation, as it is the statutory body responsible for promoting compliance with, and enforcing, competition and consumer protection law in Ireland. It should be noted that CCPC itself was designated a QE under the Injunctions Directive and it is expected to be designated a QE under EU 2020/1828. This could give rise to potential conflict of interest, as it is responsible for designating all QEs, and it is a QE itself. Clear safeguards would need to be put in place.

The scope of activities set out in Annex I covers a myriad of other statutory bodies in Ireland. These bodies have supervisory and investigatory powers. These are grouped around a specific sector or economic activity. Many have specific consumer-facing responsibilities, which could include complaints or redress powers. This is at the level of the individual consumer. Some have specific consumer enforcement powers such as the Central Bank of Ireland. The areas listed under Annex I should be mapped against the statutory bodies in Ireland. This would enable the key statutory stakeholders to be readily identifiable.

If Ireland chooses to appoint a single body to designate QEs, it must be accompanied by a structure to support coordination with all the other statutory bodies, such as the Commission for Regulation of Utilities (CRU), the Commission for Communications Regulation, the Health Products Regulatory Authority, and the Data Protection Commission. Consultation and engagement must be conducted on a sector-by-sector basis ahead of transposing the directive into Irish law. This is to allow sufficient time to focus on developing a working relationship across all consumer-facing sectors. Once established, these bodies must be actively consulted in the operation and carrying out of functions under the Directive. These bodies should have input into decisions on designating QEs within their individual sectors. Additionally, the Standards in Public Office Commission (SIPO) should be consulted on its expertise. SIPO set up and manages the Register of Third Parties and the Lobbying Register.

Qualified Entities:

Qualified Entities (QEs) must be able to demonstrate sufficient and legitimate standing in representing consumers (or specific groups of consumers), and in conducting litigation. They must be able to hold a considerable track-record in the specific area of consumer law they seek to engage in. They must be adequately equipped to represent consumers and be not-for-profit. They must also be independent from their backers.

Consideration should be given to attaching QE designation to a specific sector or activity only, where the entity has specific expertise in the protection of consumer interests in that sector only. This is consistent with establishing a direct relationship between the main objectives of the entity and the rights granted under EU law claimed to have been violated in respect of which the action is brought.

The stated requirement that a QE demonstrate 12 months of activity should be carefully considered. Data and evidence must be readily and easily verifiable. It should clearly demonstrate the protection of consumer interests prior to its request for designation. Sufficient weighting should be given to information available from public, third party or independent sources over that provided solely by the applicant. This should apply to establishing the applicants bone fides as a not-for-profit body, such as verifying its status within the established legal framework for not-for-profit or non-governmental organisations (e.g. registration with the Revenue Commissioners, Charities Regulator etc).

The one-year requirement is not too onerous, quite the contrary. QEs could seek designation during the period of new EU or national policies being formulated and could secure designation by the time they enter into force.

It is essential that the criteria used in the evaluation of determining QE designation requests is sufficiently robust. Consideration could perhaps be given to publishing an applicant list, informing key stakeholders (public and private) of the application made. This could allow public; third party; or independent entities to comment on the standing of the entity seeking designation. This could be accompanied by a set 'cooling off' period between the time an application is submitted, and the time a decision is made. An appeals-mechanism is likely to be required to address a request from an entity unsuccessful in its applications for QE designation.

The membership structure, numbers of members, governance and decision-making arrangements, and all sources of funding should be disclosed. This would prevent the creation of fictitious entities and easily expose potential conflict of interests. It is essential that designated QEs can demonstrate clear, structural independence within their organisation, and can provide verifiable assurances they are free from external influence.

Transparency must be a guiding principle in assessing, and subsequent supervision, of each QE. The designation must be renewable to ensure potential changes in operations, funding or activities remain consistent with a consumer representative body.

Finally, organisations that were designated under the Injunctions Directive must be able to meet the criteria set out under the new legislation to be recognised as QEs. There should not be an automatic recognition or 'grandfathering in' of existing QEs due to the substantive differences between the two directives. It is possible that procedures could be put in place to prioritise applications for QE designation from these entities, which includes the CCPC, ahead of potential first-time applicants.

Same criteria for domestic and cross-border QEs:

There should be no difference in the criteria used for cross-border QEs to QEs seeking designation to bring domestic actions. There is little logic as to why a differential regime would be preferable. There must be consistency across both domestic and cross border actions and the designation of qualified entities. It is important that Ireland insists on full compliance with the criteria under Article 4(3) for all QEs seeking designation here.

QEs from across the EU looking to take cross-border actions here must be able to meet the criteria set-out. There must not be a lower threshold for domestic QEs. This would minimise the risk of 'forum shopping'. Forum shopping in these actions should be discouraged. It may disproportionately affect Irish businesses should Ireland be seen as a plaintiff friendly jurisdiction, based on differential criteria between domestic and cross-border QEs. This in turn would have negative consequences for Irish-established businesses.

No designation of QEs on an ad-hoc basis:

Designation of ad-hoc QEs would not be compatible with the spirit and desired transparency of the Directive. It would open the door to abusive litigation and/or unfair forum shopping. Allowing ad-hoc designation could be exploited as nefarious, special purpose vehicles. It would be too difficult to properly assess their specific standing. They could have no track-record of consumer representation. It is possible that an entity previously turned-down for QE designation under the formal process, could then seek and secure ad-hoc designation later. Questions will remain over the transparency of ad-hoc QEs, including their specific motives, funding, and governance structures. QEs must only be designated in accordance with strict and transparent criteria set out.

Designation of specific public body/bodies to bring domestic and cross-border actions:

Ireland should designate a public body or bodies as qualified entities for the purpose of bringing representative actions. Specific engagement should occur between all statutory bodies to determine the most appropriate body (or bodies) to take such actions. For example, the CCPC was designated a QE under the Injunctions Directive, but no actions have been taken to date. A public QE must be not-for-profit and independent. This would reinforce confidence amongst consumers that their interests and claims would be represented by a trusted public body, such as the CCPC.

It is important due consideration is given to the impact of this specific measure will have on traders operating in highly regulated sectors. Well-established measures exist which allow sanctions and restrictions to be applied on inappropriate behaviours. Representative actions by public bodies could represent a dual track approach of sanctions. This would be inappropriate and burdensome on both the public bodies and private industry.

If a singular body is to be allocated the responsibility for designating QEs, there will be a case for giving it the additional responsibility for bringing domestic and cross-border actions. However, specific safeguards and guidelines will be required because in effect the body responsible for designating QEs, will also be at the top of the hierarchy of QEs. This should be considered carefully.

Their public nature would immediately satisfy the independence and non-profit requirements of qualified entities and would provide an element of confidence for consumers in knowing their interests and claims are in the hands of an established, reliable public body.

Representative actions (Article 7)

Single representative actions:

Ireland should allow QEs to seek injunctive and final measures within a single representative action. This would be procedurally more efficient for all parties as it would keep all reliefs sought relating to the same subject matter in the same proceedings. Such an approach reflects what is currently available to claimants before the Irish Courts.

Injuction measures (Article 8)

Seeking injunctive relief must be the last resort:

Careful consideration will be required regarding injunction measures (Article 8) to ensure that measures can be both operational in this jurisdiction, and that they are proportionate. Qualified Entities will be required to engage with traders on the alleged infringement before injunction measures are sought. The usual court tests for injunctive relief should apply at the very least. Input from the Courts Service will be key here.

Strict guidance will be required on the grounds for seeking an injunction. It should only be used as a last resort, and only after attempts to achieve cessation of the infringement with the trader has been exhausted. It is expensive and time-consuming. It would be wasteful of court resources to proceed to litigation in circumstances where the trader has not been given the opportunity to address the issues and remedy any potential infringements.

QEs should be required to engage with traders (e.g. inter-partes correspondence) before seeking injunctive relief. Traders must be afforded adequate opportunity to address the alleged infringements and the period for consultation with the trader must be reasonable. The suggested period of two weeks is far too short.

Redress measures (Article 9)

An “opt-out” system would open the door to US-style class action suits:

It would appear from commentary that there is consensus at national and EU-levels that avoiding US-style class actions is an outcome to be desired. If this were true however, Member States would not be given the option for an “opt-out” system for collective redress. An “opt-in” system for both domestic and cross-border actions is the only viable option to achieve a balanced system between access to justice and procedural safeguards against abusive litigation.

Collective proceedings in Europe have traditionally operated under the “opt-in” model, where affected parties affirmatively elect to join a claim. In contrast, “opt-out” mechanisms automatically coalesce group members whether or not they intend to seek a recovery. Group members may even be unaware of the claim’s existence and that they are in fact party to it. The European Commission had recognised that the awareness issues can be particularly problematic in cross-border actions.

The “opt-out” system opens the door to collective action cases being initiated on behalf of an artificially inflated number of group members. Group members may be unaware of the action being taken on their behalf. If this is the case, it can also be assumed there will be an inability to keep up to date on the proceedings being conducted in their name.

International experience demonstrates that claims under an “opt-out” system tend to be driven by claimant law firms and litigation funders rather than by impetus from directly impacted group members. More concerning is that evidence from the US shows that the bulk of damages awards and settlement sums are not received by group members. This undermines the central argument of proponents of “opt-out” systems as effective in improving access to civil justice.

An “opt-out” system would undermine Ireland’s attractiveness as a place to do business. Ireland is a global hub of world class companies and clusters. Many of these businesses would be obvious targets for claimant law firms under an “opt-out” system. It would rapidly drive Ireland down the road to a settlement culture. Companies will be placed under unreasonable pressure to settle, rather than run the risk, no matter how low, of going to court. Those bringing vexatious actions would seek to exploit this system.

Redress settlements (Article 11)

Settlement provisions must avoid compensation culture developing:

Detailed scrutiny should be conducted on the impact of this specific proposal to allow the court not to approve settlements deemed to be unfair. It will be important the settlements reflect the substantive merits of the claim. Generally, QEs and traders (or their representatives) should be more than capable of weighing the fairness of settlements and accepting or rejecting without court involvement. This must be balanced with a need to keep settlement pressure to a minimum. There may be occasions where the involvement of the court is warranted. For example, in circumstances where a settlement is in breach of a specific legislative requirement, which would require court intervention and not approving the settlement.

The UK system of collective redress points to the real dangers of a compensation culture developing through speculative or vexatious consumer actions. These target out-of-court settlements, with traders. Clear settlement rules and guidance must be put in place. Punitive damages, in all forms, should be prohibited.

Information on representative actions (Article 13)

Limit the requirements on information provision by traders:

The QE should have primary responsibility for communicating with consumers on the outcome of the action, which has been taken on their behalf. Consumers will already have an established relationship with the QE. Ireland should, therefore, limit the instances or occasions where the trader would be required to inform consumers of final decisions. For example, if qualified entities have already informed the consumers concerned or they have been provided with the information by another means, it would be inefficient and excessive to require that they be informed again by the trader. Traders should only be required to provide such information to consumers if requested to do so by a QE, and only in exceptional circumstances. For example, if the QE is deemed to be unable to communicate with the consumers in the action it has brought.

Electronic databases (Article 14)

Establish an electronic QE database:

A national database should be established detailing all designated QEs for bringing domestic and cross-border actions. It should be accessible online. It should boost the transparency of the system through providing detail on each QE, representative actions ongoing, and those that have been concluded. Sufficient safeguards will have to be built into the system to ensure it cannot be exploited as a tool to force settlements, such as potentially exposing traders to upfront, and likely disproportionate reputational damage ahead of any legal determination. Also, the information on traders or the nature of individual actions should be limited to avoid unfair coverage for traders in the media or other public forum on actions pending or yet to be completed.

The QE database should provide consumers and traders access to sufficient information on a designated QE. This should be based on the criteria set out for QE designation. Consideration should be given to allowing consumers or traders to lodge complaints about

a specific QE. This would support performance monitoring. Finally, the national QE database should be connected to other Member States' portals to support knowledge flow and transparency across the EU Single Market.

Assistance for qualified entities (Article 20)

Third-party litigation funding:

Litigation funding or case funding are not available in Ireland. In fact, third-party litigation funding is prohibited in Ireland as constituting the torts of maintenance and champerty. This was confirmed by the Supreme Court in 2017. This is a key area that warrants special attention. It is far broader in its consequence for Ireland than the directive to be transposed. Introducing such funding measures are fundamentally at odds with existing Irish civil procedure.

The area of third-party litigation funding was examined by the Civil Justice Review Group. Its recommendations should take the lead in determining the approach to be taken here, not the consultation process on the directive itself. The Review Group expressed concern that such funding without sufficient, strict, and robust safeguards would lead to the "commodisation" of litigation and would incentivise a litigation culture that would quickly overburden the court system.

Third party funding of civil claims would be a significant departure from a long line of jurisprudence. Two specific points on permissibility of third-party funding for class actions should be noted. First, third-party litigation funders are motivated by their own profit and they are not subject to regulation or professional duties in the same way as lawyers. Having external investment in the outcome of litigation is the essence of champerty which has long been prohibited in Ireland. Champerty should not be introduced solely to satisfy the requirements set out in the directive. If it is to be permitted, it should be in accordance with wider civil justice reform efforts and guided by policy. Second, litigation funders contend that they improve access to justice. It must be pointed out, however, that their income is funded from gross proceeds from settlements or damages awards that otherwise would go to the claimants. Put differently, they are funded by a diversion of sums that were intended to compensate.

Require payment of a modest entry fee:

Ireland should adopt the option of requiring consumers to pay a modest entry fee. This would be more viable then allowing public funding for collective proceedings. It would also avoid undesirable champerty being legalised in Ireland. Requiring the payment of a modest entry fee would efficiently guarantee the consumer's consent and engagement in the collective action.

Entry fees assist qualified entities with the financial burden of acting in collective actions. It is reasonable to expect that consumers seeking to benefit from a class action taken on their behalf should make a small and reasonable contribution to the QE, which after-all is to be a non-profit organisation. The payment of such a fee may enable the QE to cover part of the costs of the action, to supplement any public resources, while maintaining its independence from funding entities that have financial interests in the outcome of the action and are likely to divert the action from the protection of the interests of consumers.

There is also established precedent in Irish litigation that lay litigants are required to make some form of financial commitment, such as payment of administrative fees, in order to proceed with their action. This should be maintained through a requirement for payment of entry fees in class actions. This would help to deter ineligible individuals from initiating or joining a collection action.

The entry fee could be small and could vary depending on the number of consumers linked to the class action (e.g. €25 for claims with >1000 consumers; €50 for claims 500-1,000 consumers; and €100 for claims <500 consumers). It should be noted that a small entry or administrative fee applies to individual consumers wishing to avail of the long-established Small Claims Procedure. It is also consistent with other alternative dispute resolution mechanisms. The exact fee should be set by Government. The key point is that a modest sum should be required from each consumer party to the case. It should be set at a level so that limits affordably issues arising.

Directive EU 2020/1828 includes the principle of “loser pays”. Even though the QE would be the party directly responsible for any cost orders following a defeat, it would be reasonable to expect that the consumers party to the action should put forward a sum to meet the costs of the unsuccessful action. This could be in the form of surrendering the entry fee paid, however small. Afterall, the action would have been taken in their name.

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