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):	Joanne O'Sullivan, Partner Andrew McGahey, Partner
Organisation:	Kennedys Solicitors LLP (Ireland)
Please briefly describe your interest in this Directive:	Kennedys is a global law firm with expertise in dispute resolution and advisory services. Kennedys has 2,250+ people in 24 countries in 43 offices. Kennedys' Dublin office specialises in the insurance and reinsurance, healthcare and commercial dispute sectors. From a global and national perspective Kennedys' predominant work is defending claims brought against our clients on a national and cross-jurisdictional basis. As such, any future changes to litigation, including multi-party litigation, and how it will be conducted in Ireland is of interest to us, as it directly affects our business. Introducing representative actions in the manner envisaged by the Directive is significant for not only the EU as a whole, but particularly for Ireland given our current position in relation to multi-party litigation. For that reason, Kennedys wanted to contribute its proposals on how the Directive should be transposed to ensure access to justice, efficiency and proportionality for all parties involved.

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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:

The Competition and Consumer Protection Commission ("CCPC") is the most appropriate body in Ireland to deal with the application and designation process for qualified entities ("QE") bringing both domestic and cross border representative actions. As an established, independent, statutory body with a dual mandate to enforce competition and consumer protection law in Ireland, the CCPC is already equipped with the necessary knowledge and expertise to deal with all matters relating to consumer protection law, including the taking of enforcement actions where appropriate.

However, as the intended scope of the Directive is broad and covers a number of specialized areas (set out at Annex 1 to the Directive), we would suggest that the CCPC would seek advice in relation to specific issues, where necessary and appropriate, 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.

In the event the CCPC is not empowered to deal with the application and designation process, then we would suggest the requisite Minister should deal with the application and designation process.

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

The criteria specified in Article 4(3) for a QE bringing cross-border representative actions should also be applied for a QE bringing domestic representative 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. On that basis, we see no reason to apply different criteria for a domestic QE to that of a cross-border QE.

The intention of the Directive is to provide a harmonised model for representative actions in all EU Member States. With 'harmonisation' being the cornerstone of the Directive, consistency is key. Therefore, applying the same criteria to both types of QEs would ensure quality, uniformity and standardisation which in turn would avert any inconsistency which might undermine the role, and indeed, the legitimacy of the designated QE for bringing domestic representative actions.

Furthermore, in circumstances where parallel proceedings across Member States may be brought (as consumers from differing EU Member States may be affected by the same alleged infringement), QEs from those respective Member States have the right to join forces and 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 and, therefore, are not all on the same footing, this leaves room for problems to arise due to potential inconsistent standards and approaches.

For those reasons we believe the same criteria should be applied for both types of QEs.

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

For the same reasons outlined above (in relation to Article 4(5)), we do not believe that Ireland should avail of this option and allow QEs to be designated on an ad hoc basis in order to bring a specific domestic action.

However, should Ireland decide to avail of this option and allow such designation of a QE to bring a specific domestic action, it should be subject to the same strict criteria being satisfied. That is to say, the criteria should be the same as that required for QEs bringing cross border representative actions (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

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.

The CCPC should, in addition to dealing with the application and designation process for QEs bringing domestic and cross border representative actions, also be designated for the purpose of bringing both domestic and cross border actions. While this may require some internal changes to the CCPC, for example by way of a separate division/department to deal exclusively with either the designation process or the bringing of a representative action, there seems no reason as to why this may not be achievable.

With its remit being consumer protection, the CCPC is already armed with the necessary expertise to act as a QE in bringing domestic representative actions. By extension, it therefore also has the relevant understanding and experience in consumer protection law to act as a QE in cross-border representative actions. However, to ensure compliance with the criteria laid down under Article 4(3) of the Directive (for cross border representative actions), changes to its statutory remit may be necessary (and should easily be implemented).

In conclusion, the CCPC should be the body responsible for designating other Irish QEs (as we have suggested in answer to the question on Article 4(1)), as well as being a designated QE itself. Our view is that there is no reason it could not discharge both the functions.

Please indicate any other general comments or recommendations you may have on Article 4:

None.

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.

Although class actions, which would include collective redress actions, are currently not permitted in Ireland, our current form of representative actions are not fit for purpose in terms of implementing the Directive because of the narrow manner in which the legislation has been interpreted by the courts and the fact that our current form of representative action is limited to injunctive/declaratory relief. By introducing collective redress actions pursuant to the Directive, Ireland would effectively be paving the way for a much needed introduction to multi-party litigation in this jurisdiction in line with modern approaches.

It is interesting to note that when asked to provide its comments on the (then) proposed Directive in 2018, the Law Society of Ireland criticised the Injunctions Directive (now being repealed) for not explicitly providing for damages as a remedy (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 correct to assume that allowing for both measures in a single action would be a welcome introduction in line with the underlying objective of promoting access to justice and thus, should be an option positively availed of.

In addition to the above, 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, also addressed the possible introduction of multi-party litigation in Ireland. It conducted an analysis of various comparative jurisdictions and concluded that its preference, and therefore recommendation, for multi-party actions in Ireland is a system similar to the Group Litigation Order ("GLO") procedure in England and Wales. In circumstances where the GLO model allows for both injunctive relief and redress measures to be awarded within a single action, this has therefore already been considered and deemed both possible and appropriate for Ireland by one of the most extensive civil justice reform reviews ever carried out in the State.

It should be noted, however, that the Kelly Review Group Report found that even if a form of the GLO model is adopted into Ireland, to comply with the Directive there

would be a need to legislate discretely, whether by adapting the existing representative action for that purpose or by providing separately for such an action.
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: Yes

Ireland should avail of the options in Article 8(2).

In our view, there is no justification for opting against allowing a court which grants a final injunction defined under the Directive as "a definitive measure to cease a practice" to include as part of its decision the two options set out, i.e. a declaratory judgment (assuming one has been sought) and an obligation upon the trader to publish the "decision" (in whichever form the court so directs).

However, whilst a declaratory judgment is relatively straight forward, our recommendation is that any obligation imposed on the infringing party to publish the court's decision should be proportionate to the nature of the infringement; such proportionality to be determined by the court imposing the obligation.

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 paragraph (1)(b) after it has attempted to achieve the cessation of the infringement in consultation with the trader.

The proposed period of two weeks for the trader to cease an alleged infringement from the date of receiving a request for a consultation from a QE, however, seems remarkably short and in some instances will be wholly unachievable. A more reasonable timeframe would be somewhere in the region of 6-8 weeks for the QE and the trader to consult with one another and seek to reach an agreement before the injunctive relief may be sought. Our view is that only in exceptional circumstances, such as a threat to human life or a risk of some form of catastrophic

injury occurring, would a shorter period (or the proposed two week timeframe) be appropriate.

Giving the parties a period of 6-8 weeks (in non-exceptional circumstances) to consult with one another in relation to the cessation of an alleged infringement, would provide for a workable environment whereby both parties would be encouraged to use their best endeavours to reach a consensus.

Only in specified exceptional circumstances, such as those set out above (by way of example), should a QE be allowed to seek an interim injunction. However, in the interests of fairness, given the scope of the impact on a given trader, we would recommend that such a measure may only be sought on notice to the trader (rather than by way of an *ex parte* application).

We do not see the need for any requirement that a third party facilitate such communication between the parties, however, where the parties consider it might be appropriate (and helpful to them) in the relevant circumstances, our view is that such an option should be available.

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 only mechanism/procedure.

In the first instance, to introduce an opt-out procedure, either in isolation or combined with an opt-in procedure, would infringe Article 40.3.1 of the Irish Constitution and the implied right of access to the courts. To bind someone to proceedings they did not choose to be a part of would go against that individual's fundamental rights as enshrined in the Constitution. This was highlighted by the Kelly Review Group (see reference to the Kelly Review Group in our response to Article 7(5) above). In reaching its recommendation on the introduction of multi-party litigation in Ireland, the Kelly Review Group recommended an opt-in model. By extension, therefore, this would presumably include representative actions introduced under the Directive.

Where an opt-in model is adopted, our view is that consumers should be required to opt-in from the outset of the action (or within a strict specified period). To prevent abuse arising where multiple individuals are involved, it is important the parties have some form of ownership of their claim which involves "signing up" to the claim and perhaps paying a modest entry fee.

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

While the risk of there being outstanding funds in an opt-in system is minimal (due to there being an identifiable list of individuals who have opted into the action, and particularly so if the opt-in system is required from the outset of the action), the risk is nevertheless present and as such, a specified destination to direct such outstanding funds is important.

Our recommendation is, therefore, that such funds would be re-invested into a public, or quasi-public, fund similar to the model adopted in the Canadian province

of Québec. The Québec model facilitates funding for multi-party litigation whereby funding comes from a central justice fund, which is fed into by contributions (albeit very limited) from each and every collective action that takes place in that Canadian province. Using such funds to initiate collective redress actions, especially where the number of impacted consumers is large, would greatly assist in getting such actions "off the ground". Such a system would also ensure that no outstanding funds are improperly used or kept by the QE or indeed any other party who might have an involvement but to whom such funds do not belong, to the detriment of consumers and/or traders.
Please indicate any other general comments or recommendations you may have on Article 9: **None.**

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. Obtaining the court's sanction that fairness has been achieved would act as both a practical and welcome extension to Article 11(1)(b), which gives the court the power to invite the parties to reach a settlement regarding redress within a reasonable time limit.

Article 11(2) requires proposed settlements to be subject to the court's scrutiny. The conclusion of such scrutiny already enables the court to refuse to approve a settlement that is contrary to mandatory provisions of national law or one which contains unenforceable conditions as against the consumers concerned. It would seem sensible, therefore, that as collective redress actions are intended to be an efficient means of access to justice, grounds of fairness would also be considered and where fairness is found not to have been achieved, the court would have the power to refuse the proposed settlement.

In line with the Directive's desire to end unlawful practices (involving consumers/traders), transparency and fairness should be front and centre for all collective redress actions. Therefore, 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 and being enforceable as against the consumers concerned) would it make sense that the action may 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 paragraph (1). To give consumers the option would thwart reaching finality in any action and would be unfair to the trader involved. Being bound by a settlement reached by the QE, where such proposed settlement has been scrutinized and approved by the relevant court should, in the interest of fairness, conclude matters for consumers and traders alike and provide finality to proceedings.

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 information to consumers of any final decisions providing for injunctive relief and/or damages, and any approved settlements, if requested to do so by the QE. Our view is that rules should be laid down regardless of whether Ireland chooses to adopt an opt-in or opt-out procedure (the former being our recommendation), or a combination of the two.

Imposing a requirement on traders to inform consumers of such information could be disproportionately burdensome, particularly given the possibility of large numbers of consumers (and possibly also from differing countries) being impacted. As such, it should be for the relevant court to determine what is proportionate in the circumstances. For example, while it may be reasonable to require a trader to inform each affected consumer in an opt-in system where a defined list of affected consumers exists with contact details available, it would be unreasonable to expect a trader to have to identify each affected consumer in an opt-out system where no such contact information is readily available.

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 a designated website 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.

A trusted central point for the public (including consumers and traders) to access information surrounding designated QEs and up to date detailed information on representative actions, be it actions seeking certification/admissibility, those that are ongoing or those that are concluded, would be important not only from an information and transparency point of view but also from a general public interest point of view.

Ireland's national electronic database should be hosted within the Department of Enterprise Trade and Employment and/or the Department of Justice's websites and it should include the option to link up, albeit separately, with the EU's IMI (Internal Market Information System) so as to allow the sharing of information about domestic and cross border representative actions and QEs across the EU.

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

None.

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:

Recital 70 is clear in its language that Member States should not be required to finance representative actions. However, third party litigation funding ("TPLF") and the State's laws prohibiting maintenance and champerty are embedded in our legal system[1]. Furthermore, access to free legal aid is expressly excluded from group actions under the Civil Legal Aid Act 1995[2].

It is, therefore, essential that measures are introduced to ensure that QEs are not inhibited or discouraged from bringing representative actions under the Directive due to the high costs associated with litigation in Ireland (especially by European standards).

In terms of specific measures that Ireland should introduce, our view is that while public funding in the form suggested in our response to Article 9(7), i.e. that which is found to exist in the Canadian province of Québec, is one measure that should be introduced, in circumstances where such a measure will not fund a representative action in its entirety, we also recommend that some form of heavily regulated TPLF should be introduced exclusively for representative actions taken under the Directive. While this latter measure would clearly breach our current laws prohibiting maintenance and champerty, if it were to take a particular form and be both heavily regulated and strictly monitored as part of a representative action taken under the Directive, allowing such a form of TPLF would significantly

[1] Affirmed by the Supreme Court decision in Persona Digital Telephony Ltd v Minister for Public Enterprise and Others [2017] IESC 27

[2] Section 28 (9) (a) (viii) (ix) Civil Legal Aid Act, 1995.

increase access to justice and the proper, fair and efficient administration of justice for the taking of such actions under the Directive.

The topic of TPLF in Ireland was recently addressed in the Kelly Review Group Report and also in a joint report prepared by the Irish Society for European Law ("ISEL") and the EU Bar Association ("EUBA") on litigation funding and class actions in Ireland, published in January 2020 (the "Joint Report").

While the Kelly Review Group Report noted the "*potentially significant risks arising from any resultant "commoditization" of litigation, including the incentivising of the making of dubious claims and the imposition of a "litigation culture" on a courts system which is already heavily burdened*", it did not make a recommendation on whether TPLF should or should not be introduced in Ireland. Rather, it stated that the weighing of policy considerations should await completion of a detailed examination of the subject which is being undertaken by the Law Reform Commission.

The Joint Report also did not make any specific recommendation regarding models of facilitating litigation funding in Ireland but it did strongly recommend that proper provision would be made in this jurisdiction for both representative actions and litigation funding. In its conclusion it states "*Both are essential mechanisms of access to justice … and are necessary to enable this jurisdiction to have a realistic prospect of attracting international and cross-border litigation and arbitration*."

We would agree with the Joint Report's conclusion and would suggest strict regulation similar to that found in the UK's regulation of TPLF by its code of conduct. Strict regulation akin to that found in the UK's code of conduct would be, for example, requirements that funders would not seek to influence the funded party's legal representative to cede control or conduct of the dispute to the funder, and requirements that funders maintain adequate financial resources at all times in order to meet their obligations. Approval from the outset by the relevant court seised of the matter may also be a consideration as this would ensure strict monitoring (to include approval) forming part of any TPLF agreement between the parties.

Guidance should also be taken from the Australian approach to TPLF, as referenced in the Kelly Review Group Report[3], where TPLF agreements with respect to representative proceedings must expressly provide for an indemnity in relation to adverse cost orders in favour of the defendant (in this instance, the trader against whom the claim is made) at the outset. Mandating that this would form part of the TPLF agreement would provide some assurance to traders in that respect.

We do not believe that distinctions should be made between a domestic QE and a cross-border QE seeking to launch a representative action in relation to what type and level of support they seek. Rather, given that our view is that all QEs must

[3] Page 241, paragraph 3.3

comply with the same criteria (Article 4(3)) in order to be designated a QE, there should be no distinction in terms of how each one is treated.

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.

To do so would be in line with an opt-in system whereby claimants, in "owning" their claims, have some form of responsibility, even if just minimal. For example, the requirement could be that the claimants must pay for the initial court administration costs of getting the action issued. Making this a requirement would also potentially act as a deterrent to claimants abusing their involvement in the representative action by necessitating them to have a vested interest in the action itself.

A modest/affordable fee for each opt-in claimant would be appropriate, such as the initial court administration cost of commencing the proceedings. If the fee remains modest, we see no reason to introduce any general waiver for consumers. However, there may be some exceptional circumstances, to be determined by the requisite national Minister, which may warrant a waiver and require the State to discharge the modest fee on behalf of a particular claimant(s).

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: **Comments:**
Article: **Comments:**
Article: **Comments:**
Article: **Comments:**
Article: **Comments:**

Additional rows may be inserted, if required.