PUBLICATION ON THE DRAFT EU DIRECTIVE ON
REPRESENTATIVE ACTIONS FOR THE PROTECTION OF THE
COLLECTIVE INTERESTS OF CONSUMERS (COM (2018) 184 FINAL)

DEPARTMENT OF BUSINESS, ENTERPRISE AND INNOVATION (DBEI)

JUNE 2018
1. Introduction

1.1 The Law Society of Ireland welcomes the Department of Business, Enterprise and Innovation’s (“DBEI”) Call for views in response to Draft EU Directive on Representative Actions for the Protection of the Collective Interests of Consumers (COM (2018) 184 Final), (the “draft Directive”) and is pleased to submit the following comments.¹

2. Initial comments

2.1 The draft Directive provides for representative actions for breaches of identified consumer law, though these actions may only be taken by “qualified entities” and not by consumers themselves, or lawyers acting for consumers who might blunt the Directive’s effectiveness. Commentators have noted that the Commission is keen to avoid US-style class actions and so only approved not-for-profit bodies, such as consumer groups, will be able to avail of the proposed representative action procedure². The draft Directive replaces the Injunctions Directive under which, to our knowledge, no proceedings were ever taken by the Irish authorities.

2.2 The draft Directive does not include any mechanism to calculate and quantify damages suffered by individual consumers. This is a vexed issue in competition law private actions and the courts deserve guidance in this regard if a proper system of redress is to work.

2.3 It is not clear whether the draft Directive will create an opt-in or opt-out system of collective redress. This is something that should be addressed in the Directive so that the scope and number of consumers likely to benefit in each case is clear.

3. Summary of proposals

3.1 The draft Directive proposes to empower so-called “qualified entities” (such as, in Ireland, the Competition & Consumer Protection Commission or CCPC) to take representative actions on behalf of groups of consumers, including to obtain damages for those consumers.

3.2 The draft Directive has application to a wide range of laws, breaches of which may permit a representative action (a list of those laws is set out in Annex I to the Directive and reproduced in Annex I to this document). These include EU consumer protection rules in sectors such as financial services, energy, telecommunications, health and the environment.

3.3 Under the proposed Directive, representative actions could be brought by a national agency (in all likelihood, the CCPC in Ireland) against a business (or “trader” to use the language of the proposal) for infringements of Annex I laws.³ The new rules will

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² Bourke, Class Actions for EU Consumers, but not US-style https://www.mccannfitzgerald.com/knowledge/disputes/class-actions-for-eu-consumers-but-not-us-style
³ A trader is defined as any natural or legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in their name or on their behalf, for purposes relating to their trade, business, craft or profession.
apply to domestic and cross-border infringements alike, including infringements ceased before the representative action has started or been concluded.4

3.4 Crucial for the draft Directive’s success is ensuring consumers are informed about taking a representative action or that an action is being considered or in being5. But the Directive is vague on how consumers will be alerted to representative actions that might concern them.

3.5 The new scheme seeks to amend and replace the much criticised Injunctions Directive.6 The Injunctions Directive endeavoured to defend the collective interests of consumers by providing for two possible forms of injunction proceedings. A key criticism of the Injunctions Directive was that it did not explicitly provide for damages as a remedy (rather it allowed for injunctive relief, or cease and desist-type orders only).7

3.6 We are not aware of any Irish cases taken by the CCPC or, its relevant predecessor, the National Consumer Agency, under the Injunctions Directive, even if the rules as implemented in Ireland allowed for cases to be heard in the Circuit Court (rather than the High Court).8

3.7 Under the new proposals, so-called “qualified entities” (i.e., the CCPC in Ireland) will be able to apply for a redress order that obliges the trader to provide for, inter alia, compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid, as appropriate.9

3.8 The burden and standard of proof of the qualified entity’s case is not detailed in the draft, this seems to be left to each Member State to decide according to its own requirements. Also, no guidance on the difficult question of how to quantify individual consumer harm is provided in the proposed Directive. As a general principle, the draft Directive states (in Recital 17) that compensation awarded to consumers harmed by an infringement should be limited to the actual harm suffered. Punitive damages, leading to overcompensation in favour of the claimant party of the damage suffered, should be avoided.

3.9 Draft Article 6(2) would also allow national courts to issue, instead of a redress order, a declaratory decision on liability where, due to the characteristics of the individual harm to the consumers concerned, the quantification of individual redress is complex. This is the sole reference to quantification of damages in the draft Directive.

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4 Article 2(1), draft Directive.
5 Recital 31 to the draft Directive.
6 Directive 2009/22/EC on injunctions for the protection of consumers' interests, which was transposed into Irish law by the European Communities (Court Orders for the Protection of Consumer Interests) Regulations 2010, SI No 555 of 2010. According to the proposed Directive, “[The Injunctions Directive’s] key shortcomings are its limited scope, the limited effects of injunction decisions on redress for harmed consumers and the cost and length of the procedure,” (page 2 of the draft Directive). For other criticism of the Injunctions Directive, see Austin Representative actions, the European Way – new consumer collective redress proposals published.
8 Regulations 2(1) and 3(2), European Communities (Court Orders for the Protection of Consumer Interests) Regulations 2010, SI No 555 of 2010.
9 Article 6, Draft Directive.
4. **The current position on class actions under Irish law**

4.1 Irish legislation does not provide for class actions. Analogous procedures under Irish domestic law are (a) representative actions and (b) test cases. The former is provided for under Order 15 rule 9 Rules of the Superior Courts 1986-2018:

“Where there are numerous persons having the same interest or matter, one or more such persons may sue or be sued, or may be authorised by the court to defend, in such cause or matter, on behalf or for the benefit of, all persons so interested.”

4.2 An argument can be made that judicial interpretation of Order 15 has limited its effectiveness: remedies are restricted to injunctive and declaratory relief, parties may not seek damages; civil legal aid is not available to parties to such actions; and the members of the class must have the same interest. This final requirement has been interpreted strictly.

4.3 In contrast, the test case-approach is the more favoured and more used vehicle for multi-party actions. The Law Reform Commission has noted that “the nature of the test case does not merit description as a procedure. It is instead the application by analogy of the findings in one case to the facts of others.” This often results in the duplication of work e.g. experts’ reports, with the attendant duplication of costs. A further criticism is that damages will be awarded without regard to similar cases heard simultaneously or which will follow subsequently, so an overall sum of total damages of all cases is incalculable until the final case has been decided.

4.4 The European Consumer Organisation noted in its comments on the draft Directive that no collective redress scheme was available to the 160,000 Irish consumers who were mis-sold credit card protection policies, despite damage of between €15 and €30 million having accrued.

4.5 Under provisions of the draft Directive, it appears that infringement of identified EU consumer protection rules alone is sufficient for a qualified entity to take action, as quantification of loss or harm is not required to be proven by the qualified entity.

5. **What will change in Ireland with the introduction of the draft Directive?**

5.1 The draft Directive will introduce a style of class action to Ireland, though only approved qualified entities and not individual consumers may initiate proceedings. It will not be necessary for the qualified entity to identify all the consumers affected by the alleged breach of consumer law.

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10 Section 28(9)(a)(ix) Civil Legal Aid Act 1995.
12 The Law Reform Commission states that the test case approach encourages the multiplication rather than the division of costs for the generic issue among the members of the group, see Report on Multi-Party Litigation LRC 76-2005, para. 1.29
14 Article 6(2), draft Directive.
15 Draft Directive, Article 4(1).
16 Ibid Recital 18.
5.2 The remedies to a successful action are non-exhaustive but include injunctions, compensation, repair, replacement or a declaration that consumers’ rights have been infringed.\textsuperscript{17} Where consumers have suffered a small amount of loss, redress shall be directed to a public purpose serving the collective interests of the consumer.\textsuperscript{18} Under current Irish law, damages are available through the test case mechanism though not through the representative action.

5.3 To ensure certainty and consistency in application of the provisions, the final decision in one Member State will be presumed to be correct in an equivalent action in another Member State, if the facts and law arising in the latter are similar\textsuperscript{19}. Member States must ensure procedural costs are not a financial obstacle for qualified entities to effectively exercise their rights\textsuperscript{20}; though the recitals state that the Directive should not affect national rules concerning the allocation of procedural costs\textsuperscript{21}. Considering there is almost no civil legal aid available to litigants in Ireland, this may be a significant development.

5.4 A trader subject to a case may be obliged to present to the qualified entity evidence that is within the trader’s control\textsuperscript{22}. Similar requirements under Irish discovery rules will be familiar to Irish litigators.

The Law Society hopes that the Department will find the above comments constructive and helpful and is available to engage further with the Department if required.

For further information please contact:

Cormac Ó Culáin
Public Affairs Manager
Law Society of Ireland
Blackhall Place
Dublin 7
DX 79

Tel: 353 1 6724800
Email: c.oculain@lawsociety.ie

\textsuperscript{17} Ibid Article 6.
\textsuperscript{18} Ibid Article 6 (3)(b).
\textsuperscript{19} Ibid Article 10.
\textsuperscript{20} Ibid Article 15.
\textsuperscript{21} Ibid Recital 4.
\textsuperscript{22} Ibid Article 13.
Annex I

LIST OF PROVISIONS OF UNION LAW REFERRED TO IN ARTICLE 2(1)


