LAW SOCIETY SUBMISSION

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

DEPARTMENT OF ENTERPRISE, TRADE AND EMPLOYMENT

MAY 2021

ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

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1. Introduction

1.1. The Law Society of Ireland ('the '**Society'**) welcomes the Department's call for submissions on the transposition of Directive (EU) 2020/1828 of the European Parliament and of the Council (the '**Directive'**) and provides the below responses for consideration.

2. Executive Summary

2.1. In Ireland, there are currently a number of ways in which the courts can deal with multi-party actions under either the Rules of the Superior Courts or through statutory provisions. These include representative actions, joinder and consolidation of actions and test cases. The difficulty with the current position in Ireland is that there is no provision for the recovery of damages by affected parties in collective redress actions; the Directive will ameliorate that in certain respects and under certain circumstances.

2.2. The Directive was published in the Official Journal of the EU on 4 December 2020. Member States have until 25 December 2022 to transpose it, and it will apply in Ireland from 25 June 2023. The Directive repeals and replaces the Injunctions Directive (Directive 2009/22/EC). As noted by the Society in its submission in June 2018 on the draft Directive, we remain unaware of any Irish cases taken by the Competition and Consumer Protection Commission (CCPC) as a qualified entity under the Injunctions Directive. As stated in the DBEI Consultation Paper, the Directive aims to improve tools for stopping illegal practices and facilitating redress for consumers where a number of them are victims of the same infringements of their rights, in a mass harm situation.

2.3. Various reports have commented on the absence of a comprehensive procedure for multi-party actions, including the Law Reform Commission's 2005 Report on Multi-Party Litigation (the '**LRC Report**') (which criticised the lacuna and recommended measures to address it) and the recently published Report by a Review Group under the Chair of Mr Justice Peter Kelly, entitled *Review of the Administration of Civil Justice* (the '**Review Group's Report**'), which observed that:

> *'it is clear from the European Commission's report of January 2018 on implementation of its 2013 Recommendation ... that Ireland is in a minority of EU Member States in not having a compensatory collective redress procedure.*
>
> *Lastly, both the representative action proposed by the Recommendation of 11th June 2013 and that which would be required by the representative action under the Proposed Directive on representative actions for the protection of the collective interests of consumers envisage relief being claimed for damages and/or other financial redress. These types of relief are not an established characteristic of the existing representative action procedure in Ireland and this supplies a further rationale for the introduction of a new and more comprehensive multi-party action procedure to accommodate mass claims.'*

2.4. While the Society welcomes the Directive, we would support broader reforms designed to ensure collective redress in appropriate cases.

3. Article 4 – Qualified Entities

3.1. **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 Society does not have a particularly strong view on the body or organisations that should deal with the application and designation process, other than to stress the importance to ensure that the process is dealt with by an independent body and one with sufficient expertise and knowledge of the scope of the Directive to enable it to make informed decisions regarding the designation of qualified entities. The Society emphasises the importance of having regard at all times to the criteria set out at Article 4(3) of the Directive when appointing a body/organisation to deal with the application and designation process.

The scope of the Directive is broad, applying to representative actions brought against infringements by traders of the provisions of Union law referred to in Annex I insofar as they relate to consumer protection. Annex I lists 66 legal acts which cover - carriage of passengers by air and by rail, medicinal products and devices, data protection, GDPR, UCITS and Solvency II amongst others.

The new Directive expands the scope of the Injunctions Directive and brings the following sectors into scope: financial services, telecommunications, health and environment. It is important that the body or organisation dealing with the application and designation process for qualified entities, to bring either domestic or cross-border representative actions, is in a position to identify sufficiently suitable entities in compliance with the requirements of the Directive.

3.2. **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, as it will ensure uniformity and consistency in terms of cross-border and domestic representative actions thereby facilitating access to justice while avoiding undesirable practices.

The Directive introduces a style of class actions (albeit through qualified entities rather than individual consumers as plaintiff). Currently, Irish legislation does not provide for class actions. Analogous procedures under Irish domestic law are representative actions and test cases.

Article 4(3) is prescriptive in terms of qualified entities bringing cross-border representative actions.

As there is no existing process in Ireland under which class action style proceedings are permissible, it is important not to impose divergent criteria between qualified entities which are entitled to bring domestic representative actions and cross-border representative actions.

Under the Directive, qualified entities from another Member State can bring a cross-border representative action in Ireland concerning Irish consumers and Irish traders (Article 6 of the Directive provides that Member States shall ensure that qualified entities, designated in advance in another Member State for the purpose of bringing cross-border representative actions, can bring such representative actions before their courts or administrative authorities). If more stringent criteria are imposed on qualified entities seeking to bring domestic actions in Ireland, it will create unnecessary obstacles for any such qualified entity compared with qualified entities from other Member States.

Similarly, if less stringent criteria are imposed on qualified entities seeking to bring domestic representative actions in Ireland, it may result in increased representative actions being taken before the Irish courts/administrative authority in the case where a company has a branch or subsidiary in Ireland i.e. forum shopping.

We believe that consideration should be afforded to the creation of an exception to allow an entity to seek, in exceptional circumstances, a designation in order to facilitate a fast-track application and to receive designation to allow it to instigate a collective redress action without the need to establish 12 months of public activity where urgent intervention is warranted in a particular case.

3.3. **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

It may be beneficial in terms of increasing access to justice and providing flexibility for consumers as limiting collective redress to qualified entities designated as such by Member States, may impact on access to justice. Any rules around designation of such entities on an ad hoc basis should be the same, or more, than what is required for qualified entities in line with the requirements of the Directive.

There is some concern that permitting ad hoc entities to bring specific domestic actions may undermine certain broader objectives of the Directive insofar as such bodies may be profit-making (the Directive provides that, for the purposes of bringing cross-border representative actions, qualified entities should be of a non-profit-making character) and funded by third parties which would infringe Ireland's rules against third party funding.

However, access to justice will be facilitated by allowing ad hoc entities to bring such claims in appropriate circumstances.

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

The Society considers that there is a risk that, if public bodies are designated as qualified entities for the purposes of bringing domestic and cross-border actions, this may cause conflict between the public bodies public enforcement objectives and private consumer interests.

Additionally, many such public bodies are funded by the industry they regulate which may give rise to a perception of bias if they were a designated entity bringing a collective redress action against members of that industry.

4. Article 7 – Representative Actions

4.1. **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. Several 'qualified entities' from different Member States can jointly bring a single representative action in one Member State where the alleged infringement affects, or is likely to affect, consumers from different Member States. This can lead to significant savings on time, costs and court resources.

5. Article 8 – Injunction Measures

5.1. **Question 2**: **Should Ireland avail of the options in paragraph 2? Please provide reasons for your answer in each case.**

Response

We are of the view that, should Ireland avail of the obligation to publish the decision on the measure (in full or in part) or the obligation to publish a corrective statement, it should seek to ensure the rights of the respondent trader are properly considered and weighed up in the context of such publication.

5.2. The above response also applies in respect of Question 4.

6. Article 9 – Redress Measures

6.1. **Question 2 - 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

There are advantages and disadvantages to both opt-in and opt-out systems. A major consideration is whether consumers are less likely to take active steps to participate in representative actions (opt-in).

On balance, it is arguable that the “opt-in” system, which is based on consent from the consumer, and respects the rights of each individual consumer to decide whether to pursue his/her claims, is preferable.

The LRC Report noted that the attractiveness of the "opt-in" system was in "its familiarity or, conversely, in the unfamiliarity of the opt-out approach. An opt-out regime would require a dramatic shift away from the traditional voluntary method of instituting litigation. The idea of compelling an individual to take steps to withdraw from litigation that they never undertook sits uneasily with the traditional concept of litigation. Thus, the real possibility arises that individuals may become involved unwittingly in litigation”.[1]

We endorse this view and add that our professional standards, which require clear and affirmative instructions in advance of the commencement of litigation on behalf of a client, favours the adoption of an "opt-in" system.

The comments of the Law Reform Commission that the pool of potential litigants in Ireland is small remains valid, such that "*an organised and targeted means of notification should serve the objective of widespread reach and obviate the need for an opt out approach. In short, the geographic and demographic profile of Ireland does not warrant an opt out system*"[2].

As regards constitutional rights, and as noted by the LRC Report, the right of access to the courts (which is protected under Article 34 of the Constitution), may involve a corresponding and converse right of non-access or the right to be left out of proceedings unless a positive commitment is made to engage in such proceedings.

In other words, whilst it may involve a right not to be compelled to litigate "*that a requirement to "opt out" may have implications for personal property rights in that a cause of action may attract the constitutional protection afforded to other forms of private property*".[3]

[1] LRC Report, para. 2.14

[2] LRC Report para 2.18

[3] Review Group Report, para. 4.1

However, the Law Reform Commission recommend that multi-party actions proceed on the basis of an opt-in system.[4] The Society maintains that this conclusion applies a fortiori to representative actions.

The issue of timing and the "opt-in" system may have implications in respect of the Statute of Limitations ('the '**Statute'**). The difficulty lies in determining the point at which the Statute stops running against the defendant trader. The position under Irish law is such that, time for the purposes of the Statute, stops on the date that an action is brought[5] i.e. the date proceedings are issued. Should a consumer wish to opt-in after this point, the matter should be one for judicial consideration in the context of those proceedings.

7. Article 11 – Redress Settlements

7.1. **Question 2: Should Ireland allow for the court not to approve settlements that are unfair? Please provide reasons for your answer.**

Response

The Society endorses the approach described at paragraphs 2.101 – 2.103 of the LRC Report.

Where an opt-in mechanism applies to domestic and cross-border representative actions, and where Article 11 of the Directive expressly provides that settlements are subject to the scrutiny of the court or administrative authority, the refusal of a settlement on the grounds of unfairness appears to be unnecessary and arbitrary. This is best explained by way of comparison to consumers who find themselves participants in representative actions because of their failing to opt-out of that action. Such participants may be compared to the infant or minor plaintiff, where court approval of settlements is required, in order to safeguard the interests of the minor plaintiff and the passive consumer participant who has failed to opt-out.

However, where the opt-in mechanism is applied, all participant consumers will have consented to the representative action and it is anticipated that the terms of the representative action, including terms and conditions of any potential settlement, will be discussed and agreed at the outset.

Simply because a settlement is "unfair" and notwithstanding the difficulties in defining such a settlement, that should not require court approval where consumers have opted-in to the representative action. Allowing an option for court approval of unfair settlements opens the door to potentially disgruntled individual consumers petitioning the court where they are unsatisfied with a settlement.

The finality of settlements is an important element in the system of the administration of justice in the State which allows parties to freely negotiate settlements in the expectation that it ends the matter (thereby encouraging settlements in order to avoid ongoing litigation).

7.2 The above response also applies to Question 4.

[4] LRC Report, para 2.26

[5] See the Statute of Limitations 1957

8. Article 13 – Information on Representative Actions

8.1. **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

This approach seems logical, whereby the trader would provide information to consumers around any final decisions and any approved settlements, only where the qualified entity so requests.

9. Article 14 – Electronic Databases

9.1. **Question 1**: **Should Ireland set up such databases and what form should they take? Please provide reasons for your answer.**

Response

The provision of national electronic databases would be in the interests of justice and promoting access to justice.

The database may be particularly effective where proceedings are instituted in the courts of lower monetary jurisdiction in Ireland, notably the Circuit Court or the District Court.

Currently, the Irish Courts Service operates a "Legal Search" function, whereby information on extant litigation before the superior courts is accessible by members of the public. This information is not available for the lower courts, so an electronic database publicly accessible through websites, which provides information on qualified entities designated in advance (as well as general information on ongoing and concluded representative actions) would be welcome.

10. Article 20 – Assistance for Qualified Entities

10.1 **Questions 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

Ireland is mandated (under Article 20 of the Directive) to provide assistance for qualified entities.

In particular, Article 20(1) obliges Ireland to take measures which aim to ensure that the cost of proceedings related to representative actions do not prevent qualified entities from effectively exercising their right to seek redress or injunctive measures.

Third party litigation funding is prohibited in Ireland as it offends rules on maintenance and champerty, as affirmed in the Supreme Court decision of *Persona Digital Telephony Ltd v Minister for Public Enterprises and Others* [2017] IESC 27. As noted by the Review Group in its consideration of third-party funding:

"The impediment to third party funding of litigation stems from the laws designating as torts and criminal offences maintenance - the "giving of assistance, by a third party, who has no interest in the litigation, to a party in litigation" – and champerty – assistance given to a litigant by a third party on the basis that the latter will receive a share of the proceeds of the award if the litigation succeeds".[6]

The Supreme Court in *Persona* considered whether the current prohibition on litigation funding was appropriate. While recognising the issues in that regard, the Court held that it was a policy issue and any change in the law in respect of funding litigation was a matter for the Oireachtas (see *Persona* and the comments of the Review Group on the Review of the Administration of Civil Justice at 10.2.6).

Many other common law jurisdictions have introduced reforms to allow litigation funding (subject to appropriate safeguards) and the Society believes that, in the absence of an adequate civil legal aid system, it is imperative that the Oireachtas should consider reform of the law relating to litigation funding in order to promote access to justice.

In the interim, and in the absence of such reform, we believe that consideration should be given to mitigating the exclusions under the Civil Legal Aid Act 1995 (the '**1995 Act'**), which currently provide - at section 28(9)(a)(ix) - that civil legal aid is not available where the application for same is made "*by, or on behalf of, a person who is a member, and acting on behalf, of a group of persons having the same interest in the proceedings concerned*".

Section 28(10) of the 1995 Act provides that the Minister for Justice may, by order, disapply the section 28(9) exclusions. This power could be invoked, in the interim, to enable legal aid to be granted in respect of group litigation, pending any further reform of the law around third-party litigation funding. In this regard, there should be no distinction made between a domestic qualified entity and a cross-border qualified entity seeking to launch a representative action as regards the type and level of support which can be sought.

Article 12 of the Directive provides that the unsuccessful party (in a representative action for redress) is required to pay the costs of the proceedings which have been borne by the successful party, **in accordance with conditions and exceptions provided for in national law applicable to court proceedings in general.**

It may be that the provisions Order 99 of the Rules of the Superior Courts (which provide that the costs of, and incidental to, every proceeding in the Superior Courts shall be at the discretion of those Courts) may be of assistance in this regard.

Order 99, Rule 3(1) requires the court, when considering costs, to have regard to the matters set out in section 169(1) of the Legal Services Regulation Act 2015. According

[6] Review Group Report at para 10.2.6

to Murray J in *Chubb European Group SE v Health Insurance Authority* [2020] IECA 183, the general principles now applicable to the costs of proceedings are:

> *"(a) The general discretion of the Court in connection with the ordering of costs is preserved (s. 168(1)(a) and O. 99, r. 2(1)).*
>
> *(b) In considering the awarding of costs of any action, the Court should 'have regard to' the provisions of s. 169(1) (O. 99, r. 3(1)).*
>
> *(c) In a case where the party seeking costs has been 'entirely successful in those proceedings', the party so succeeding 'is entitled' to an award of costs against the unsuccessful party unless the court orders otherwise (s.169(1)).*
>
> *(d) In determining whether to 'order otherwise' the court should have regard to the 'nature and circumstances of the case' and 'the conduct of the proceedings by the parties' (s.169(1)).*
>
> *(e) Further, the matters to which the court shall have regard in deciding whether to so order otherwise include the conduct of the parties before and during the proceedings, and whether it was reasonable for a party to raise, pursue or contest one or more issues (s. 169(1)(a) and (b)).*
>
> *(f) The Court, in the exercise of its discretion may also make an order that where a party is ' partially successful' in the proceedings, it should recover costs relating to the successful element or elements of the proceedings (s.168(2)(d)).*
>
> *(g) Even where a party has not been 'entirely successful' the court should still have regard to the matters referred to in s. 169(1)(a)-(g) when deciding whether to award costs (O. 99, r. 3(1)).*
>
> *(h) In the exercise of its discretion, the Court may order the payment of a portion of a party's costs or costs from or until a specified date (s. 168(2)(a)).*"

Although it is far from satisfactory, that assistance for qualified entities would be provided in terms of costs orders under Order 99 and section 169(1) of the LSRA 2015, the comments from the Chief Justice in *SPV Osus Limited v HSBC Institutional Trust Services (Ireland) Limited* [2018[IESC 44 are noteworthy.

Mr Justice Clarke CJ observed that the increasing complexity of litigation and the increasing cost of same has the tangible effect of denying parties, who have suffered wrongdoing, access to courts. Mr Justice Clarke urged the legislature to address the area of litigation funding, cautioning that:

"undesirable as unregulated change might be … ***a point might be reached where the courts had no option but to go down such a route if it became clear that no real effort was being made on the part of the legislature to address issues*** *such as those which came into focus in [the] appeal".*[7] *[emphasis added]*

Third-party funding is well established in other common law jurisdictions where, contrary to speculation, it has not led to a wave of unmeritorious litigation. Funders have a vested commercial interest in funding meritorious claims which otherwise may not have the opportunity to be litigated.

[7] Clarke CJ, at para 2.9

10.2. **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

We have no objection in principal to requiring consumers to pay a modest entry fee. This would align with the opt-in mechanism discussed above.

There should be absolute transparency around the level of fee charged, which should be capped. The amount should be such as to ensure that it is not, in effect, an impediment to accessing justice. In the event of a waiver, provisions around such circumstances authorising a waiver, should be expressly defined in advance.

Conclusion

The Society appreciates the opportunity to contribute to the Department's consideration of this issue and will be glad to engage further on any of the matters raised.

For further information please contact:

Fiona Cullen
Public and Government Affairs Manager
Law Society of Ireland
Blackhall Place
Dublin 7

Tel: 01 672 4800
Email: F.Cullen@lawsociety.ie