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Representative Consumer Actions: Update

The Representative Actions for the Protection of the Collective Interests of Consumers Bill 2023 ("the Bill") was published on 13 March 2023 with a deadline for entry into force of the legislation set for 25 June 2023.

As noted in our previous <u>article</u> on the General Scheme of the Bill ("the **General Scheme**"), the primary purpose of the proposed legislation is to transpose the European Union ("**EU**") Directive on representative actions for the protection of the collective interests of consumers (EU) 2020/1828 ("the **Directive**"). This will provide for a new legal framework which will allow a Qualified Entity (as defined below) to bring representative actions (sometimes called "class actions" and "group actions") on behalf of consumers, at both national and cross-border level, in circumstances where a trader has infringed their consumer rights under specified consumer legislation.

The Bill does not depart from the framework provided by the General Scheme but does provide an additional level of detail on how the eventual Act might operate in practice. Notably, the key issue as to funding remains and while the legislation is due to enter into force on 25 June 2023, Ministerial regulations will also be required to enable the effective operation of the legislation.

Qualified Entity – 'Main Purpose'

Under the Bill, a Qualified Entity is a legal person or public body representing consumers' interests designated in accordance with section 8 as qualified to bring representative actions in accordance with the Directive ("Qualified Entity"). The Bill does not provide guidance as to the application process for designation as a Qualified Entity, simply stating the relevant application must be in the "prescribed form" as set out in future Ministerial regulations. The Bill does, however, provide insight on what information a Qualified Entity will be obliged to disclose and the regulatory requirements that will be imposed on their operation.

An additional feature in the Bill is that of the "main purpose" requirement. A Qualified Entity's 'main purpose' is defined in Section

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8(1) as being its "legitimate interest in protecting consumer interests provided for in a relevant enactment". Section 19(4) then provides that a Court may examine whether a Qualified Entity's 'main purpose' justifies its taking of a representative action in respect of the infringements at issue. It is, therefore, envisaged that prior to bringing a representative action, a Qualified Entity will need to be satisfied that the representative action in question falls within the scope of its legitimate interests.

Representative Actions

The Bill removes the ambiguity created by the General Scheme's suggestion that the legislation may have retrospective application by stating that it applies only to "actions brought on or after 25 June 2023 in respect of infringements by traders occurring on or after that date". An infringement, the subject matter of an action, therefore, has to have occurred on or after 25 June 2023.

Similar to the General Scheme, the Bill provides for both injunctive relief and/or monetary redress against the trader who has infringed the consumer's rights. Furthermore, the 'optin' provision, whereby in a representative action seeking redress, a consumer must notify their interest in being included in the action, is provided for. This provision does not apply to an application for injunctive relief.

Funding

The key issue raised both by the Government's report on the pre-legislative scrutiny of the General Scheme and in Oireachtas debate on the Bill, was the issue of third-party funding. The issue is particularly acute given that the prospective cost of running a representative action falls on the Qualified Entity rather than individual consumers and the operation of the 'loser pays' principle in Irish Law which will apply to this legislation.

The Bill adopts the wording of the General Scheme to the effect that third party funding is permitted only "insofar as permitted in accordance with law". However, the Irish torts of maintenance and champerty prohibit third party funding of litigation in Ireland, save in very limited circumstances. Further, the Bill only makes provision for the Qualified Entity to charge a "modest fee" to consumers prior to their entry into the representative action. It, therefore, appears that the Irish Government has declined to create a stand-alone thirdparty funding regime in respect of representative consumer actions. This aspect of the legislation will, therefore, be dependent on broader civil law reform on third party funding either at Irish level or via the proposed EU Regulations on third party litigation funding.

Conclusions

The Bill represents an effective restatement of the principles within the General Scheme. Although it remains to be seen what changes will be made to the draft Bill as it progresses through the legislative stages in the Oireachtas, the issues around third-party funding will likely remain front and centre until the eventual entry into force on 25 June 2023.

It is also anticipated that while the legislation may be in force on 25 June 2023, it will not be effective until the enactment of the relevant Ministerial regulations regarding the application process and regulation of Qualified Entities, which are only possible post enactment.

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