STATEMENT OF REPRESENTATIVES OF THE LAW SOCIETY of IRELAND TO A MEETING OF JOINT COMMITTEE ON ENTERPRISE, TRADE AND EMPLOYMENT, 14th September 2022

PRE-LEGISLATIVE SCRUTINY OF THE GENERAL SCHEME OF THE REPRESENTATIVE ACTIONS FOR THE PROTECTION OF THE COLLECTIVE INTERESTS OF CONSUMERS BILL, 2022.

Thank you, Chair, and thank you to the Committee for opportunity to discuss the General Scheme of the Bill (the "General Scheme"). The Law Society welcomes the opportunity to contribute to the Committee's scrutiny of the General Scheme.

First, let me introduce myself. I am a member of the Business Law Committee of the Law Society of Ireland and I am a practising Irish solicitor in the area of EU, Competition, Trade and Regulated Markets. My practice is mainly advisory and I do not regularly litigate cases and I am not therefore an expert in Irish litigation practice and procedure. I am joined by my colleague, Alexandra Pruska, a Polish qualified lawyer who recently joined my law firm from the CCPC.

1. **Background**

    a. In 2005, the Irish Law Reform Commission conducted a review of the law regarding multi-party litigation, and reached a preliminary conclusion that the Irish legal system "… *lacks a comprehensive procedure that would tackle class claims in a uniform and consistent fashion.*" A Law Reform Commission *Report on Multi-Party Litigation Report* (LRC 76-2005) published on foot of that review recommended that a formal procedural structure for collective redress be established.

    b. In 2017, following introduction of a Private Members' Bill on Multi-Party Actions to regulate multi-party actions, then Minister for Justice and Equality referred the question of the introduction of a multi-party action procedure in the Irish legal system to a Review of Administrative Civil Justice Group, established in 2017 and chaired by then President of the High Court, The Hon. Mr. Justice Peter Kelly.

    a. In January 2018, the European Commission published a report and study on collective redress mechanisms in the Member States. The report and study found that Ireland was an outlier among EU Member States because there is "… *no dedicated mechanism for bringing collective claims in Ireland. Rather, mass claims are dealt with under the general rules of civil procedure which only allow for collective claims in very limited circumstances.*"

b. A 2020 Report on foot of work of the Administrative Civil Justice Group (the "Kelly Report") concluded that, *in addition to* the EU Directive 2020/1828 on representative actions for the protection of the collective interest of consumers, there was "… *a further rationale for the introduction of a new and more comprehensive MPA [multi-party action] procedure to accommodate mass claims*." More specifically, while acknowledging the importance of public law redress mechanisms like that provided for in Directive 2020/1828, the Kelly Report concluded that in addition "[*i*]*t would seem clear that there is an objective need to legislate for a comprehensive multi-party action ("MPA") in Ireland*" (at para. 6.2.1).

a. In *SPV Osus Limited v HSBC Institutional Trust* [2018] IESC 44, then Chief Justice Clarke stated that: "*I remain very concerned that there are cases where persons or entities have suffered from wrongdoing but where those persons or entities are unable effectively to vindicate their rights because of the cost of going to court. That is a problem to which solutions require to be found. It does seem to me that this is an issue to which the legislature should give urgent consideration*" (at para. 2.5).

c. While the Law Society of Ireland welcomes the Directive and the General Scheme, the Law Society of Ireland would support broader and carefully balanced reforms that implement the recommendations of the Law Reform Commission and the Kelly Report. It would be important that such reforms are carefully balanced to facilitate small-harm class action lawsuits while preventing excessive litigation.

d. In the U.S., courts can generally apply a lenient standard for certification of class actions. For example, a recent U.S. class action lawsuit (Chimienti v Wendy's et al.) lodged in May 2022 in a New York district court) seeks compensatory damages, disgorgement of ill-gotten gains, punitive damages, and injunctive relief for alleged misrepresentations and omissions because "*Wendy's advertises its burgers … to make it appear that the burgers are substantially larger in size than the actual burger served to customers*." The lawsuit goes on to claim that "[*t*]*he beef patties used for its advertisements are not fully cooked to make it appear that they are approximately 15-20% larger than the beef patties that are actually served to customers*." The claim is brought by the plaintiff "… *on his own behalf and on behalf of all other person or entities who purchased an Overstated Wendy's Menu Item*." It is estimated that more than 10,000 new class actions are filed each year in U.S. federal and state courts. According to one source, "[*a*] *putative class action takes no more than a single named plaintiff and a filing fee typically of several hundred U.S. dollars*."

2. **Three Specific Comments / Questions**

a. EU *Directive 2020/1828 on representative actions for the protection of the collective interests of consumers* ("the Directive" or "Directive 2020/1828") sets minimum standards only. It requires Member States to put in place, at a minimum, at least one procedural mechanism to enable consumer organisations (called "qualified entities" to commence representative actions on behalf of consumers). Notably, under the Directive and the General Scheme, only qualified entities, not individual consumers, can bring representative actions. Many, if not most, Member States are expected to go beyond the minimum requirements, or already do so.

b. A key purpose of the Directive is to enable, consistent with Article 38 of the Charter of Fundamental Rights of the EU, representative actions to ensure a high level of consumer protection (Recital 4). To that end, the Directive requires Member States to implement, at a minimum, a type of collective representative actions involving a qualified entity (Article 4(4)). It is not a purpose of the Directive to require that representative actions can *only* be taken by qualified entities.

c. In *Head 5 – Application*, subsection (1), the General Scheme states that "[*a*] *representative action may be only brought before the Court by a qualified entity designated by the Minister for the purposes of bringing a domestic representative action*." A question arises why Head 5(1) appears to suggest that "*only*" collective actions by qualified entities are permitted in Irish law. By explicit inclusion of the word "only," a question arises whether a limitation is incorporated into the Irish legislation that may have unintended consequences. Could this approach prevent "organic" emergence of representation actions in common law? Ireland currently has a relatively restricted regime for collective action, including by reference to other EU Member States, as well as other common law jurisdictions. A legislative provision that limited private-party rights to take collective or multi-party actions in such a way could also run counter to recommendations of the Law Reform Commission and the calls for legislative reform by the judiciary.

d. The 2020 Kelly Report refers at some length to a 2001 Supreme Court of Canada authority, *Western Canadian Shopping Centres Inc. v Dutton* [2001] 2 S.C.R. 534, in which the Court held that "*… absent comprehensive legislation establishing a class action procedure, the courts must fill the void under their inherent power to settle the rules of practice and procedure as to disputes brought before them*" (at para. 35). By that judgment, the Supreme Court of Canada effectively introduced a nationwide class action practice and procedure. At the time, only the

provinces of British Columbia, Ontario, and Quebec had enacted comprehensive statutory schemes to govern class action practice.

e. The scope of claims covered by the General Scheme is relatively wide, governing actions concerning, for example, product liability, data protection, financial services, travel and tourism, energy and telecommunications. Notably, the General Scheme does not govern lawsuits concerning antitrust (*i.e.*, competition) laws. Directive 2020/1828 explicitly provides that "*Member States should remain competent to make provision of this Directive applicable to areas additional to those falling within its scope*" (Recital 18). In the UK, following a landmark 2020 ruling (*Mastercard v Merricks*) in which the UK Supreme Court adopted a relatively permissive approach towards collective antitrust claims, a wave of U.S.-style class actions has commenced against companies such as Meta/Facebook, Apple, Qualcomm and Sony backed by litigation funders like Woodsford.

f. Directive 2020/1828 does not stipulate what criteria Member States may use to designate an entity as qualified to bring *domestic* representation actions (Recital 26), provided the criteria used by a Member State in so designating an entity as qualified to bring domestic representation actions "… *are consistent with the objectives of this Directive in order to make the functioning of such representative actions effective and efficient*" (Article 4(4)).

g. The General Scheme proposes that the Minister for Enterprise, Trade and Employment will designate entities as qualified to bring *domestic* representation actions where a relatively strict set of criteria are complied with by the applicant entity (among other things, it is a legal person, it can demonstrate 12 months of public activity, its articles of association or incorporation demonstrate that is has a legitimate interest in protecting consumer interest, it is non-profit making, and it is not influenced by persons other than consumers).

h. We note also that the Directive recommends that "[*c*]*onsumer organisations in particular should play an active role in ensure the relevant provisions of Union law are complied with. They should all be considered well placed to apply for the status of qualified entity in accordance with national law*" (Recital 35). Article 4(4) of the Directive requires Member States to " … *ensure that entities, particularly consumer organisations … are eligible to be designated as qualified entities for the purposes of bringing domestic representative or cross-border representative actions, or both*."

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