DÁIL ÉIREANN

AN COMHCHOISTE UM FHIONTAR, TRÁDÁIL AGUS FOSTAÍOCHT

JOINT COMMITTEE ON ENTERPRISE, TRADE AND EMPLOYMENT

Dé Céadaoin, 29 Meitheamh 2022

Wednesday, 29 June 2022

Tháinig an Comhchoiste le chéile ag 9.30 a.m.

The Joint Committee met at 9.30 a.m.

Comhaltaí a bhí i láthair / Members present:

Teachtaí Dála / Deputies	Seanadóirí / Senators
Richard Bruton,	Ollie Crowe,
Louise O'Reilly,	Marie Sherlock.
David Stanton.	

Teachta / Deputy Maurice Quinlivan sa Chathaoir / in the Chair.

General Scheme of the Representative Actions for the Protection of the Collective Interests of Consumers Bill 2022: Discussion

Chairman: The proceedings of the Oireachtas committee will be conducted without the requirement for social distancing with normal capacity in the committee rooms restored. However, committees are encouraged to take a gradual approach to this change. Members and witnesses have the option to attend meetings in the relevant committee room, or online through Microsoft Teams. All those attending in the committee room should continue to sanitise and wash their hands properly and often, and avail of sanitisers outside and inside the committee rooms, be respectful of other people's physical space, and practice good respiratory etiquette. If they have any Covid-19 symptoms, no matter how mild, they should not attend in the committee room. Members and all in attendance are asked to exercise personal responsibility in protecting themselves and others from the risk of contacting Covid-19. Members who wish to participate in the meeting remotely must do so from within the Leinster House complex only.

Apologies have been received for this meeting from Deputy Paul Murphy and Senator Garrett Ahearn.

We will talk today about the general scheme of the representative actions for the protection of the collective interests of consumers Bill 2022 which aims to give effect to the directive by creating a new civil litigation mechanism in which a qualified entity may act as playing a part on behalf of consumers who have opted into a representative action against the trader in the High Court. The Bill also creates a mechanism whereby an organisation which represents the collective interests of a consumer, may apply to the Minister to be designated a qualified entity in order to bring a representative action in Ireland or in another EU member state. The new law is a response to recent mass consumer rights breeches by private companies. It will allow for several cross-border qualified entities to come together to represent EU consumers where they have been harmed by the same alleged infringement which has been caused by the same trader in several member states.

I am pleased we have an opportunity to consider these matters further with the following representatives from the Department of Enterprise, Trade and Employment. I welcome Ms Clare McNamara, principal officer, competition and consumer policy unit; Mr. Paul Brennan, assistant principal; and Ms Sadhbh McGrath, administrative officer.

Before we start, I will explain some limitations to parliamentary privilege and the practice of the Houses as regards references made to a person in evidence. The evidence of witnesses physically present or who give evidence within the parliamentary precincts is protected pursuant to both the Constitution and statute by absolute privilege. Witnesses are again reminded of the long-standing parliamentary practice to the effect that they should not criticise or make charges against a person or entity by name or in such a way as to make him, her or it identifiable, or otherwise engage in speech that might be regarded as damaging to the good name of the person or entity. Therefore, if their statements are potentially defamatory in relation to an identifiable person or entity, they will be directed to discontinue their remarks. It is imperative that they comply with any such direction.

The opening statements have been circulated to all members. To commence our consideration on this matter today, I invite Ms McNamara to make opening remarks on behalf of the Department of Enterprise, Trade and Employment.

Ms Clare McNamara: I thank the Chair and the committee members for the opportunity to discuss the scheme of the Bill. As the Chair said, I am joined by my colleagues, Mr. Paul Brennan and Ms Sadhbh McGrath. We very much welcome the opportunity to contribute to the committee's scrutiny of the scheme and to assist it in any way we can. I intend to outline the context for introducing the scheme and then set out its main provisions after which we will look forward to hearing the member's views and answer questions.

This scheme transposes 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 it repeals Directive 2009/22/EC. Member states have until 25 December 2022 to transpose this directive.

The 2015 Dieselgate scandal affected thousands of consumers across the EU. This scandal, among others, highlighted gaps in consumer rights law across the EU's internal market. Back then there was no tool across the EU that would have allowed consumers, in mass harm situations, to litigate and be represented in large groups by another entity. The directive on representative actions creates such a new tool: representative action by qualified entities for groups of consumers to enforce their rights. It is different from the US class action system. The US class action system is a for-profit mechanism where consumers can be responsible for the costs, while the EU system is non-profit and consumers do not cover the costs. It does not create any new consumer rights. The directive on representative actions applies to a specific list of EU laws, 66 in total. Actions can be brought on a domestic or cross-border basis. A public consultation was conducted in the spring of 2021. There were 17 responses from varied stakeholders ranging from law firms to consumer rights organisations.

The transposition of the directive on representative actions means for the first time in Irish law, a group of consumers can take an action through a qualified entity. Traders compliant with consumer protection legislation have nothing to fear as this Bill does not impose any new obligations on them. The scheme of the Bill under scrutiny by the committee today was approved for drafting by the Government on 22 March this year. Given the time limitation, the Chair will excuse me for not going through the scheme provision by provision. Instead, I will summarise as far as it is possible to do so.

The scheme contains three parts and one schedule. In the main, the directive on representative actions is a maximum harmonisation directive giving member states little discretion as to its implementation. Member states have discretion on measures such as how qualified entities are funded and whether consumers should opt in or opt out of representative actions.

Part 1 includes heads 1 to 4, inclusive, and deals with preliminary matters. Heads 1 and 2 deal with standard provisions, such as the Short Title and definitions. Head 3 permits the Minister to make regulations for the process of designating qualified entities and permits the Minister for Justice to make regulations for the process of bringing a representative action to the High Court. Head 4 permits the Superior Courts Rules Committee to make rules of court in relation to the conduct of representative actions pursuant to Part 2 of the Act.

Part 2 incorporates heads 5 to 15, inclusive, and covers representative actions. This part provides overall for representative actions which a designated qualified entity may bring and

the High Court's role.

A qualified entity may bring a representative action to the High Court on behalf of consumers who have opted in to the action. The Statute of Limitations periods are suspended during a representative action. A qualified entity may seek any combination of an injunction or redress measures. However, the action can only be taken against a trader for an alleged breach of one of the EU or national consumer protection provisions listed in Schedule 1 of the Act.

Qualified entities bear the costs of the representative action, not the consumers. Any costs orders made by the court, apart from exceptional circumstances, will be made against the qualified entities. The qualified entity must enter into pre-litigation consultation with the trader.

The High Court must assess the admissibility of the representative action and can dismiss manifestly unfounded cases. The High Court must ensure there are no conflicts of interest between the qualified entity and any third-party funder. The inclusion of qualified entities designated in another member state on the Commission's qualified entity list is proof of standing. A court decision from another member state about the same trader for the same practice can be used as evidence. The High Court can order either party to inform consumers about the result of the representative action and impose penalties on any party failing to comply with the court order.

Part 3, on qualified entities, provides the mechanism whereby organisations which have a track record in representing the collective interests of consumers, and which meet other criteria, can be designated by the Minister as qualified entities.

An appeals mechanism is set out and the Minister can revoke designation where it is determined that the organisation no longer meets the designating criteria. Qualified entities can charge consumers an entry fee. A qualified entity is also required to notify consumers about representative actions it has brought or intends to bring, and how consumers can notify the qualified entity of their wish to be represented in a representative action.

The Schedule lists the European Union measures and Irish measures under which a representative action may be brought against a trader for alleged infringements.

I am happy to discuss the provisions of the scheme in more detail and to respond to questions from members of the committee.

Chairman: I thank Ms McNamara. I now invite members to discuss the issue with the officials who are here. I would remind members participating remotely to use the raised-hand feature and, more important, when they are finished speaking, to take their hand down. As members will be aware, we have a rota system in place. The first person who has indicated to speak is Deputy O'Reilly.

Deputy Louise O'Reilly: I thank the Chair. I will have to leave at 10 a.m. but I will be back.

Can Ms McNamara elaborate about the qualified entities that will be allowed to bring this representative action? It has been mooted that the Competition and Consumer Protection Commission, CCPC, is likely to be a qualified entity for the State. Will there be only one or does Ms McNamara envisage that there could or will be more qualified entities? It is contained in head 16 but when I read it, it was not crystal clear.

In the case that it is only the CCPC, we have had legislation already to give the CCPC additional powers. We do not want a situation whereby it has all of the additional powers and the additional responsibilities but does not have the necessary resources. We will need to have the two as well. In the event that it is only the CCPC, would Ms McNamara be confident that it will be resourced or will there be more qualified entities?

Ms Clare McNamara: No decision has been made yet as to who is a qualified entity. We must wait. People must apply to be a qualified entity and apply to be designated.

However, the directive allows for the designation of public bodies under Article 4.7 of the directive. It does not preclude a body such as the CCPC but, as I say, no decisions have been taken as to the designation of any qualified entity, including any public body. There has been no decision as regards the CCPC.

There are considerable implications involved in the possible designation of public bodies, including their enforcement role. It would have to weigh that up in terms of the dual role they would play if one had a public body that was doing both. We would have to make sure that the public body's role as a qualified entity does not conflict with, say, the founding legislation of the public body. Also, the Deputy is absolutely right that if a public body were to be designated, we would then have to look at the implication for resourcing of that body at the time.

Deputy Louise O'Reilly: What would be the sequencing on that? If a body applies to be a qualified entity but is considered not sufficiently well resourced, would Ms McNamara envisage a situation whereby one could say it will be appointed as a qualified entity but only at the stage when it is sufficiently well resourced or would it be the case that it would get the qualification and then the resources should come from that? Ms McNamara can see the concern I am driving at. It is that all the powers in the world do not make any difference if one does not have the resources to be able to enforce it.

Ms Clare McNamara: I absolutely take that on board.

It might help if I run through the minimum standards and criteria that a qualified entity must meet in order to be designated in the first instance. It has to be a legal person - that is merely a legal term - with 12 months of public activity protecting consumer interests. The articles of association have to show a legitimate interest in protecting consumer rights. It has to be non-profit making, which is why, as I say, it does not exclude public bodies. It cannot be subject to insolvency proceedings. It must be independent and not influenced by traders. It has to publish on its website how it complies with those criteria.

The sequencing is a good question. If it were, for example, to be the CCPC, that falls under the remit of the Minister who would be doing the designation in the first place. The resourcing of the CCPC would have to be taken into account in terms of making the designation and a case would have to be made to ensure that the body is adequately resourced.

Going back to one of the Deputy's original questions, there is absolutely no limit in this legislation on the number of qualified entities that can be designated.

Deputy Louise O'Reilly: That is great. I thank Ms McNamara.

Has Ms McNamara any designs or any ideas for the representative action procedure that will be in place for injunctions and redress actions which can be brought by these qualified entities when established? How will that work?

Ms Clare McNamara: The legislation sets out how the procedure will work, but it will also involve some work on the part of the Department of Justice in terms of rules of court. That will have to be established by secondary legislation following on from the Bill.

Qualified entities can seek injunctions, redress measures or both in the same action. Once it is commenced, a representative action can proceed in accordance, as I say, with the existing High Court procedures or, if they end up being amended if the Department of Justice decides that they need to be amended in order to tie in with this proposed Bill once it is enacted, amended ones.

The qualified entity, essentially, would act as the claimant party and as the plaintiff and the trader would be the defendant.

Deputy Louise O'Reilly: Unless the Department of Justice brings in changes, it would be in line with how it happens at present in High Court actions.

Ms Clare McNamara: Yes, under existing High Court procedures.

The qualified entities must engage with the trader for pre-litigation consultation before taking a representative action seeking an injunction. That pre-litigation consultation provides the trader and the qualified entity with the opportunity to have the trader cease the infringement. They have to be given that opportunity before one starts going to the High Court. If the trader has not ceased the infringement within two weeks of having received a request for a consultation or engaged in a consultation, the qualified entity can proceed to court to seek an injunction.

Deputy Louise O'Reilly: I thank Ms McNamara. Under head 7 concerning parties in a representative action, it states that all costs will be borne by the qualified entity. There can be entry-level fees to bring a case and third-party funding for the representative entities will be allowed. Will the State then fund the qualified entities so they can bring the representative action? How would that happen?

Ms Clare McNamara: No. The State will neither fund qualified entities that are not already established with the State following their designation, nor will it underwrite the costs for legal challenges. The directive allows for member states to fund costs. However, in Ireland we are limited by what is known as champerty and maintenance rules. Third party funding is very limited or unusual in Ireland. Therefore, the State's way of overcoming this in terms of support, is we are looking to waive the court fees for the qualified entity. However, the State will not actually fund or underwrite the representative action.

Deputy Louise O'Reilly: There will not be any fees to fund or underwrite the costs. That is the intention.

Ms Clare McNamara: They will not be paying. In this legislation we are waiving the qualified entity's court fees.

Deputy Louise O'Reilly: There would not be any other costs associated with it. The court fees are the ones they would need assistance with. Not funding, because that is not provided for.

Ms Clare McNamara: The qualified entity, as a claimant party, would cover the overall costs. For example, if the costs are awarded against them, the usual principle applies in terms of court costs. The qualified entity is taking that risk, which is why we say that the qualified entity

must engage in the pre-litigation consultation. They have to be absolutely-----

Deputy Louise O'Reilly: They have to do everything to avoid-----

Ms Clare McNamara: Sure. There is a loser pays principle. In Ireland, because we are a common law jurisdiction, we have champerty and maintenance laws. Therefore, in terms of actual funding, either State or third party funding is very restricted in an Irish context.

Deputy Louise O'Reilly: I thank Ms McNamara. I have to go, but I will be back.

Senator Ollie Crowe: I thank the officials for their time this morning. As noted earlier, the directive provides discretion in terms of how member states choose to implement it, including whether to provide for an opt-in or opt-out mechanism or a combination of both. This allows the consumer to decide whether or not to be represented by the qualified entity in action or whether or not to benefit from the outcomes, naturally, of that action. Obviously, Ireland is choosing the opt-in method. Why, in particular, was that viewed as the preferred method?

Ms Clare McNamara: I mentioned that we had done a public consultation, and which method is favourable would have been one of the questions we posed. There were some legal doubts raised around the opt-out option. Certainly, in terms of the consultation, the responses we would have gotten would have been mostly in favour of an opt-in choice. That would have helped us in our policy decision.

Senator Ollie Crowe: I understand there is a considerable amount of discretion in the implementation of the directive in a number of areas, for example, both our courts and authorities may reject proposed settlements on the grounds that they are not reasonable or unfair. It is also left to the discretion of the member states whether the relevant consumers may refuse to be bound by the settlement. Another example I would give would be the required degree of similarity of individual cases and the minimum number of consumers impacted by an action in order to be admitted as litigated in a representative action. As qualified entities have the capacity to undertake cross-border action, is it likely that a substantial number of collective claims will end up being taken in the same jurisdiction, by whichever jurisdiction would be most favourable? What are Ms McNamara's thoughts on that?

Ms Clare McNamara: I am not quite sure I understand the Senator's question. A cross-border representative action is possible in any member state. That is one of the aspects of this Bill. We have to allow for recognition of cross-border qualified entities to take actions in Ireland, and *vice versa*, an Irish qualified entity could take an action in another member state.

The Senator talked about a lot of discretion in this directive. There is actually very little discretion in this directive for member states. It is pretty much maximum harmonisation. The only real discretion we have is on the funding of the qualified entities and the opt in or opt out.

On settlements, the court can refuse a settlement, but there is a mandatory settlement for consumers in this once a settlement is arrived at. The directive would apply exactly the same in every member state. I am not quite sure I understood that last part of the Senator's question, on moving from one jurisdiction to another because it is the same directive across the EU. It will apply in the same way.

Senator Ollie Crowe: Okay. That is fine. I did not fully understand the cross-border action and was looking for clarity on the entities issue.

I will leave it at that for now and perhaps will come back in later.

Deputy Richard Bruton: I have a few questions. If this entity is not indemnified by the State, if it is not for profit and if it has limited access to third-party funds, how does it actually have the capacity to take on some of these cases? I imagine these are pretty daunting cases, for example, a case could involve a huge company doctoring its fuel rating or whatever. That is one question.

What are the limits of the type of class actions? We know flight cancellations are occurring and we will see faulty products being withdrawn. Are these the types of things or can they be an accumulation of individual bad service, if you like, that consumers have encountered?

Ms McNamara said that no cost can be found against the consumer. Does that include the entity? If it does, can that be constitutional that there is sort of a one-way bet, where they can go in and no cost can be found against them? Is that a constitutional situation?

Ms McNamara mentioned the Minister for Justice had a role if this went to the High Court. Perhaps she can explain what the Minister's role is in that instance.

Ms Clare McNamara: On the role of the Minister for Justice, I said in the opening statement that Part 1 allows for the Minister for Justice to have a role in terms of making regulations around the process of bringing a representative action to the High Court. We would be engaging with the Department of Justice to see what potential regulations might have to follow from the directive in terms of the actual process. At the moment, when I was answering Deputy O'Reilly, I said it would operate under the current High Court procedures. If those were to change, that would be a matter for the Minister for Justice. The Minister for Justice, however, is responsible for the waiving of court fees that I mentioned earlier and will be making any regulations necessary around that.

On an entity not being indemnified and funding and how they would be able to take cases, at the end of the day, they can charge consumers a nominal fee to take a case on their behalf. If they end up with a number of consumers, then they are getting a nominal fee to help support them in taking the case. That combined with the waiving of court fees should help. However, again, I will point out there is a whole-----

(Interruptions).

Ms Clare McNamara: There seems to be audio feedback. There is a need for a pre-litigation consultation. Any qualified entity would be expected to try to avoid significant costs by trying to resolve the issue before it gets as far as the court. Ultimately, one of the benefits of this is that the consumers themselves bear no costs.

Deputy Richard Bruton: My question was how the entity would fund this. There may be a ruling of no court fees but it still has to employ lawyers and will have its own costs. If the entity is not indemnified, is not-for-profit and is just getting nominal sums from consumers, how will it fund these potentially substantial cases?

Ms Clare McNamara: The entity will have to fund itself. Under the laws of champerty and maintenance, we are very limited in what we can do to actually fund bodies in cases like this. They would have to fund themselves. That is the risk they are taking if they apply to be a qualified entity in the first place.

Deputy Richard Bruton: That goes back to the issue of whether these are State entities or not. If it is a State entity, it has the State standing behind it but if it is a private one, it does not. The choice of whether this is a State body or private body seems pretty fundamental to the law. Is it?

Ms Clare McNamara: We are not ruling out public bodies but we have to wait and see which bodies apply to be qualified entities once this comes into law. We do not know who is going to apply. If the State was funding a qualified entity, ultimately the State would be the *de facto* plaintiff in the case, not the qualified entity. The State cannot underwrite this. It would be a very risky thing for the State to be underwriting costs. The idea of this is not to have vexatious cases. It is under a very strict set of EU laws. The Deputy asked about limitation to actions. There is a limitation. It is listed in the schedule. Action can only be taken for breaches of a very specific set of consumer protection laws, which are all listed. There are 66 EU laws listed in the schedule. That is where the limitation applies. It is for breaches of consumer rights under those pieces of legislation.

Deputy Richard Bruton: I will hand over to Deputy Stanton.

Deputy David Stanton: To follow up on that, there is always a risk, even though it might be a slim one, of losing a court action. Ms McNamara said that if the State was underpinning this entity it would be open to major risks. I take that to mean financial risks. So far I can only see this applying to the CCPC. Are there other organisations that might apply to be qualified entities? Would they have the resources behind them to absorb legal costs if a case went against them? Would they be allowed to take a case in the first place if they did not have substantial financial resources behind them?

Ms Clare McNamara: I would love to be able to answer that question positively. We have to wait and see. Bodies have to apply to be a qualified entity under this legislation. They have to apply for designation and until this legislation is enacted and open for applications we will not know who is going to apply to be qualified entity.

Deputy David Stanton: According to the general scheme, a qualified entity has to have "12 months of actual public activity in the protection of consumer interests prior to its application for designation" and "a legitimate interest in protecting consumer interests", be "independent and not influenced by persons other than consumers" and be not-for-profit. What Deputy Bruton has been alluding to, and I am puzzled by this as well, is how, if these are the criteria under which they have become qualified entities, they can take a case if they have no money or not enough funding behind them to be certain they can pay up if they lose. The chances seem to be very slim, and there are other things they can do as well like pre-litigation and alternative dispute resolutions and so forth, but on the off chance one of these cases was lost, who pays if they do not have the funding?

Ms Clare McNamara: That is the risk. The qualified entity pays. That is the whole risk in taking the action in the first place. Qualified entities can charge a fee to the consumers. If they are representing significant number of consumers they can charge a nominal fee of up to €100 per consumer, which could be charged to several thousand consumers. The criteria that are set out for the qualified entities are mandatory. They are set out in the directive so we have not had any leeway there. These are mandatory criteria. Obviously, the not-for-profit piece allows for a public body to also be considered. Deputy Bruton said the CCPC is underpinned by the Government. The Government resources the CCPC and funds it the same as any other public body but if the Government designated the CCPC as a qualified entity it would still not take on

the responsibility of the covering the costs. That will always be the risk for the qualified entity itself, regardless of whether it is a not-for-profit organisation or a public body. In taking the risk of taking the case, they risk having costs awarded against them, regardless of their status.

Deputy David Stanton: Has any work been done on how high these costs might be? Is there a ballpark figure for a case like that?

Ms Clare McNamara: I could not answer that.

Deputy David Stanton: What is in this legislation to prevent abuse or opportunistic litigation? Is there anything there to dissuade people from going down that route?

Ms Clare McNamara: There is not. If a qualified entity is taking the risk of having costs awarded against it, it will follow all the processes and attempt everything it can to get the issue resolved before it ends up in the courts.

Deputy Matt Shanahan: This is about the harmonisation of European law. Has the Department looked at actual cases from the past that could have been taken once this legislation is transposed? Ms McNamara mentioned consumer class action against Volkswagen. I only remember that being done through the American courts. I ask the witnesses to give us an indication of where they see this legislation coming into play in Ireland. If the CCPC is going to use it, how will it use it? How would it bring an action under this process?

Ms Clare McNamara: The Deputy asked about actual cases in the past that could have been taken. We have not really examined that. I mentioned the example of the "dieselgate" situation back in 2015. Another example the Deputy may be aware of is the French leaseback situation, where consumers from all over Europe - Irish consumers were affected as well - bought properties in France with the guarantee of a leaseback and then found it did not work out. The French consumer agency is investigating complaints on people's behalf. If this legislation had been in place at the time, there may have been a case for a representative action to be taken in France, with consumers from all over the EU joining in on that.

As to how a case would be taken, I may have already outlined this. It would be done under existing High Court procedures. The qualified entity, regardless of what body it is, would have to engage in all of the dispute resolution mechanisms or try to avail of the dispute resolution mechanisms that already apply. It would have to go into pre-litigation consultation and only after that can it follow the normal High Court procedures in seeking an injunction or injunctive relief from the trader on behalf of the group of consumers it is representing.

Deputy Matt Shanahan: Does Ms McNamara see this being used mainly in the financial services sector? I am just thinking of the issue of tracker mortgages. For instance, if a large group of people who have been questioning tracker mortgages for a long time wanted to get together, who would the qualified entity be in that case? Would the financial ombudsman or somebody like that take a case using this mechanism for something like trackers?

Ms Clare McNamara: The qualified entity will essentially be whoever has applied to be designated as a qualified entity. If the financial ombudsman has applied to be designated as a qualified entity, then that body would be the most qualified to take a case relating to financial services and products. However, if that ombudsman has not applied to be a qualified entity, it is whatever body is designated as a qualified entity. We have no control over that. We have to wait and see the application process. Assuming this Bill is enacted before the end of the year, the application process will take place sometime in the first half of 2023. We have to wait and

see who applies to be a qualified entity.

The Deputy mentioned financial services and products. That accounts for 17 of the laws, while 22 of the EU laws in the Schedule are around goods and services, for example. There are five laws around travel and four around air travel. The Bill covers the consumer protection elements of those laws, where there is a breach. It is not creating any new consumer rights but it is covering all the consumer rights that exist within the legislation that is set out in the Schedule to the Bill.

Deputy Matt Shanahan: The Department does not know who will be a qualified entity because it is waiting to see who will apply. What is the Department's position on people who are, in effect, making applications to be entities but do not know what resourcing they will have, apropos what Deputies Bruton and Staunton alluded to? Could somebody potentially take a case who has not got the wherewithal to meet this case if it goes against them? Where would that liability ultimately fall? It will not fall on consumers because it has been said they are protected. How do the officials see that playing out, if we have got people making applications who ultimately will not have any resourcing to back up a case? They be able to prosecute it but they may not be able to pay for a case that goes against them.

Ms Clare McNamara: I read out the list of mandatory criteria a qualified entity has to meet. No further vetting criteria will be applied or required. If an entity applies to be a qualified entity, such an entity will be aware of all the risks it is taking on. It will be aware that it will have to engage its own legal and professional advice, it will be aware that it has to take a case in accordance with the way it is set out in legislation, and it will be aware of the risks it is taking on. A body that applies to be a qualified entity would be taking on a massive risk, if it does not ensure it is capable of doing it and resourcing themselves.

Deputy Matt Shanahan: To get back to the point we are all circling, if a State body decides to become a qualified entity, takes a case that is ultimately unsuccessful and has to meet the cost of that case, it looks like the State will be the backstop. Depending on what bodies they are, if they do not have finance themselves, it is quite likely they will not have the finance to meet redress in a case they are not successful in.

Ms Clare McNamara: I do not believe the High Court would allow a claim to proceed if funding is not assured. The High Court has a role here in deciding on the admissibility of a case. I am sure that is one of the things the High Court would have to take into account.

Deputy Matt Shanahan: I thank Ms McNamara for that clarification.

Chairman: Nobody else has indicated to speak. I have one quick query about the qualified entity. When is it anticipated people will apply for that? Is there any process? Will the Department invite some people to apply? Have departmental officials met people already? If they have, I do not need to know who those people are or whatever. Has the Department met people on the issue of qualified entities? When does it anticipate such entities will be up and running?

Ms Clare McNamara: We have had a number of inquiries from different bodies regarding what will apply and what the criteria are but, until this is enacted, we cannot actually engage with anybody. If we meet our transposition deadline of 25 December, we will set out the application process in the first half of 2023. We have to do that via regulation. The ministerial regulations have to be prepared and, once they are ready, we will then invite qualified entities to apply for designation under those regulations.

Chairman: I understand that Ms McNamara does not know because the legislation has not been enacted yet. She has said that some people have expressed an interest. Has the Department met those people or organisations? Again, I do not need to know who they are.

Ms Clare McNamara: We have met with one organisation to discuss this, among other issues. The Department has had a few written inquiries about it. Our response is that until this is enacted we cannot engage or make any decisions because the regulations have to be in place.

Chairman: Were there a number of inquiries? Are officials happy with who has inquired so far? Are they concerned that some people have not inquired?

Ms Clare McNamara: No. We-----

Chairman: I know it is early days yet, in fairness.

Ms Clare McNamara: We have not seen any cause for concern so far.

Deputy Richard Bruton: To follow up on what Deputy Shanahan said, this Bill will allow regulators to take class actions. I understand that is not allowed under present legislation covering regulators. It has been one of their discontents that they have to take individual actions every time an infringement crops up. Will this automatically transpose into legislation governing regulators? Some of them, including the financial services ombudsman as far as I recall, seek such powers. Will we need to see amendments to the various regulator Acts to accommodate this new power? We have many regulators and they may well be the qualified entities.

I also ask for clarification on the Department's decision regarding opt in or opt out. I take it what is meant there is that if someone is part of a class of consumers that is affected by this collective harm, and someone takes an action, he or she will have the choice of opting in, or being included from the outset, and then having to opt out. What is our actual decision on this?

Do we have any experience from other EU countries that have perhaps had legislation of this nature before us? How successful has that legislation been in tackling some of these issues?

Ms Clare McNamara: I will go back to the Deputy's first question on qualified entities and statutory bodies. If a qualified entity applies for designation, we would at that time have to examine if the possible designation would conflict with its founding legislation and make a decision at that time on what to do, or what amendments may need to be made, to founding legislation in order to allow that body to act as a qualified entity. We will not know-----

Deputy Richard Bruton: Should we not anticipate that? It seems to me a positive thing. For example, if the financial services ombudsman had the ability to take class actions, it would have made life a good deal simpler for consumers over the past few years. Can we accelerate the consideration of that? One of the benefits of this legislation might be seeing such actions. Similarly, the regulator has been hampered in respect of telecommunications and various of these large quasi-monopoly providers. Do we not need to move on that?

Ms Clare McNamara: We could waste a lot of time making all the necessary changes to the financial services ombudsman legislation at this point, but that ombudsman may never apply to be a qualified entity. It is very hard for us to pre-empt what may or may not happen next year once the application process is open because we have no indication as to whether the bodies the Deputy has named would be interested in being a qualified entity or not. We cannot start changing legislation that is completely outside the remit of this Department in advance of

a potential application from a regulator that may never apply. That is not something we can do at this point. We have chosen an opt-in option only, not the opt-out.

The Deputy asked about other successes. I will ask my colleague, Ms McGrath, to respond on that.

Ms Sadhbh McGrath: The Netherlands has legislation, namely, the Resolution of Mass Damage in Collective Action Act, known as the WAMCA. It has had great success at achieving successful class actions for consumers in that jurisdiction.

Deputy Richard Bruton: Are there any lessons as to how the Netherlands applied it in terms of the things we are discussing, such as opt-ins and opt-outs and other regulators taking advantage of this class action to strengthen their armouries?

Ms Sadhbh McGrath: Could the Deputy repeat the first part of the question?

Deputy Richard Bruton: I am wondering if there is any evidence of the elements of its success in terms of the things that we can alter, such as opt-ins or anticipating our regulators becoming party to this. I refer here to the regulators of financial services, telephone services and energy services. These are regulators that do not have this power.

Ms Sadhbh McGrath: The Netherlands has changed its system. It has an opt-out system for its residents only, so the Dutch people will have to opt-out. If an Irish person wanted to get involved once this legislation comes through in that jurisdiction, the person will have to opt-in on that.

I do not have the information regarding regulators to hand, but I can respond in writing on that matter.

Deputy Richard Bruton: Could Ms McGrath also respond on why we are choosing to opt in if the Dutch have had opt-out and it has been successful? Opting out obviously means that there are more people in from the start and that people have to make an active decision to leave. As a result, the entity is in a stronger position than in an opt-in situation.

Ms Clare McNamara: I will take that question. Opting out is legally questionable in a common law jurisdiction. Netherlands has a civil law jurisdiction, not a common law one. The directive allows opting in or opting out, but it favours opting in. I mentioned in response to an earlier question on this that we did a public consultation. One of the questions we put was about the opt-in and the opt-out. The responses to that consultation helped to inform our policy decision.

Deputy Richard Bruton: I thank the witnesses.

Chairman: That concludes our consideration of the matter. I thank Ms McNamara, Mr. Brennan and Ms McGrath for attending and for assisting the committee with its deliberations. The committee will consider the matter further as soon as possible.

While we are still in public session, I wish to advise the members that the report of the committee on its detailed scrutiny of the Working from Home (Covid-19) Bill 2020, a Private Members' Bill, has now been finalised. There will be a brief announcement of the launch of the report on the Plinth after this meeting concludes. Any members who are available are invited to attend the launch. The report will also be circulated to members today. I thank the members for their collaborative work in finalising this report.

That concludes the committee's business in public session for today. I propose that the committee go into private session to consider other business. Is that agreed? Agreed.

The joint committee went into private session at 10.24 a.m. and adjourned at 12.34 p.m. until 9.30 a.m. on Wednesday, 6 July 2022.