

Representative Actions for the Protection of the Collective Interests of Consumers Bill 2023

Bill No. 21 of 2023

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Abstract

The main purpose of the *Representative Actions for the Protection of the Collective Interests of Consumers Bill 2023* is to transpose Parliament and Council Directive (EU) 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers. This Directive repeals Directive 2009/22/EC to permit qualified entities to represent consumers in a representative action (civil claim) where a trader has infringed their consumer rights.



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Glossary and abbreviations

Table 1: Glossary & Abbreviations

Glossary & Abbreviations	
ADR	Alternative Dispute Resolution
CAI	Consumer Association of Ireland
CCPC	Competition and Consumer Protection Commission
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.
DETE	Department of Enterprise, Trade and Employment
GLO	Group Litigation Order - procedure in England and Wales which requires claimants individually to institute proceedings in pursuit of their claims and join a multi-party action register.
Injunctive Measure	An injunctive measure is a provisional or definitive measure to stop or prohibit a practice.
Maintenance	Giving of assistance, by a third party, who has no interest in the litigation.
MPA	Multi-Party Action
Opt-In	Consumers required to explicitly express their wish to be represented by the qualified entity in the representative action for redress measures.
Opt-Out	Consumers required to explicitly express their wish not to be represented by the qualified entity in the representative action for redress measures.
Qualified Entity	Any organisation or public body representing consumers' interests which has been designated by a Member State as qualified to bring representative actions in accordance with this Directive.
Redress Measure	A measure that requires a trader to provide consumers concerned with remedies such as compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid, as appropriate and as available under Union or national law.
Representative Action	An action for the protection of the collective interests of consumers that is brought by a qualified entity as a claimant party on behalf of consumers to seek an injunctive measure, a redress measure, or both.

Summary

- The [Representative Actions for the Protection of the Collective Interests of Consumers Bill 2023](#) was published on 13 March 2023.
- The Bill comprises of 34 sections and 3 parts.
- The primary purpose of the legislation is to transpose [Parliament and Council Directive \(EU\) 2020/1828 of 25 November 2020](#) on representative actions for the protection of the collective interests of consumers. This Directive repeals the Injunctions Directive ([Directive 2009/22/EC](#)) to permit qualified entities to represent consumers in a representative action (civil claim) where a trader has infringed their consumer rights under one or more of the legislative provisions listed in the Schedule in the Bill.
- The Directive came into force on 24 December 2020 with a deadline of 24 months for Member States to transpose it into national law, and with the resulting measures to be applied from June 2023. In Ireland's case, that deadline has not been met.
- The Directive was part of "[A New Deal for Consumers](#)" package of proposals launched by the European Commission on 11 April 2018 and aims to facilitate coordination and effective action from national consumer authorities at EU level and reinforce public enforcement action and better protection of consumer rights.
- The Directive proposes a modernised system of representative actions, building on the existing Injunctions Directive ([Directive 2009/22/EC](#)) to:¹
 - expand the scope of the old Directive to cover other horizontal and sector-specific EU instruments relevant for the protection of collective interests of consumers in different economic sectors such as financial services, energy, telecommunications, health and the environment,
 - allow non-profit making qualified entities such as consumer organisations or independent public bodies, which have been designated in advance by Member States, to take either domestic or cross border representative actions to defend the collective interests of consumer in cases of mass harm,
 - require Member States to ensure 'due expediency' of procedures and to avoid procedural costs becoming a financial obstacle to bringing representative actions,
 - require that Member States shall lay down the penalties applicable to non-compliance with decisions issued within the representative action, that they shall take all necessary measures to ensure that they are implemented and shall ensure that penalties may take the form of fines, and

¹ Department of Enterprise, Trade and Employment (2021), *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*. Available [here](#).

- enable qualified entities (QE) to bring representative actions seeking different types of measures as appropriate, depending on the circumstances of the case i.e. interim or definitive measures to stop and prohibit a trader's practice or to eliminate the continuing effects of the infringement. The latter could include redress orders establishing the trader's liability towards the consumers harmed by the infringements.
- The Department of Enterprise, Trade and Employment (DETE) undertook a [public consultation](#) between March and May 2021 seeking views from interested parties on the transposition of [Directive \(EU\) 2020/1828](#). In particular, the Department was keen to consult on the use of Member State options, being matters in respect of which Member States can or must make a choice under the Directive. A total of 17 submissions were received from various stakeholders ranging from law firms to consumer rights organisations.
- The European Commission published an [Impact Assessment](#) accompanying the Directive which states that there will be no significant costs for compliant traders associated with interventions on penalties, remedies and collective injunctions and redress. Non-compliant traders will face additional costs from these interventions, in particular because of stronger penalties and because consumers will have better mechanisms to claim remedies.
- The General Scheme underwent pre-legislative scrutiny (PLS) by the Joint Committee on Enterprise, Trade and Employment. Two public hearings were held (on [29 June](#) and [14 September](#) 2022) and the Committee issued a [report](#) in December 2022, which included a number of recommendations under 11 'key issues' as identified / categorised by the Joint Committee.
- The L&RS has also published a [Bill Briefing](#) page on this Bill [internal access only].

Introduction

The [*Representative Actions for the Protection of the Collective Interests of Consumers Bill 2023*](#) was published on 13 March 2023. The Bill contains 34 sections and 3 parts and seeks to give legal effect to the Parliament and Council Directive (EU) 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers.

Announcing Government approval to begin drafting a law which will give designated qualified entities new powers to take enforcement action on behalf of a group of consumers whose rights have been breached either in Ireland or in another EU country, the former Tánaiste and Minister for Enterprise, Trade and Employment, Leo Varadkar T.D. stated that:²

“This new law will make it easier for consumers to group together and seek redress when a large group of them have been affected by a breach of their rights, either at home or in another European country. It will allow a designated qualified entity to take a company to the High Court, on behalf of a group of individual customers.

I know people can often feel intimidated and powerless when there’s been a large-scale consumer rights breach. By providing a way for them to act collectively with representation from a qualified entity, this new law will massively strengthen their position. Ireland currently has no mechanism for collective redress.”

The [*Explanatory Memorandum*](#) for the Bill notes that the purpose of the Bill is to transpose 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.

Cost implications

The Regulatory Impact Analysis for the *Representative Actions for the Protection of the Collective Interests of Consumers Bill 2023* assessed the impact of the preferred means of transposing the Directive in Ireland.³ It looked at several different impacts, including those on consumers and on small and medium-sized enterprises (SMEs).

It notes that consumers will benefit by allowing them to avoid the direct costs of commencing an individual case against a trader. Instead, consumers will be able to participate in a binding High Court action at a modest fee by supporting a qualified entity who is prepared to act on their behalf against an errant trader. Under the Directive it is the qualified entity, not the consumer, who will be responsible for the costs of taking the action.

² See Department of Enterprise, Trade and Employment, Press Release, *Government agrees new enforcement rights of ‘mass harm’ of consumers* (22 March 2022). Available [here](#).

³ Department of Enterprise, Trade and Employment (24 February 2023), *Regulatory Impact Analysis of the Representative Actions for the Protection of the Collective Interests of Consumers Bill 2023*.

In relation to compliant traders, it envisages no cost impacts and in fact states that it will benefit them as it will add an additional mechanism for consumers to take action against non-compliant traders. For those not in compliance there is a potential cost impact in defending a representative action as under the Bill it is intended that a defendant trader will be required to pay the costs incurred by a successful qualified entity as well as pay any compensation ordered by the court.

Pre-legislative scrutiny (PLS)

The [General Scheme](#) of the *Representative Actions for the Protection of the Collective Interests of Consumers Bill 2023* was published and received Government approval for drafting a new law in March of 2022. The General scheme was referred to the Joint Committee on Enterprise, Trade and Employment for pre-legislative scrutiny.

The Committee commenced pre-legislative scrutiny on the Bill in June of 2022. Two PLS hearings were held on [29 June](#) and [14 September](#) 2022 and included the following witnesses:

- Ms. Clare McNamara, Mr. Paul Brennan, and Ms. Sadhbh McGrath (Department of Enterprise, Trade and Employment)
- Mr. Philip Andrews (Law Society)
- Mr Jeremy Godfrey, Mr. Kevin O'Brien, Ms Síona Ryan, and Mr. Robert Dunne (Competition and Consumer Protection Commission)
- Mr. Michael Kilcoyne, Mr. Raymond O'Rourke, and Mr. Dermott Jewell (Consumer Association of Ireland)

The Joint Committee subsequently published its PLS findings in December 2022 in its [Report on the Pre-Legislative Scrutiny of the General Scheme of the Representative Actions for the Protection of the Collective Interests of Consumers Bill 2022](#).

Table of provisions

Table 2: Summary of provisions contained in the Bill

Section	Title	Effect
Part 1: Preliminary and General		
1.	Short title and commencement	This is a standard provision and provides that, if enacted, this Bill may be cited as the Representative Actions for the Protection of the Collective Interests of Consumers Act 2023. It will be commenced by Ministerial order and different provisions may be commenced at different times.
2.	Interpretation	Section 2 of the Bill defines key words and terms used in the Bill.
3.	Regulations	Section 3 of the Bill sets out the regulation making powers of the Minister.
4.	Service of documents	Section 4 of the Bill deals with the service of documents.
5.	Application	Section 5 sets out the scope and application of the Bill and applies to representative actions brought on or after 25 June 2023 in respect of infringements by traders occurring on or after that date that harm or may harm the collective interests of consumers.
6.	Revocation	Section 6 of the Bill provides for the repeal of European Communities (Court Orders for the Protection of Consumer Interests) Regulations 2010 (S.I. No. 555 of 2010).
7.	Expenses	Section 7 deals with expenses incurred by the Minister in the context of the Bill.
Part 2: Qualified Entities		
8.	Designation of qualified entities	Section 8 of the Bill sets out the criteria which an entity seeking to be designated as a qualified entity must satisfy and how the designation process will be conducted by the Minister.
9.	Refusal of designation	Section 9 of the Bill sets out the mechanism whereby the Minister may inform an entity of his decision to refuse designation.
10.	Directions notice	Section 10 of the Bill permits the Minister to issue a directions notice to direct the qualified entity to return to compliance with any relevant provision of the Bill and thereby avoid revocation of designation.
11.	Revocation of designation	Section 11 of the Bill sets out the mechanism for revoking designation as a qualified entity.

12.	Representations	Section 12 of the Bill permits an entity or qualified entity, as the case may be, make representations following notification of the Minister's intention to refuse designation or revoke designation.
13.	Review of designation	Section 13 of the Bill sets out the circumstances in which the Minister may undertake a review of a qualified entity's designation.
14.	Review of refusal of designation or revocation of designation	Section 14 of the Bill provides for a review mechanism for entities whose application for designation has been refused by the Minister or where a qualified entity's designation as a qualified entity has been revoked.
15.	Request by Minister for information	Section 15 of the Bill provides for a mechanism whereby the Minister can request a qualified entity to provide information to assess continued compliance with designating criteria.
16.	Register	Section 16 of the Bill requires the Minister to establish and maintain a register of qualified entities in Ireland.
17.	National contact point	Section 17 of the Bill designates the Minister as the national contact point for the purposes of the Directive in Ireland.
18.	Information to be provided by qualified entities	Section 18 of the Bill specifies information which a qualified entity must make publicly available on its website.
Part 3: Representative Actions		
19.	Representative action brought by qualified entity	Section 19 of the Bill specifies that only a qualified entity designated in Ireland, or another EU Member State, may bring a representative action before the High Court.
20.	More than one qualified entity may bring a representative action	Section 20 of the Bill provides for the situation where multiple qualified entities are involved in bringing the same representative action.
21.	Consultations with trader	Section 21 of the Bill specifies that a qualified entity must first attempt to engage in consultations with a trader before seeking an injunction against that trader.
22.	Alternative dispute resolution	Section 22 of the Bill states that a qualified entity may engage with an ADR entity in seeking to commence consultations with a trader.
23.	Injunctions	Section 23 of the Bill sets out the mechanism by which the High Court will deal with an application for injunctive relief in a representative action.

24.	Notification to be represented by qualified entity for redress measures	Section 24 of the Bill sets out how a consumer must inform a qualified entity of their wish to be represented by it in a representative action.
25.	Declaration by consumer concerning compensation	Section 25 of the Bill provides for a declaration to be signed by a consumer when joining a representative action to prevent double compensation from the same trader for the same cause of action.
26.	Redress measures	Section 26 of the Bill sets out the mechanism by which the High Court will deal with an application for redress from a qualified entity.
27.	Funding of representative actions for redress measures	Section 27 of the Bill provides for disclosures to be made by qualified entities to the High Court where the representative action is funded by a third-party, in so far as permitted in accordance with Irish law.
28.	Reckoning of time for purpose of Statute of Limitations, etc.	Section 28 of the Bill deals with the matter of reckoning time for the purposes of interrupting the Statute of Limitations.
29.	Fees charged by qualified entity	Section 29 of the Bill permits qualified entities to charge a consumer a modest entry fee to be represented by it in a representative action.
30.	Settlements under redress measures	Section 30 of the Bill specifies the role of the court in dealing with proposed settlements in a representative action.
31.	Costs	Section 31 of the Bill deals with allocation of costs by the High Court following a representative action.
32.	Admissibility of final decisions of the Court or Courts or administrative authorities of other Member States	Section 32 of the Bill specifies the admissibility of final decisions of Courts or administrative authorities of other Member States in a representative action.
33.	Requirement to inform consumers of final decisions or settlements	Section 33 of the Bill requires a trader or a qualified entity to publish details of any final decisions or settlements after a representative action has been concluded.
34.	Disclosure of evidence	Section 34 of the Bill deals with disclosure of evidence by parties, including third parties, in a representative action.

Source: [Explanatory Memorandum](#).

Legislative framework

The Collective Redress Directive

The [Directive \(EU\) 2020/1828 on Representative Actions for the protection of the collective interests of consumers \(RAD\)](#) introduces a right to collective redress across the EU to enhance consumers' access to justice, boost consumer confidence, and contribute to fairer competition in the internal market.⁴

It requires Member States to put procedures in place for “qualified entities” to bring representative actions to obtain injunctions,⁵ award damages and other remedies⁶ on behalf of consumers seeking redress for breach of certain EU consumer legislation. The legislation in question is set out in Annex I to the Directive, which lists 66 specific instruments.

It has been noted that the Directive “takes a cautious approach”⁷, as reflected by the safeguards aimed at preventing vexatious litigation, such as the requirements qualified entities must comply with in order to be eligible to bring ‘cross-border representative actions’⁸ and the rules on the funding of representative actions for redress measures.⁹

Member States were required to have transposed the Directive into national law by 25 December 2022, with a further six months for the new provisions to come into effect. The European Commission communicated an **infringement decision** on the failure to transpose the Directive by Ireland and 23 other Member States on its official [website](#) as well as an official communication dated 27 January 2023.

Background to the Directive

The RAD came into force on 24 December 2020, following years of discussions at the EU level, driven by a view that only a handful of EU member states had adequate regimes for collective claims by consumers.¹⁰ In 2008, the Commission published the Green Paper on consumer collective redress¹¹, followed a year later by Directive 2009/22/EC (the Injunction Directive)¹². In

⁴ Directive 2020/1828/EU Article 1(1), Recital 7.

⁵ Ibid Directive 2020/1828/EU, art. 8.

⁶ Ibid art. 9.

⁷ Rielaender, F., 2022. Aligning the Brussels regime with the representative actions directive. *International & Comparative Law Quarterly*, 71(1), pp.107-138.

⁸ Ibid art. 4.

⁹ Ibid art 10.

¹⁰ A framework for collective injunctions had been introduced in Directive 98/27/EC on injunctions for the protection of consumers' interests [1998] OJ L166/5 followed by Directive 2009/22/EC on injunctions for the protection of consumers' interests [2009] OJ L11/30. However, these did not cover compensatory redress.

¹¹ Commission ‘Green Paper Damages actions for breach of the EC antitrust rules’ COM (2005) 672 final.

¹² [Directive 2009/22/EC \[2020\] L409/1](#)

2013 the EU Parliament issued a non-binding Recommendation on Collective Redress¹³ requesting that all 28 Member States implement some form of collective redress mechanism. However, a 2018 Commission report found several Member States still lacked compensatory collective redress mechanisms.¹⁴ A separate study on the implementation of collective redress concluded that the heterogeneity of procedures within the EU was problematic; not all EU citizens are afforded the same level of protection by domestic laws.¹⁵ After the Dieselgate scandal¹⁶, the Commission pushed further and delivered a proposal for the Representative Actions Directive in 2018 in the context of its 'New Deal for Consumers'.¹⁷

Recital 12 of the Directive explains that it does not envisage an overall framework for collective consumer redress. Still, it aims to regulate certain procedural aspects and integrate them with national systems. While the Directive seeks to ensure a higher level of consumer protection and consumer access to justice, the prevention of abusive litigation lies behind many of the provisions.¹⁸

¹³ Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law [2013] OJ L 201/60.

¹⁴ Commission 'Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the implementation of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law' COM/2018/040 final ('2018 Commission Report').

¹⁵ See Directorate General for Internal Policies, Policy Department for Citizens' Rights and Constitutional Affairs, Collective Redress in the Member States of the European Union, PE 608.829 (October 2018).

¹⁶ See Marco Frigessi di Rattalma (ed), The Dieselgate – A Legal Perspective (Springer 2017).

¹⁷ Commission, 'Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC' COM/2018/0184 final ('Commission Proposal').

¹⁸ Dir 2020/1828/EU, art 1 and recital 10.

Current Collective Redress Procedures in Irish Law

Until now, Ireland has been a relative outlier within the EU as:

- ❖ Irish law makes no provision for class/collective actions,
- ❖ Ireland does not have a compensatory collective redress procedure.¹⁹

However, there are two procedures which, in practice, operate as a form of class/collective action. These procedures are **representative actions** and **test cases**. Additionally, the joinder and consolidation procedures can be viewed as a form of collective action.²⁰

1. **Test Cases:** This is where multiple plaintiffs pursue similar claims against a single defendant or group of defendants. There are no formal rules governing test cases. The first case to be litigated becomes the benchmark for the remaining cases. The damage suffered must be identical or similar for a test case to be effective. Technically, the subsequent claimants are not bound by the decision in the test case. However, in practice, the doctrine of precedent means that subsequent courts are bound to follow the decision in the earlier case unless it can be distinguished on its facts. As a result, the remaining cases are often settled out of court by reference to the outcome of the test case. Because there are no formal rules to govern test cases, they are more easily opposed by defendants in the course of litigation.²¹
2. **Representative actions:** Order 15 Rule 9 of the Rules of the Superior Courts 1986 (RSC) establishes the procedure for representative actions. It provides that when numerous persons have the same interest in a cause or matter, one or more of them may sue on behalf of or for the benefit of all interested persons. The court must be satisfied that each member of the class has authorised the representative. The decision of the court will generally bind every interested party. However, remedies are limited to injunctive and declaratory relief. In addition, there are strict requirements around establishing the necessary link between the parties. Legal aid is also not available. Funding for such actions is expressly precluded by legislation. Legal aid is

Collective Representation vs Class Action

The Directive does not propose to match the US class action system; instead, it seeks to create a new tool for representative action. In contrast to the US class action suits in which consumers/claimants can be held responsible for costs, the EU scheme is a non-profit mechanism with no basis to hold consumers responsible for costs. Rather, Qualified Entities ("QE's") acting as the Plaintiff bear the costs of the representative action. Any cost orders made by the court, apart from exceptional circumstances, will be made against the QE or cross-jurisdictional QEs. An outcome will not bind group action claimants unless they opt-in.

See Section below on **Class Actions in the US, Canada and Australia**.

¹⁹ See: Law Reform Commission's 2005 Report on Multi-Party Litigation and Mr Justice Peter Kelly, 'Review of the Administration of Civil Justice'.

²⁰ Rules of the Superior Courts 1986 (RSC) enable courts to hear two or more related actions together under specific and limited circumstances – see **Joining other claimants** [Class/collective actions in Ireland: overview, Practical Law Country Q&A](#).

²¹ [Class/collective actions in Ireland: overview | Practical Law \(thomsonreuters.com\)](#).

not granted where “the application for legal aid 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.”²²

Transposition of the Directive: I. Procedural Flexibility

Member States have **considerable flexibility** under the RAD to decide on procedural issues. These include:

1. Whether their regime for domestic collective actions for redress measures should operate on an opt-out or opt-in basis

In opt-in mass actions, each claimant must take proactive steps to join the action. In contrast, an opt-out procedure allows a qualified entity to bring a claim on behalf of an entire class, without the express mandate or even knowledge of each member of the class.

The RAD grants each Member State discretion on whether they should introduce an opt-in or an opt-out system, but they must implement an opt-in procedure at a minimum. Where a Member State chooses to introduce an opt-out system, only consumers who are habitually resident in that State can be automatically included in the class; persons who reside elsewhere must proactively opt-in.²³ There is no opt-in provision in relation to seeking injunctive relief. This means that the QE can bring such an action without consumers’ opting-in. Consumers could, therefore, await the outcome of an injunctive relief action and opt-in if successful.²⁴

So far, the Czech Republic, France, Germany, Poland, Spain have decided on Opt-in; Hungary and the Netherlands are Opt-out; Netherlands, Luxembourg, Belgium, and Romania have adopted a mixed approach. Ireland provides for an opt-in approach.²⁵

2. “Qualified entities” authorised to bring collective actions

According to the definition of Article 3(4), a qualified entity is either an organisation or a public body representing consumers’ interests designated to bring representative actions by a Member State. The Directive provides that qualified entities have the power to launch actions on behalf of and represent consumers. Only the QE are parties to the trial, not the consumers themselves. This type of representative action contrasts the American class or group action model. Member States are given **significant discretion** regarding the criteria for the designation of a QE.

- In **domestic collective actions**, QEs must always be transparent about their funding, avoid conflicts of interest and provide consumers with adequate information about

²² Civil Legal Aid Act 1995(section 28(9)(a)(ix) See: [Class/collective actions in Ireland: overview | Practical Law \(thomsonreuters.com\)](#).

²³ Directive 2020/1828/EU art. 5.

²⁴ Directive 2020/1828/EU art. 8.

²⁵ See <https://publisher.dentons.com/experience/eu-class-action-directive>.

representative actions so that individuals can take informed decisions about whether to join.

- In **cross border actions**, QEs must satisfy more stringent criteria: they need to be established, independent and properly-governed not-for-profit legal entities with a legitimate interest in consumer protection.

Both public and private bodies can be designated as QEs. It has been noted that Member States are empowered to designate public bodies as QEs without prerequisites, making it possible for a national statutory body currently exercising enforcement competence to be empowered to take a collective redress action.²⁶ Public bodies designated as qualified entities under the current EU collective injunctions framework can retain this designation under the representative action directive. Hornkohl (2021) believes that the Directive undersells the role public bodies could play in representative actions - their use would help solve abusive funding litigation concerns.²⁷ Notably, concerns about the potential financial impact on the State where public bodies are designated entities were raised during committee debates on the draft legislation.

The Bill provides that domestic and cross-border representative actions may only be brought by QEs designated by the Minister for Enterprise Trade and Employment provided that it:

- Is properly constituted in accordance with Irish law and can demonstrate 12 months of actual public activity in the protection of consumer interests.
- Has a constitution demonstrating that it has a legitimate interest in protecting consumer interests prior to designation.
- Is non-profit making.
- Is solvent.
- Is independent and not influenced by persons other than consumers, particularly by traders, who have an economic interest in the bringing of any representative action.
- Publishes information on its website in plain and intelligible language that it complies with the criteria and provides information on its source of funding, organisational, management and membership structure and its statutory purpose and activity

²⁶ See Lynch Shally, Karen (2022), *The European Union Collective Redress Action in Irish Financial Services: Convergence or Divergence and Potential Clarification?* Irish Journal of European Law, 24 (2022):53 'Notwithstanding paragraphs 3 and 4, Member States may designate public bodies as qualified entities for the purpose of bringing representative actions' where the paragraphs in question identify specific criteria and general requirements in relation to designation.

²⁷ Hornkohl, L., 2021. Up-and Downsides of the New EU Directive on Representative Actions for the Protection of the Collective Interests of Consumers—Comments on Key Aspects. *Journal of European Consumer and Market Law*, 10(5).

3. Certification process and criteria

For example, how many claimants there should be as a minimum – something on which jurisdictions currently diverge - and the required level of similarity between the issues in the individual claims.

4. Third-party funding of mass actions

The QE, not the consumers, will be responsible for the costs associated with taking a representative action, although the entity can charge a ‘modest entry fee’ to consumers in order for the entity to represent them. The usual principles in terms of court costs in this jurisdiction, namely the “loser pays principle”, will apply to these representative actions as set out in the Legal Services Regulation Act 2015. As such, if costs are awarded against the QE, it will have to pay the trader’s costs.

As we have seen, to be designated as a QE, a body must have a ‘non-profit making character’. Therefore the question remains as to how such a non-profit entity will be able to discharge either its own ongoing costs or those of a successful defendant to an action.

Of significance, the Bill provides for funding of a representative action for redress “by a third party, insofar as permitted under Irish law”. Ireland’s laws of champerty²⁸ and maintenance²⁹ prohibit third-party litigation funding in Ireland, and there is currently no provision for legal aid or public funding for consumer actions in Ireland. Therefore most forms of third-party funding are not “permitted under Irish law.”

For some time, the judiciary has been calling for legislative intervention to provide for the possibility of third-party litigation funding in Ireland. In January 2020, a joint report by the EU Bar Association and the Irish Society for European Law was published, which strongly recommended that proper provision be made for litigation funding as an essential mechanism to access justice.³⁰ Similar recommendations were made in the Kelly Report in December 2020³¹. On 27 May 2022, the Government published an implementation plan for the Kelly Report³² which indicates that any further policy change in relation to litigation funding (apart from a limited form of third-party funding

²⁸ Maintenance is the giving of assistance or encouragement to one of the parties to litigation by a person who has neither an interest in the litigation, nor any other motive recognised by law as justifying interference. Champerty is a type of maintenance. It involves an agreement between the claimant and a third party to divide the compensation between them in return for the third party's support of the litigation. See [Class/collective actions in Ireland: overview, Practical Law Country Q&A](#)

²⁹ Affirmed in the Supreme Court decision of *Persona Digital Telephony Ltd v Minister for Public Enterprises and Others* [2017] IESC 27.

³⁰ In January 2020 a [joint report by the EU Bar Association and the Irish Society for European Law](#) was published which strongly recommended that proper provision be made for litigation funding as an essential mechanism to access justice.

³¹ [Review of the Administration of Civil Justice Report](#), October 2020 (The Kelly Report).

³² Department of Justice, [‘Implementation Plan on Civil Justice Efficiencies and Reform Measures’](#) 27 May 2022.

for insolvency practitioners³³ and for international arbitrations³⁴) will await the publication of a further report and recommendations from the Law Reform Commission. Most recently, on 13 September 2022, a resolution was adopted by the European Parliament³⁵ recommending that after the Directive becomes operational on 25 June 2023, a new directive should be proposed to establish common minimum standards for third-party litigation funding across the EU.

Separately, the Kelly Report implementation plan provides for legislation to be drafted in 2023 for the introduction of a comprehensive multi-party action procedure, similar to the Group Litigation Order process in the UK, by 2024.

Transposition of the Directive: II. Further than minimum requirements

Member States are free to choose to implement reforms which go further than the minimum standards required by the RAD. For example, examining two aspects of the scope available to Member States:

1. The subject matter of the claims which may be brought
2. Extending the procedure

Subject Matter of the Claims

Member States are required by the RAD to provide compliant representative actions systems for the breach of any of the 66 pieces of legislation set out in Annex I or their domestic implementing legislation. **However, it remains open to Member States to bring other types of claims into their RAD-compliant representative actions regimes.** For example, the Redress of Mass Damages in Collective Action ('Wet Afwikkeling Massaschade in Collectieve Actie') ("WAMCA") regime in the Netherlands extends to claims about any subject matter suitable for a civil claim. By contrast, Ireland's Bill refers only to representative actions for breach of the listed 66 pieces of EU law.

Extending the Procedure

Similarly, while the focus of the RAD is on collective redress procedures for consumers, Member States are still free to open these procedures up to businesses too. Germany, for example, makes its new remedial action procedure available to small businesses (those with 50 employees or fewer and annual turnover of no more than EUR 10 million). Again, affected businesses in the Netherlands can already join a representative action, and this will continue.

³³ The Kelly Report implementation plan does provide for legislation to be drafted next year to allow for a limited form of third-party funding for liquidators, receivers, administrators under the Insurance (No.2) Act 1983, the Official Assignee and trustees in bankruptcy to fund proceedings that are intended to increase the pool of assets available to creditors.

³⁴ Section 111 of The Courts and Civil Law (Miscellaneous Provisions) Act 2023 removed a restriction on third party funding in relation to international commercial arbitrations by an amendment to the Arbitration Act 2010.

³⁵ See [European Parliament resolution of 13 September 2022 with recommendations to the Commission on responsible private funding of litigation](#).

In comparison Ireland, the Directive has been transposed in the Bill by the introduction of a new procedure, which in most respects, will closely map the minimum requirements set out in the Directive. This procedure will sit alongside the Irish courts' existing mechanisms for dealing with mass claims.

Table 3: This table provides a picture of the status of implementation of the Directive in the Netherlands and Germany, including the current collective litigation mechanisms in place in these jurisdictions.

	Ireland	Netherlands	Germany
Has the Directive been implemented in the jurisdiction (2 February 2023)	No	Yes The implementing legislation was adopted on 23 November, 2022. The act entered into force on 23 June, 2023.	No
Latest reform to date	Not applicable. Ireland is one of a minority of EU Member States that does not have a compensatory collective redress procedure. There is currently no comprehensive provision in Irish court rules for tackling class claims in a uniform and consistent manner. Instead, a range of procedural options are available to allow claims involving multiple parties to be litigated as private actions.	1 January, 2020, following prior legislation of 1 July, 2004.	18 July, 2018.
Does this latest reform take the Directive into account? Is there a draft	The Department of Enterprise, Trade and Employment held a public consultation on 15 March, 2021 - 7 May, 2021 to seek	Yes. The new reform deviates on two points from the Directive:	No. The latest reform does not consider the Directive. There is no public draft available. However, the

<p>under discussion?</p>	<p>the views of interested parties on the implementation of the Directive in Ireland.</p> <p>The Department published the General Scheme of the Representative Actions for the Protection of the Collective Interests of Consumers Bill in March 2022 which underwent pre-legislative scrutiny by the Joint Committee on Enterprise, Trade and Employment.</p> <p>The Bill was published on 13 March, 2023 and once complete, will be formally drafted and signed into law by the President of Ireland.</p>	<p>No central public body for institution of domestic actions</p> <p>No electronic database</p>	<p>Ministry of Justice has prepared an internal draft which is currently subject to negotiations among the German government.</p>
<p>Latest reform details: actionable rights.</p>	<p>When implemented, it is envisaged that the Bill will create a new civil litigation mechanism by which a qualified entity may act as the claimant party on behalf of consumers who have opted into a representative action against a trader in the High Court. They may seek either an injunction or redress, or both, against that trader for breach of one of the provisions of EU and Irish consumer protection</p>	<p>Individual homogenous rights.</p>	<p>Consumer and investor rights.</p>

	law set out in Schedule 1 of the Bill.		
Latest reform details: who is entitled to start an action?	<p>The Bill will create a mechanism whereby an organisation which represents the collective interests of consumers may apply to the Minister for Enterprise, Trade and Employment to be designated as a Qualified Entity provided it meets minimum criteria and standards. This will allow it to bring a representative action in Ireland or another EU Member State.</p> <p>Each Member State can designate at least one “Qualified Entity” to bring actions on behalf of consumers. It is anticipated that a Qualified Entity will be a non-profit organisation in the area of consumer protection, be independent, and have a legitimate interest in ensuring the provisions of the Directive are complied with.</p>	Associations or foundations (so-called interest groups - no minimum number of members).	Investors or consumer associations (consumer umbrella associations with a minimum of 10 consumer associations as members or a single consumer association with at least 350 individual members).
Latest reform details: opt-in/opt-out system.	Under the Bill, the scheme will operate as an “opt-in” system.	<p>Opt-out for Dutch nationals.</p> <p>Opt-in for foreign individuals.</p>	Opt-in.
Latest reform details: outcome:	Not applicable.	Prior to January 2020 only judgment on	Judgment on responsibility only.

AN/Quantum (Declaratory judgment /Quantification of damages).		<p>responsibility could be sought.</p> <p>With the reform of January 2020, declaratory judgments and judgments on compensation are possible.</p>	<p>Individuals must file their own claims to seek damages.</p>
Latest reform details: what is the final term for claimants to adhere to the action?	Not applicable.	<p>Due to the opt-out nature for Dutch nationals, no deadline applies.</p> <p>Foreign individuals need to opt in at the commencement of the legal proceedings.</p>	<p>Judgment on responsibility only.</p> <p>Individuals must file their own claims to seek damages.</p>
Brief description of major class action cases, including details if the new legislation applies.	Not applicable.	<p>Recent representative cases (under the 2020 regime):</p> <ul style="list-style-type: none"> • Class actions against social media platforms: several interest groups against Tik-Tok seeking compensation for the inappropriate use of data of minors. • Class actions against car manufacturers: several interest groups seeking compensation for the consequences of the “Dieselgate” emissions scandal. Recent judgments in these proceedings have referred the matters back to proceedings under the previous regime (i.e. only a declaratory judgment can be sought) due to the 	<p>All cases fall under the current regime and therefore do not relate to the Directive.</p> <p>Recent representative cases:</p> <p>Investors against Telekom AG (Capital Markets Model Case Act)</p> <p>Consumers in the aftermath of the “Dieselgate” emissions scandal against Volkswagen AG (model declaratory action under German Code of Civil Procedure).</p>

		<p>period in which the alleged acts occurred.</p> <p>In addition, the following is under the 2004 regime, and only a declaratory judgment:</p> <ul style="list-style-type: none">• Collective action on climate goals: an interest group seeking adherence by the Dutch government to the Paris Climate Goals. <p>See above: the diesel emissions cases have been referred back for further litigation under the old regime.</p>	
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Source: [Dentons](#)

Policy context

New Deal for Consumers

In April 2018, the European Commission proposed a '[New Deal for Consumers](#)' to ensure that all European consumers fully benefit from their rights under Union law. The initiative aimed at strengthening enforcement of EU consumer law in light of a growing risk of EU-wide infringements and at modernising EU consumer protection rules in view of market developments.

In practice, the 'New Deal for Consumers' aims to:

- modernise existing rules and fill the gaps in the current consumer acquis;
- provide better redress opportunities for consumers, support effective enforcement and greater cooperation of public authorities in a fair and safe Single market;
- increase cooperation with partner countries outside the EU;
- ensure equal treatment of consumers in the Single market and guarantee that national competent authorities are empowered to tackle any problems with 'dual quality' of consumer products;
- improve communication and capacity-building to make consumers better aware of their rights and help traders, especially small and medium-sized enterprises, to comply more easily with their obligations; and
- look at future challenges for consumer policy in a fast evolving economic and technological environment.

To achieve the above goals, the 'New Deal for Consumers' proposes changes to the legislative framework complemented by a set of non-legislative actions, as set out in this [Communication](#) from the European Commission.

The legislative package is composed of the following two instruments:

1. proposal for a [Directive](#) amending Council Directive 93/13/EEC, Directive 98/6/EC, Directive 2005/29/EC and Directive 2011/83 as regards better enforcement and modernisation of EU consumer protection rules;
2. proposal for a [Directive](#) on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC. This proposal intends to facilitate redress for consumers where many consumers are victims of the same infringement, in a so-called mass harm situation.

It is the second of these instruments which is the subject of the *Representative Actions for the Protection of the Collective Interests of Consumers Bill 2023*.

Public consultation

The Department of Enterprise, Trade and Employment undertook a public consultation between March and May 2021 seeking views from interested parties on the transposition of Directive (EU) 2020/1828. In particular, the Department was keen to consult on the use of Member State options, being matters in respect of which Member States can or must make a choice under the Directive.

The [consultation document](#) contained questions focused on the following parts of the Directive:

- Article 4 – Qualified entities
- Article 7 – Representative actions
- Article 8 – Injunction measures
- Article 9 - Redress measures
- Article 11 – Redress settlements
- Article 13 – Information on representative actions
- Article 14 – Electronic databases
- Article 20 – Assistance for qualified entities

A total of 17 submissions were received from various stakeholders ranging from law firms to consumer rights organisations. These included the following:

- [Bar Council of Ireland](#)
- [Banking & Payments Federation Ireland](#)
- [Consumers' Association of Ireland](#)
- [Competition and Consumer Protection Commission](#)
- [DLA Piper](#)
- [Dublin Solicitors Bar Association](#)
- [European Justice Forum](#)
- [Experian](#)
- [Global Justice Network](#)
- [HealthTech Ireland Association](#)
- [Health Products Regulatory Authority](#)
- [IBEC](#)
- [Johnson & Johnson](#)
- [Kennedys Solicitors](#)
- [Law Society of Ireland](#)
- [Liberty Insurance](#)
- [U.S. Chamber Institute for Legal Reform](#)

The Law Reform Commission Report on Multi-Party Litigation

The Law Reform Commission published a report in 2005 which set out the need for procedural reform in the area of multi-party litigation.³⁶ The Commission concluded that to date ad hoc arrangements have been used to deal with the demands of multi-party litigation and that a more structured approach should be available.³⁷

A total of 21 recommendations were put forward in the report. Some of the key recommendations included the following:

- The new form of private multi-party litigation should be called a Multi-Party Action (MPA) and should be introduced by way of Rules of Court;
- The MPA procedure should deal only with common issues among the individuals actions involved;
- The MPA procedure should operate the basis of a opt-in system whereby individual litigants will be included in the group only where they decide to join the group action (this is very different from the US class action procedure in which individuals are deemed to be part of the class action unless they opt-out);
- The MPA would require certification by a court before it could become established;
- The court would certify the MPA only where it was considered to offer a fair and efficient means of resolving the common issues involved;
- The court would establish an MPA Register, containing a list of the cases in the MPA;
- The court would where appropriate select lead cases to go forward as representative of those in the group;
- The court would set a general cut-off date for entry onto the MPA;
- A single legal representative would be agreed to by the MPA members or nominated to deal with the common issue arising within the MPA;
- The costs associated with the MPA would be spread among its members in equal measure;
- Where an individual member of the MPA would have been eligible as an individual litigant for civil legal aid, they should continue to be eligible for aid to the extent of their share of the costs under an MPA.

³⁶ Multi-party litigation refers to situations where several parties are involved in a single piece of litigation.

³⁷ The Law Reform Commission (2005), *Multi-Party Litigation*. Available [here](#).

Peter Kelly Report

Following the introduction of a [Private Members' Bill](#) on multi-party actions, the then Minister for Justice and Equality referred the question of the introduction of an MPA procedure in the Irish legal system to the review of the administration of civil justice review group, established in 2017 and chaired by the then president of the High Court, Mr. Justice Peter Kelly.³⁸

Chapter 8 of the [final report](#) examined Multi-party Litigation. It concludes by stating that:

“It would seem clear that there is an objective need to legislate for a comprehensive multi-party action (“MPA”) procedure in Ireland, while acknowledging the importance of public law redress mechanisms such as regulatory oversight and intervention in resolving certain multiple claim categories.

The Review Group shares the preference of the Law Reform Commission for a model along the lines of the Group Litigation Order (“GLO”) procedure in England and Wales which would require claimants individually to institute proceedings in pursuit of their claims and join an MPA register. While noting the perceived benefits of the US style class action model, the Review Group does not consider it either realistic or legally safe to adopt such a model in this jurisdiction given lack of familiarity with it here and possible constitutional difficulties presented by the “opt out” approach in binding passive claimants to proceedings they have not instituted.”

The Review Group considered whether it should supplement its recommendation for an “opt in” GLO-type procedure by recommending one or more of the following:

- the permitting in law of third party litigation financing for actions covered
- the permitting of contingency fee-based remuneration arrangements in connection with that procedure
- that the Civil Legal Aid Act 1995 be amended to make provision for the funding of an otherwise eligible class/group member for his/her proportion of any eventual costs order.

In the end, the Review Group noted the arguments in favour and against the individual options concerned and considered that they raise issues of policy concerning the funding of litigation which require more detailed discussion with the interests involved. In the circumstances, it did not consider it appropriate to express an opinion on those options.

³⁸ Dáil Eireann debate, Tuesday 14 November 2017. Available [here](#).

International approaches to Multi-Party Actions

This section looks at the approach taken to multi-party actions in a number of different countries. A multi-party action is a claim started by a group of people making the same or similar claims against one defendant. The countries examined below include the US, Canada, Australia, England and Wales and is based on a summary review of these procedures as contained in the Peter Kelly [report](#).

US³⁹

The US Federal class action procedure is contained in Rule 23 of the Federal Rules of Civil Procedure.⁴⁰ An important initial consideration to be taken into account in evaluating the class action in the US is that costs do not generally follow the event in that jurisdiction: parties are expected to bear their own costs and plaintiffs' lawyers are often remunerated with a percentage of damages awarded, which can exceed 20% of the amount recovered.⁴¹

Rule 23(a) of the Federal Rules provides that one or more members of a class may sue or be sued as representative parties on behalf of all members provided:

1. the class is so numerous that joinder of all members is impracticable (the "numerosity" requirement);
2. there are questions of law or fact common to the class (the "commonality" requirement);
3. the claims or defences of the representative parties are typical of the claims or defences of the class (the "typicality" requirement); and
4. the representative parties will fairly and adequately protect the interests of the class (the "adequacy of representation" requirement).

The US procedure is an "open class" – or "opt out" – model, i.e. one in which the adjudication in or settlement of the action generally binds a member of the class unless that member positively opts out of the action.

Where a class action sought to be brought under Rule 23 seeks monetary damages, the intended class must satisfy the additional requirements of Rule 23(b)(3), in particular that the questions of law or fact common to the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the dispute.

³⁹ This section is a summary taken from the Peter Kelly Report (2020), *Review of the Administration of Civil Justice* pgs. 232-237. Available [here](#).

⁴⁰ Rule 23, containing the amendments which came into effect as of the 1st December 2018, is available [here](#).

⁴¹ "Costs follow the event" is a legal phrase that means the losing party in a court case must not only pay their own legal fees but also those of the defendant too.

Canada⁴²

Court systems in nine of the ten Provinces of Canada now have legislation-based class action regimes, while the Federal court system has such a regime for certain prescribed categories of claim. The legislative regimes draw on the model Uniform Class Proceedings Act adopted by the Uniform Law Conference of Canada and the US Federal Rule 23.

The Canadian class action regime differs from the US Federal procedure in a number of respects, notably:

- Significantly, costs follow the event in Canada (as in Ireland and most other common law jurisdictions) and this raises the issue of how class actions can be funded given the heavy costs risk to which the representative plaintiff is exposed. Other than the representative plaintiff, class members are not liable for costs except with respect to the determination of their own individual claims.
- The test for certifying a class action in the common law Provinces is less restrictive in relation to:
 - numerosity: an identifiable class of two or more persons must exist – the class does not, as with US Federal class actions, have to be so numerous as to render joinder of all claimants impracticable;
 - commonality: the claims of the class members need only raise a common issue, and it is not necessary that that common issue predominates over issues affecting only individual members;
 - typicality: there is no requirement that the claims or defences of the representative parties are typical of those of the class.
- In a minority of Provinces, an exception is made to the general “opt out” approach in that class members residents outside the Province only participate in the action if they have positively opted in.

Australia⁴³

Class actions were introduced in Australia at Federal level in 1992 based on recommendations of the Australian Law Reform Commission (“ALRC”) in a report of 1988.⁴⁴ The following features of the Australian class action regime (known as “representative proceedings”) distinguish it from the US and Canadian models described above.

⁴² This section is a summary taken from the Peter Kelly Report (2020), *Review of the Administration of Civil Justice* pgs. 237-241. Available [here](#).

⁴³ This section is a summary taken from the Peter Kelly Report (2020), *Review of the Administration of Civil Justice* pgs. 241-243. Available [here](#).

⁴⁴ Australian Law Reform Commission, “Grouped Proceedings in the Federal Court”, *op. cit.*, see in particular para. 69 and Chapter 9.

- While, as in Canada, costs follow the event, contingency fee agreements remunerating a lawyer on the basis of a percentage of any damages awarded are not permitted.
- Although the Australian class action procedure was conceived as an open class “opt out” model, the Full Federal Court of Australia found that closed classes were permissible.
- Where the court considers that determination of the common issues will not finally determine the claims of all class members, it may give directions in relation to the determination of the remaining issues.

England and Wales⁴⁵

The approach adopted in England and Wales for multi-party litigation is known as the Group Litigation Order (“GLO”) procedure. A GLO is an order for the case management of claims which give rise to common or related issues of fact or law (“the GLO issues”). The court may make a GLO where there are or are likely to be a number of claims giving rise to the GLO issues.

Since the GLO regime’s introduction in May 2000, some 105 GLOs had by 2019 been made, the bulk of these in mainly consumer-focused areas (e.g. product liability claims, tax disputes, environmental claims, and industrial disease claims), with only a few for financial services or shareholder claims.⁴⁶

The “costs follow the event” principle applies to litigation in England and Wales. GLO proceedings may be financed through conditional fee agreements (“CFAs”) – generally, “no win, no fee (or reduced fee)” agreements – and damages-based agreements (“DBAs”) – under which the lawyer will receive a percentage of the damages awarded.

Collective proceedings involve the making of a collective proceedings order (“CPO”) by the Competition Appeal Tribunal (CAT) including authorisation of the person who brought the proceedings to act as the representative in those proceedings, the description of a class of persons whose claims are eligible for inclusion in the proceedings, and specification of the proceedings as “opt in” collective proceedings or “opt out” collective proceedings.

In order to be able to make a CPO, the CAT will, chiefly, require to determine that “the claims raise the same, similar or related issues of fact or law”, and that a collective proceeding would be appropriate based upon a preliminary assessment of the merits and available alternative regimes. The CAT determines in the CPO whether the collective proceedings are to proceed as “opt in” or “opt out” collective proceedings.

In 2007, the Civil Justice Council recommended that properly regulated third party funding should be recognised as an acceptable option for mainstream litigation – as having the potential to increase access to justice in areas of consumer rights and multi-party action – and that in multi-

⁴⁵ This section is a summary taken from the Peter Kelly Report (2020), *Review of the Administration of Civil Justice* pgs. 244-251. Available [here](#).

⁴⁶ HM Courts & Tribunals Service quoted in Foggo and Hill, “Group Litigation Orders—Sharing the Spotlight”, 169 *New Law Journal* 7851, page 20 (August 2019).

party cases where no other form of funding is available, regulated contingency fees should be permitted to provide access to justice. As in the case of GLO proceedings, CFAs and third party financing may be employed to fund collective proceedings under section 47B of the Competition Act 1998, but a DBA relating to opt-out collective proceedings is unenforceable.

Principal provisions of the Bill

This section of the Digest examines some of the main provisions of the Bill. The Bill comprises of 3 Parts and 34 sections in total. A short synopsis of each section is given in [Table 2](#) above.

Part 1 – Preliminary and General

Part 1 of the Bill deals with general matters such as interpretation of key terms used in the Bill and also its scope and application. It states that this Act applies to representative actions brought on or after 25 June 2023 in respect of infringements by traders occurring on or after that date that harm or may harm the collective interests of consumers and both applies to domestic and cross-border infringements.

Part 2 – Qualified Entities

Part 2 of the Bill covers the designation of a “qualified entity” which is defined in the Bill to mean a legal person or public body representing consumers’ interests which has been designated by (a) the Minister under section 8(4)(a), or (b) a Member State (other than the State), as qualified to bring representative actions in accordance with [EU Directive 2020/1828 on representative actions for the protection of the collective interests of consumers](#).

Section 8 provides the statutory basis for the Minister to designate entities who apply to be designated as qualified entities under the Act and the criteria to be used to allow a decision to be made on the request for designation.

An organisation may apply to be designated by the Minister for Enterprise, Trade and Employment as a qualified entity for the purposes of taking domestic representative actions or taking cross border representative actions, or both, if it satisfies all of the following criteria:

- a. it is a legal person and can demonstrate in the application 12 months of actual public activity in the protection of consumer interests prior to the application,
- b. its main purpose is one that demonstrates that it has a legitimate interest in protecting consumer interests provided for in a relevant enactment,
- c. it has a non-profit-making character,
- d. it is not the subject of insolvency proceedings and has not been declared insolvent,
- e. it is independent and is not influenced by persons other than consumers, in particular by traders, who have an economic interest in the bringing of any representative action, including in the event of funding by third parties, and, to that end, it has established procedures to prevent such influence as well as to prevent conflicts of interest between itself, its funding providers and the interests of consumers, and
- f. it makes publicly available in plain and intelligible language by any appropriate means, in particular on its website, information that demonstrates that it complies with the matters referred to in paragraphs (a) to (e) and information about the sources of its funding in general, its organisational, management and membership structure, its statutory purpose (if any) and its activities.

Based on these criteria there are a number of existing bodies within Ireland that may fall into the category of prospective qualified entities. For example, some of those with existing supervisory or enforcement competence in the financial services industry have been examined in the literature and include the likes of the Central Bank of Ireland, Competition and Consumer Protection Commission and the Financial Services and Pensions Ombudsman. It also raises the question as to whether designation as a qualified entity has any implications for the existing institutional dynamic in the national regulatory environment.⁴⁷

Box 1: PLS discussion relating to designation of qualified entities

During pre-legislative scrutiny, one of the issues that arose was how prescriptive the criteria need to be for designation of qualified entities. The **DETE** stated that once the Bill is enacted they will set out the application process for designated entities via ministerial regulations. The **Law Society** were of the opinion that it is not a requirement of the EU Directive that the six stipulations included under this section must be applied in respect of domestic representation actions and that Member States have greater freedom to adopt different criteria than under the proposed Bill. The **CCPC** expressed the view that the interests of consumers are best served if they have the option of civil society bodies taking representative actions on their behalf in addition to public bodies taking enforcement actions against traders who breach consumer law. They also referenced in their response to the public consultation, that they supported the idea that there might be ad hoc designation for the purposes of a specific domestic action, though cautioned that it is important the Bill does not facilitate a compensation culture.

The **Joint Committee on Enterprise, Trade and Employment** recommended in its PLS report for a detailed application, criteria and designation process for Qualified Entities to be prescribed in legislation and that the Minister for Enterprise, Trade and Employment engage with industry stakeholders to limit the administrative burden on the Qualified Entity.

Source: Joint Oireachtas Committee PLS meetings ([29 June](#) and [14 September](#)) and [report](#)

Section 14 provides for a review mechanism where a decision has been made by the Minister for Enterprise, Trade and Employment to refuse a request for a designation by an entity due to their non-compliance with one or more of the qualifying criteria for designation.

An applicant whose application for designation is refused by the Minister or a qualified entity whose designation is revoked by the Minister may, within 28 days from the date of the notification, request in writing a review of such refusal or revocation, as the case may be, in the prescribed form. The Minister shall, upon receipt of the review request, appoint an independent person to carry out a review requested.

Section 16 requires the Minister for Enterprise, Trade and Employment to establish and maintain a register of qualified entities in Ireland. Information concerning designated qualified entities shall be made available to the public on a website maintained by the Minister.

⁴⁷ Lynch Shally, Karen (2022), *The European Union Collective Redress Action in Irish Financial Services: Convergence or Divergence and Potential Clarification?* Irish Journal of European Law, 24 (2022):53-105.

Part 3 – Representative Actions

Part 3 of the Bill deals with “representative actions” which means an action for the protection of the collective interests of consumers that is brought by a qualified entity as a plaintiff on behalf of consumers to seek either an injunction or a redress measure, or both.

Section 19 states that only a qualified entity may bring a representative action to the High Court, and can seek either an injunction or redress measure(s) against a trader, or both in the same action. The EU Directive on Representative Actions ([Article 5\(1\)](#)) provides that the European Commission will maintain a list of qualified entities designated in each Member State as being permitted to bring a cross-border representative action. This section transposes a mandatory provision of the Directive which states that inclusion on that list must be accepted by the Court of any Member State in order for a qualified entity to bring an action on a cross-border basis.

It places the qualified entity as the claimant party in the representative action, so that it will have all of the responsibilities and powers of the plaintiff party. This means that all existing Court procedures and orders will apply to the qualified entity, including orders for discovery, inspection and interrogatories, in line with the existing rules of Court.

A qualified entity shall provide the Court with sufficient information so that it may assess the admissibility of the representative action concerned. The Court may, on the application of a party to a representative action, or of its own motion dismiss a representative action which appears to the Court to be manifestly unfounded as soon as the Court has received the necessary information in order to make such a decision.

Section 20 provides that more than one qualified entity may bring a representative action. Where a single representative action is brought by a number of qualified entities, those qualified entities shall nominate one qualified entity from amongst themselves to lead the conduct of the representative action.

Section 21 specifies that a qualified entity must first attempt to engage in consultations with a trader before seeking an injunction against that trader. While many of the injunction provisions in the Directive are mandatory, Member States are permitted to use existing procedural mechanisms which provide equivalent procedures to those required by the Directive. The first step in the procedural mechanism for a representative action seeking an injunction requires that a qualified entity must first engage in consultations with the trader concerned with a view to having the alleged infringement brought to a halt without the need to launch a representative action. If the trader does not engage with a request for consultations within two weeks of having received the request for consultations, a qualified entity may immediately begin the process of bringing a representative action before the Court seeking an injunctive measure.

Box 2: PLS discussion relating to injunctive measures

During pre-legislative scrutiny, stakeholders such as the **Consumer Authority of Ireland (CAI)** and the **CCPC** both expressed the view that the consultation process prior to a qualified entity bringing an action before the courts seeking an injunctive measure should not be unduly prolonged such that it renders injunctions pointless.

Source: Joint Oireachtas Committee PLS meetings ([29 June](#) and [14 September](#)) and [report](#)

Section 22 states that where a qualified entity requests a trader to cease an infringement or enter into consultations regarding an infringement in accordance with section 21(2), the entity may engage an alternative dispute resolution (ADR) entity (within the meaning of the Regulations of 2015 - [S.I. No. 343 of 2015](#)) for the purpose of resolving the alleged infringement to which Regulation 3 of the Regulations of 2015 applies.

Section 23 sets out the mechanism by which the High Court will deal with an application for injunctive relief in a representative action. On receipt of an application for an injunction, the High Court may make an order granting one of the following:

- a) an interim injunction to cease a practice or, where appropriate, to prohibit a practice where that practice has been deemed by the Court to constitute an infringement;
- b) an injunction to cease a practice or, where appropriate, to prohibit a practice, where that practice has been found by the Court to constitute an infringement.

A qualified entity in making an application under this section shall not be required to prove:

- a) actual loss or damage on the part of an individual consumer affected by the alleged infringement, or
- b) intent or negligence on the part of the trader, the subject of the application concerned.

Section 24 provides the statutory basis for consumers to be represented by a qualified entity in a representative action for redress. Consumers who wish to be represented in the case may notify the qualified entity at any time until the case has been deemed admissible by the Court. If a consumer has not done so by this deadline, then they cannot join the action, or benefit from any redress obtained by the qualified entity in this case. The qualified entity will then notify the consumers about whether the High Court has determined that the case is admissible, and maintain contact with the consumers through the litigation process.

A consumer who has notified the qualified entity of his or her request to be represented in accordance with this section and has paid such entry fees as may be required by the qualified entity shall then be bound by the outcome of such representative action and not be represented in any other representative action with the same cause of action against the same trader. They may also not bring an action individually with the same cause of action against the same trader.

There has been some discussion as to whether the scope of the redress available under the Directive should be widened as part of the national transposition process. This is in reference to limiting it both to existing EU law and also to a certain class of consumer as defined under the Directive. In some cases Irish legislation has extended further which poses the question as to whether the representative action should either be partially or fully extended to align more with the full scope of national regulation.⁴⁸

⁴⁸ Lynch Shally, Karen (2022), *The European Union Collective Redress Action in Irish Financial Services: Convergence or Divergence and Potential Clarification?* Irish Journal of European Law, 24 (2022):53-105.

Box 3: PLS discussion relating to redress measures

During pre-legislative scrutiny, there was some discussion around whether to introduce an opt-out or opt-in mechanism for consumers which is an option under the Directive. In an opt-in mechanism, consumers should be required to explicitly express their wish to be represented by the qualified entity in the representative action for redress measures. In an opt-out mechanism, consumers should be required to explicitly express their wish not to be represented by the qualified entity in the representative action for redress measures. The **Department of Enterprise, Trade and Employment** stated that opting out is legally questionable in a common law jurisdiction and also that the responses to the public consultation were largely in favour of an opt-in system. The **Law Society** commented that the benefit of the opt-out system is that many of the cases may be settled which is generally better in that it avoids the litigation costs.

The **Joint Committee on Enterprise, Trade and Employment** noted in its PLS report that the Committee supports the 'opt in' system as the preferred method for multi-party actions. It also recommended that the scope of qualified entities be widened additionally to provide for consumer claims from sole traders, SME's and other businesses.

Source: Joint Oireachtas Committee PLS meetings ([29 June](#) and [14 September](#)) and [report](#)

Section 26 sets out the mechanism by which the High Court will deal with an application for redress from a qualified entity. Without prejudice to a discretionary power the Court may have in relation to redress, the Court may, in respect of a representative action before it, require a trader who is a defendant in the action to provide a consumer with one or more of the following remedies:

- a) compensation;
- b) repair;
- c) replacement;
- d) price reduction;
- e) contract termination;
- f) reimbursement of price paid.

A consumer shall not be entitled to receive compensation more than once arising from the same cause of action against the same trader.

Section 27 deals with funding of representative actions for redress measures. Where a representative action for redress measures brought in accordance with section 26 is funded by a third party, insofar as permitted in accordance with law, the Court shall ensure that conflicts of interest are prevented and that funding by third parties who have an economic interest in the bringing or the outcome of the representative action for redress measures does not operate to divert the representative action from the protection of the collective interests of consumers.

A qualified entity bringing a representative action for redress measures in accordance with section 26 shall disclose to the Court a financial overview that specifies the sources of funds used by it to support the representative action.

Section 29 makes provision for a modest entry charge to be charged by a qualified entity on consumers who seek to participate in a specific representative action. The Minister for Enterprise, Trade and Employment will prescribe the maximum amount of the fee to be charged and may

prescribe different fees for different classes of representative actions and different classes of consumers.

It has been commented upon in the literature that the financing of collective actions is the most important issue as a pre-condition for the effectiveness of those actions. Options such as limiting court fees only addresses a small fraction of the costs and will not be sufficient. Another suggested approach might be to allow any unclaimed amounts to flow to the qualified entity or instead to transfer them to a special organisation that provides funding for collective actions. In any event, it remains to be seen how the financing problem may be fully solved. If not, it is very likely that a representative action will not be brought for the simple reason that no one might be willing to take that risk, given the lack of financing.⁴⁹

Box 4: PLS discussion relating to funding of the litigation

During pre-legislative scrutiny, the issue was raised of the capability of qualified entities to be able to fund representative action. While the Directive allows for Member States to fund costs, in Ireland we are limited by champerty and maintenance rules. The term 'champerty' refers to 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 while 'maintenance' is the giving of assistance, by a third party, who has no interest in the litigation.⁵⁰

The **DETE** noted that third party funding is very limited or unusual in Ireland. Therefore, the State's way of overcoming this in terms of support is to try to waive the court fees for the qualified entity which is a matter of responsibility for the Minister for Justice as it is also to make any changes in relation to champerty and maintenance. However, DETE were clear that the State will not actually fund or underwrite the representative action. They stated that qualified entities can charge consumers a nominal fee to take a case on their behalf and that this combined with the waiving of court fees should help towards the funding of cases. The **CCPC**, while welcoming the possibility of removing court fees payable by qualified entities taking a representative action, noted however that such fees are not likely to be material in the overall cost of a representative action, and that the prohibitions of champerty and maintenance will severely limit the ability of qualified entities to fund representative actions. It did caution about models where funders get a percentage of the damages awarded and the need to avoid a litigation culture which can increase the cost of doing business. It also raised a further funding issue in that if a qualified entity loses a case, it may have to pay the other side's costs, known as the loser pays principle.

The **Joint Committee on Enterprise, Trade and Employment** recommended in its PLS report that proper provision is made for representative actions and litigation funding. The Committee is

⁴⁹ Visscher, L. and Faure, M. (2021), *A Law and Economics Perspective on the EU Directive on Representative Actions*. Journal of Consumer Policy, 44 (2021):455-482. Available [here](#).

⁵⁰ Peter Kelly Report (2020), *Review of the Administration of Civil Justice* pg. 324, report prepared by a Review Group following a decision of the Government in March 2017.

concerned that the vast cost burden may be an obstacle to many consumers seeking to achieve redress and that groups who genuinely require access to this redress will not be accounted for and may be excluded due to funding issues. The Committee further recommended that engagement occurs with the Minister for Justice and the Department of Justice to scrutinise and reform the matter of third-party litigation funding provisions in order to review and reform the laws on champerty and maintenance. It also recommended that the entry fee should be small to not create additional obstacles to redress and consideration could be made for it to vary dependent on the number of consumers linked to the class action.

Source: Joint Oireachtas Committee PLS meetings ([29 June](#) and [14 September](#)) and [report](#)

Section 31 deals with allocation of costs by the High Court following a representative action. Any costs incurred in the bringing of a representative action for redress shall not be borne by the consumers represented by it. However, where any individual consumer, through their own intentional or negligent conduct, results in any party incurring costs, then a cost order for those costs may be made against that consumer.

Pre-Legislative Scrutiny

The [General Scheme](#) of the *Representative Actions for the Protection of the Collective Interests of Consumers Bill 2023* was published and received Government approval for drafting a new law in March of 2022. The General Scheme was referred to the Joint Committee on Enterprise, Trade and Employment for pre-legislative scrutiny.

The Committee commenced pre-legislative scrutiny on the Bill in June of 2022. Two PLS hearings were held on [29 June](#) and [14 September](#) 2022 and included the following witnesses:

- Ms. Clare McNamara, Mr. Paul Brennan, and Ms. Sadhbh McGrath (Department of Enterprise, Trade and Employment)
- Mr. Philip Andrews (Law Society)
- Mr Jeremy Godfrey, Mr. Kevin O'Brien, Ms Síona Ryan, and Mr. Robert Dunne (Competition and Consumer Protection Commission)
- Mr. Michael Kilcoyne, Mr. Raymond O'Rourke, and Mr. Dermott Jewell (Consumer Association of Ireland)




The Joint Committee published its PLS findings in December 2022 in its [Report on the Pre-Legislative Scrutiny of the General Scheme of the Representative Actions for the Protection of the Collective Interests of Consumers Bill 2022](#).

The Joint Committee's PLS report made a number of recommendations related to various parts of the General Scheme of the Bill. These are detailed in Table 5 below.

As part of the Bill Digest process, the L&RS compares the recommendations made in the PLS report with their inclusion, partial or otherwise, in the subsequent Bill. We do this through liaison with the Department, in this case, the Department of Enterprise, Trade and Employment, by asking the Department to outline the extent to which, in their view, each of recommendations of the Joint Committee influenced the drafting of the resulting Bill. Along with the Department's input, the L&RS also assess the extent to which the PLS process impacted the drafting of the Bill. We do this, as

set out in Table 4 below, by means of a ‘traffic light’ system, which for each recommendation allocates a green, orange or red light indicating respectively the extent to which it has been accepted in full, in part or is not reflected in the published Bill.





Table 4: Key to traffic light dashboard comparing the Bill as published with Committee PLS recommendations.

L&RS categorisation of the Department’s response in the Bill to the Committee’s key issue	Traffic light dashboard used to highlight impact of the Committee’s PLS conclusion
Key issue has clearly been accepted and is reflected in the Bill.	
The Bill may be described as adopting an approach consistent with the key issue or the impact of the key issue is unclear.	
Key issue has not been accepted or implemented in the Bill.	

Source: L&RS


Table 5 below therefore shows for each recommendation the extent or otherwise it has been reflected in the Bill along with the commentary in each instance from the Department of Enterprise, Trade and Employment.




Table 5: Traffic light dashboard comparing the Bill as published with Committee PLS recommendations.

Commentary as per Committee report		Whether addressed (either in whole or in part) in the Bill ⁵¹
Recommendation 1: Qualified Entities		
1. The Committee recommends that the Minister for Enterprise, Trade and Employment engage with industry stakeholders to limit the administrative burden on the Qualified Entity. ⁵²		1. Yes. Will be addressed in the development of the secondary legislation to do with the designation process for entities seeking to be designated.
Recommendation 2: Impact on the product and consumer sector		
2. The Committee recommends that the scope of Qualified Entities be widened additionally to provide for consumer claims from sole traders, SME's and other businesses.		2. Disagree. Definitions for a 'consumer' and a 'trader' are clearly specified in article 3 of the Directive. It is clear that the Directive is intended only to protect the collective interests of consumers. The Directive specifically states that "... Infringements that harm natural persons qualifying as traders under this Directive should not be covered by it..."
Recommendation 3: Opt-in vs opt-out models		
3. The Committee supports the 'opt in' system as the preferred method for multi-party actions.		3. Agreed. Addressed in the Bill.
Recommendation 4: Costs and fees		
4. The Committee recommends that the entry fee should be small to not create additional obstacles to redress and consideration could be made for it		4. Agreed. Addressed in the Bill.

⁵¹ The response text in this column is taken directly from the Department of Enterprise, Trade and Employment's email communication to the L&RS on 1 April 2022. The responses was received from the Department following the routine request, as part of the preparation of Bill Digests, from the L&RS to Departments in respect of Bills that have undergone PLS and the extent to which the resulting Bill has adopted the recommendations made by the relevant Joint Committee.

⁵² The Department of Enterprise, Trade and Employment have indicated in their response to this recommendation that it will be addressed in the development of secondary legislation rather than in the Bill itself.

Commentary as per Committee report	Whether addressed (either in whole or in part) in the Bill ⁵¹	
to vary dependent on the number of consumers linked to the class action.		
Recommendation 5: Third party litigation funding		
<p>5. The Committee recommends proper provision is made for representative actions and litigation funding. These measures will 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.</p> <p>The Committee is concerned that the vast cost burden may be an obstacle to many consumers seeking to achieve redress. The Committee is further concerned that groups who genuinely require access to this redress will not be accounted for and may be excluded due to funding issues.</p>		<p>5. Addressed in part in the Bill.</p> <p>The issue of third-party funding lies within the policy responsibility of the Minister for Justice. Third party funding of civil litigation is prohibited under the laws on champerty and maintenance (these are torts under common law). The Supreme Court has left it to the legislature to develop this complex area. Minister Calleary wrote to Minister James Browne at the Department of Justice with responsibility for Law Reform, on 20 September 2022 and underlined the importance of reform in this area in support of consumers exercising their rights through a QE under the RAD legislation. In response, Minister Browne noted that the matter is important and indicated that the Law Reform Commission has been tasked by the Minister for Justice to review the current situation regarding funding third party litigation and it is due to report to the Minister in 2024. The Minister for Enterprise, Trade and Employment awaits the findings of the review with interest.</p>
<p>6. The Committee recommends that engagement occurs with the Minister for Justice and the Department of Justice to scrutinise and reform the matter of third-party litigation funding provisions in order to review and reform the laws on champerty and maintenance.</p>		<p>6. As indicated at # 5 above, this engagement has already commenced. It will be followed up with the Minister for Justice in due course.</p>

Commentary as per Committee report	Whether addressed (either in whole or in part) in the Bill ⁵¹
Recommendation 6: Secondary Legislation	
<p>7. The Committee recommends a detailed application, criteria and designation process for Qualified Entities to be prescribed in legislation.⁵³</p> <p>8. The General Scheme includes provisions for the Minister to make regulations to administer the designation and monitoring of Qualified Entities, and for the Minister for Justice to make regulations relating to the conduct of representative actions, where necessary. The Committee noted the concerns of the stakeholders, and the proposed regulations may need further clarification to provide greater transparency for consumers.</p>	<div>  <p>7. Addressed outside of the Bill. This will be developed in secondary legislation in due course.</p> </div> <div>  <p>8. The Department will consult with relevant industry and other stakeholders when draft regulations are being prepared.</p> </div>
Recommendation 7: Miscellaneous matters	
<p>9. The Committee recommends the provision of a national electronic database to track representative actions and provide monitoring and transparency.</p>	<div>  <p>9. Yes. This will be addressed as part of the implementation arrangements when the Act is commenced in due course.</p> </div>

Source: L&RS is grateful to the Department of Enterprise, Trade and Employment for providing their analysis of how the Committees recommendations have impacted on the Bill. The traffic light assessment represents the analysis of the L&RS.

⁵³ The Department of Enterprise, Trade and Employment have indicated in their response to this recommendation that it will be addressed in the development of secondary legislation rather than in the Bill itself.

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