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Trádála agus Fostaíochta**
Department of Enterprise,
Trade and Employment

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

Regulatory Impact Analysis

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Related Publications:

- [Parliament and Council Directive 2009/22/EC of 23 April 2009 on injunctions for the protection of consumers' interests \(Codified version\) \[2009\] OJ L110/30](#)
- [S.I. No. 555/2010 - European Communities \(Court Orders for the Protection of Consumer Interests\) Regulations 2010](#)
- [Commission, 'Inception Impact Assessment: Targeted Revision of EU Consumer Law Directives' \(Commission June 2017\)](#)
- [Commission, 'Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee A New Deal for Consumers' COM\(2018\) 183 final](#)
- Commission, 'Inception Impact Assessment: A New Deal for Consumers – revision of the Injunctions Directive' (Commission 2018) (available at request from the Department of Enterprise, Trade and Employment)
- [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 \(2013/396/EU\)' COM\(2018\) 40 final](#)
- [Commission, 'Impact Assessment Accompanying Proposals for Directives of the European Parliament and of the Council \(1\) amending Council Directive 93/13/EEC, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules and \(2\) on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC' SWD\(2018\) 96 final](#)
- [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\(2018\) 184 final](#)

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- [Parliament and Council Directive \(EU\) 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC \(Text with EEA relevance\) \[2020\] OJ L409/1](#)
- [Department of Enterprise, Trade and Employment, 'Public Consultation on the Transposition of Directive \(EU\) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC' \(Department of Enterprise, Trade and Employment, March 2021\)](#)
- Representative Actions for the Protection of the Collective Interests of Consumers Bill 2023

Other sources:

- [Biard A, 'Collective Redress in the EU: A Rainbow Behind the Clouds?' \(2018\) 19 ERA Forum 189](#)
- [Cortes P, *The Law of Consumer Redress in an Evolving Digital Market* \(Cambridge University Press, 2018\)](#)
- [Hodges C, 'Collective Redress: The Need for New Technologies' \(2019\) 42 Journal of Consumer Policy 59](#)

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Summary

Prior to the preparation of the Directive on Representative Actions (EU 2020/1828) (hereafter “*The Directive*”), the European Commission undertook a series of regulatory impact assessment exercises. This Regulatory Impact Assessment (RIA) document focuses on the impact of the Representative Actions for the Protection of the Collective Interests of Consumers Bill which will transpose the Directive, and therefore complements the earlier European Commission assessments.

Primary legislation is the best option available for effectively transposing the Directive into domestic law. The design of discretionary aspects of the Bill were proposed and recommended by stakeholders during the consultation.

Unlike many other European Union Member States, there is no established collective redress mechanism in Irish law. Therefore, it is difficult to quantify the impact of this proposed legislation in terms of the likely number of cases which will be heard or the outcome of them.

It should be noted that the proposed legislation does not create new consumer rights or impose additional obligations on traders; it provides a new route for consumers to enforce their existing rights before the High Court.

The policy decisions made in preparing this Bill transpose the mandatory provisions of the Directive and implement the discretionary elements of the Directive to give effect to the policies and principles of the Directive within the existing Irish legal tradition in full.

Part 6 of this RIA provides information on how the representative actions mechanism will be monitored and reviewed by the Department of Enterprise, Trade and Employment in 2025 and on a pan-European basis by the European Commission starting in 2027.

Part 1: Issues and policy objectives

The objective of the policy is to fully and efficiently transpose the Directive, so that it is fully enacted and in place by the deadlines set by the European Union for the hearing of representative actions.

Policy origin

A “New Deal for Consumers” package was launched by the European Commission on 11 April 2018. The “New Deal for Consumers” aimed 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 package comprised proposals for two new Directives. One was a proposal on representative actions for the protection of the collective interests of consumers. This proposal repeals the current Directive 2009/22/EC on injunctions for the protection of consumers' interests. The Directive aims to improve tools for stopping illegal practices and facilitating redress for consumers where a number of them are victims of the same infringement of their rights, in a mass harm situation.

The 2015 “Dieselgate” scandal or the massive 2017 flights cancellation affecting hundreds of thousands of consumers across the EU highlighted gaps in consumer rights law across the EU’s internal market.¹ The Directive is aimed at ensuring cheaper and more effective means to stop and remedy breaches harming multiple EU consumers. As cross border commerce is at the heart of the European single market, the Directive allows some qualified entities to take cross border representative actions in any Member State. The Directive also allows for several cross border qualified entities to come together to represent European consumers where they have been harmed by the same alleged infringement which has been caused by the same trader in several Member States.

The Directive was published in the Official Journal on the 4 December 2020 and Member States had until 25 December 2022 to transpose it.

Policy objectives

In preparing legislation to give effect to the Directive, four policy objectives have been identified:

1. Formulate a legislative structure to give effect to the Directive
2. Determine which approach to take with respect to the discretionary measures contained in the Directive

¹ Commission, ‘Inception Impact Assessment: A New Deal for Consumers – revision of the Injunctions Directive’ (Commission 2018) page 1.

Part 1: Issues and policy objectives

3. Determine a structure for collective redress within the existing Irish civil litigation system
4. Lay down arrangements for administrative processes in Ireland for the designation of both domestic and cross border Qualified Entities.

The first policy objective is to formulate a legislative structure to give effect to the Directive. This legislative structure will ensure that a representative action mechanism for the protection of the collective interests of consumers is available in this jurisdiction while providing appropriate safeguards to avoid abusive litigation. The overall purpose of the Bill is to devise a procedural mechanism for collective redress which will contribute to the proper functioning of the internal market by approximating certain aspects of the laws, regulations and administrative provisions of this jurisdiction concerning representative actions. To this end, the Bill also aims to improve consumers' access to justice.

The second policy objective is to give effect to 'discretionary' articles in the Directive which require enabling provisions. These include non-mandatory provisions in relation to the designation criteria for domestic qualified entities, the mechanism for designating entities which are seeking designation under Part 2, and the pre-litigation consultation process for Qualified Entities seeking to commence a representative action for injunctive relief, etc.

The third policy objective is to determine the structure for a collective redress system in the Irish civil litigation system and which court will hear these actions, how they will determine the admissibility of a claim made by a Qualified Entity, how the court will manage the claim while it is in process and the offences which a trader may be found guilty of under the Bill and the range of penalties which the court will have at its disposal to deal with offences.

Finally, the fourth objective relates to laying down the administrative procedures under which the Department of Enterprise, Trade and Employment will manage applications from organisations seeking to be designated, for the review and revocation of designations where their holders may no longer be deemed to be in compliance with the criteria specified in article 4 of the Directive. The Bill instances functions where the Minister for Enterprise, Trade and Employment may make regulations to deal with specific requirements that arise in the context of the operation of the procedural mechanism.

Part 2: Identification and description of options

Scope of options

With respect to delivering the identified policy options, there are three:

- Option 1: Do nothing
- Option 2: Transpose the Directive by way of secondary legislation under the European Communities Act 1972
- Option 3: Transpose the Directive by way of primary legislation

Summary of Options

These can be summarised as follows:

Option for Transposition	Option 1: Do nothing	Option 2: Transpose the Directive by way of secondary legislation under the European Communities Act 1972	Option 3: Transpose the Directive by way of primary legislation
Benefit	None. Ireland would not be in compliance with EU requirements to have a representative action mechanism in its domestic legal system by 25 December 2022.	The mandatory provisions of the Directive, where no policy formation requirements are needed, could be enacted speedily and without the need for the full legislative process through statutory instruments made under the 1972 Act.	Both the mandatory and discretionary aspects of the Directive would be given legal effect through the creation of a single, new piece of primary legislation, under which regulations can be made to deal with administrative issues.
Risk	Reputational and financial damage from non-transposition of a European Union Directive. Irish courts would not be empowered to hear	Many of the provisions of the Directive are discretionary in nature and require policy decisions to give effect to them in Irish law.	Delays in the legislative process may challenge Ireland's ability to meet the EU requirements to have a representative action mechanism in its domestic legal system by 25 December 2022.

Part 2: Identification and description of options

	representative actions brought by Qualified Entities in other Member States and Irish consumers would not be able to avail of their EU collective redress rights.	Risk of legal challenge to any secondary legislation which attempted to transpose broad policies and principles.	
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Option 1: Do nothing

The option to “do nothing” is not feasible. The Directive is a Union measure and there is a legal obligation on Ireland and Member States to transpose Union law into national laws within a certain timeframe. This Directive was published in November 2020, and it must be transposed by Member States so that the first representative actions can be heard from June 2023. Ireland risks incurring potential infringement proceedings, including the application of fines, for not transposing the Directive in a comprehensive manner and on time. The Department of Enterprise, Trade and Employment goes to considerable lengths to ensure that Union laws which are due to be transposed by this Department are not delayed or that their transposition deadlines are not missed. The Department regards it as a priority issue for its engagement with the EU institutions that it is not seen as damaging its reputation by incurring fines and penalties for not transposing Union laws in a timely manner.

Where the transposition of an EU Directive is late or incorrect, sanctions are brought against the offending Member State. The European Commission under article 226 of the Treaty of Amsterdam will issue a formal notice of proceedings against Ireland. The matter is then decided by the Court of Justice of the European Union.

Finally, Ireland is anxious to ensure that consumers have access to a strong and robust system for collective redress when their rights have been infringed. Ireland also wants to ensure that traders have access to their right to a fair and impartial forum where they can have such claims examined. It is also worth noting that Ireland, unlike some Member States, does not have a collective redress mechanism for consumers already in force.

As the “do nothing” option does not meet any of the four policy objectives set out above, it is not a viable option for dealing with the transposition of this Directive. Consequently, it should be fully eliminated.

Option 2: Transpose the Directive by secondary legislation under the European Communities Act, 1972

Section 3 of the 1972 Act permits the transposition of certain EU measures into domestic law by way of regulation rather than the creation of primary legislation. Where an EU measure does not require a Member State to formulate novel policy approaches to give effect to an EU obligation or objective, the transposition of the measure can be undertaken by secondary legislation under the 1972 Act.

The 1972 Act does not offer a satisfactory legislative route for transposing the discretionary provisions of a Directive which require policy responses on the part of the Member State. In the context of the Directive, the 1972 Act does not fully serve the purpose of achieving the full transposition. The 1972 Act may provide a route for the transposition of some obligatory operative provisions in the Directive. However, the 1972 Act would not be an appropriate mechanism to enable representative actions to be heard in an Irish court or for the administrative machinery necessary for organisations to be designated as a Qualified Entity. These policy decisions will require enabling primary legislation to allow them to be transposed lawfully.

If the 1972 Act was used to transpose the Directive, many parts of the Directive could not be operationalised because there would be no legislative basis for doing so. The limitations associated with using the 1972 Act are such that Ireland would run a high risk of being subject to infringement proceedings for not fully transposing the Directive. Further, full transposition by way of regulation is likely to be challenged on a constitutional basis, and the calibre of the outcomes that it yields.

In the circumstances, option 2 is a sub-optimal mechanism as it could not offer an effective mechanism for fully transposing the Directive. Further, it would not meet any of the policy goals. Accordingly, option 2 must be eliminated as a feasible means for transposing the Directive.

Option 3: Transpose the Directive by way of primary legislation

This option allows for the preparation of primary legislation to give effect to the Directive, for enabling provisions to allow the Minister for Enterprise, Trade and Employment to make Ministerial Regulations to lay down procedures for the full designation process for Qualified Entities, the waiving of court fees for Qualified Entities seeking to launch a representative action (function of the Minister for Justice), the setting of fees for consumers seeking to participate in a representative action, the monitoring, review and reporting on entities designated as Qualified Entities, etc. Primary legislation allows the Minister to set out the underpinning policies and principles necessary for the preparation of Ministerial regulations without the need for specific operative provisions to be contained in the Act. The same applies to the making of Ministerial

Part 2: Identification and description of options

regulations in relation to matters affecting the court which will be nominated to hear representative actions in due course. The choice of selecting primary legislation to transpose the Directive also confers the advantage of subjecting the legislative process to full Parliamentary scrutiny, unlike the preparation of implementing regulations under the 1972 Act. By selecting the primary legislation route, the process of publishing the general scheme of a Bill, publication of the Bill itself and the scrutiny process on the draft Bill as it progresses through the Oireachtas subjects the transposition process to a very rigorous parliamentary scrutiny process and allows for revisions to the Bill.

The use of the primary legislative route offers a precise and much more focussed tool to the policy maker in terms of the latitude they need to fully transpose a measure such as the Directive. When subjected to addressing the various requirements of efficiently transposing the Directive, this option offers the necessary flexibility to meet all the transposition requirements for successfully achieving this task.

Option 3 is considered to be an optimal solution for the challenges posed in transposing this measure. Further, it meets all of the policy objectives mentioned in Part 1 of this RIA. Accordingly, option 3 is recommended as the preferred route for addressing the transposition requirements for this Directive.

Part 3: Stakeholder consultation

Consultation process

The Department undertook a comprehensive stakeholder and public consultation programme prior to the drafting of the General Scheme, to ascertain stakeholder perspectives on policy formulation to give effect to the discretionary aspects of the Directive.

Visitors to the Department's website who wished to make a submission were provided with a description of the Directive and a short synopsis of those mandatory provisions of the Directive which Ireland is required to directly transpose.

Questions Asked

Respondents were asked for their views on the discretionary measures in the Directive, which were grouped as follows:

Qualified Entities

- Whether Ireland should impose the same criteria for organisations which sought designation as a Qualified Entity to bring domestic representative actions as for those seeking to bring cross-border representative actions;
- Whether to permit the granting of designation as a Qualified Entity on an ad-hoc basis;
- Whether to permit public bodies to be designated as Qualified Entities.

Representative actions

- Whether to permit the bringing of actions for redress and injunctions in one action;
- Whether to require Qualified Entities to communicate with traders prior to commencing a representative action for an injunction against a trader;
- Whether to require consumers to opt into representative actions for redress or opt out
- Whether to empower the High Court to refuse to approve unfair settlement terms;
- Whether to require traders to inform consumers about representative actions brought against them.

Administration

- Whether Ireland should set up a database of representative actions brought in the State;
- Whether to provide financial support for Qualified Entities, and to permit Qualified Entities to charge a modest entry fee to consumers who wish to be represented by it in a representative action.

Part 3: Stakeholder consultation

Respondents' Answers

In total, 17 comprehensive submissions were received from organisations which provided the Department with insights from three different perspectives.

1. Industry representative organisations;
2. Consumer representative organisations;
3. Legal and insurance firms.

With respect to the specific issues which were asked in the consultation document, the views of respondents to the consultation can be summarised:

Qualified Entities

The consensus from submissions was that, for Ireland where the number of designated Qualified Entities is expected to be small, and in order to promote transparency and improve the public understanding of the work and remit of Qualified Entities, it would be appropriate to apply the same criteria for designating Qualified Entities for both a domestic and cross-border purposes.

It was also felt that the same criteria should apply to any public bodies which might seek designation as a Qualified Entities.

It was also the consensus of the respondents that, in order to ensure that Qualified Entities could demonstrate a track record in representing the collective interests of consumers before commencing representative actions, Qualified Entities should not be designated on an ad-hoc basis.

Representative Actions

The consultation process showed that respondents believed that representative actions brought under the Act should follow as closely as possible existing rules, practice and procedure of civil claims brought through the High Court.

To that end, respondents felt that it would be appropriate to permit Qualified Entities to seek both redress and injunctive relief in the same action. It was also felt that, in order to promote the early settlement of claims between the parties while protecting the rights of consumers, the High Court should be empowered to refuse to approve settlement terms which it deemed to be unfair. Similarly, in order to prevent unnecessary litigation, respondents believed that Ireland should impose rules for compulsory communication between the Qualified Entity and the trader in an attempt to resolve the alleged infringement of the consumers' rights before the Qualified Entity is permitted to bring a representative action for injunctive relief.

Part 3: Stakeholder consultation

Respondents were unanimous in their belief that Ireland should adopt an “opt-in” approach to participating in representative actions. This would require consumers to indicate their wish to be part of a representative action and be bound by its outcome. It was noted by some respondents that there may be constitutional difficulties with an “opt-out” mechanism where all consumers would be deemed to be part of the litigation unless they informed the Qualified Entity of their desire not to be included as part of the action. Respondents believed that this “opt out” mechanism may result in consumers, who did not opt out in time, being part of litigation against their wishes.

In order to increase the public’s knowledge of representative actions and their outcomes, a majority of respondents believed that the court should be permitted to order traders to inform consumers about representative actions brought against them.

Administrative arrangements

The Directive permits Member States to set up a public database of representative actions brought in the State, including details of parties, the issues of consumer rights which gave rise to the case and the outcome. A majority of respondents believed that Ireland should set up such a database to help consumers understand the types and range of cases which have been before the courts. A number of respondents noted that care would be needed to ensure that accurate details of the outcome of cases is provided, especially where a case against a trader has not been proven.

Respondents believed that Qualified Entities, because they must be of a not-for-profit nature, should be able to charge a modest entry fee on consumers who have opted into the representative action. It was noted by many respondents that the maximum fee should not be too high to discourage consumers from exercising their right to be represented by a Qualified Entity.

It was also felt that rules should be put in place to require Qualified Entities to publicly disclose their source of funding, and the source of funding of any individual representative action, to avoid potential conflicts of interest. It was generally felt that the State should not directly fund litigation brought by Qualified Entities as to do so, without providing similar funding to defendant traders (some of whom may be sole traders or SMEs), would be unjust.

It was noted by some respondents that, where the cost of litigation may be a disincentive for a Qualified Entity to bring a case, efforts could be made by the State to lower these costs through reduced court fees and charges to parties bringing litigation under this Act. It was also felt that,

Part 3: Stakeholder consultation

where appropriate, summary procedure could speed up the process of litigation and thereby limit costs incurred.

Pre-Legislative Scrutiny

The General Scheme was referred to the Joint Committee on Enterprise, Trade and Employment for pre-legislative scrutiny on 24 March 2022, and the Committee invited officials of the Department to attend a hearing by the Committee of its scrutiny of the Bill on 29 June 2022. The Joint Committee issued their report on 1 December 2022.

The Department has considered the recommendations in the Joint Committee's report. The Department acknowledges there are limitations arising from the common law rules on Champerty and Maintenance which restrict access to third party funding of civil litigation in Ireland. In that respect, the Department looks forward to a review of the policy in this area which will be undertaken by the Department of Justice after the completion of the detailed examination of this subject being undertaken by the Law Reform Commission.

Part 4: Selected policy option

Structure of legislation

It is intended that the Directive and the policy option selected will be transposed through a short piece of legislation with three Parts. Part 1 will deal with administrative issues such as commencement dates and regulations. Part 2 will deal with the administration of the designation and monitoring of Qualified Entities, and Part 3 will deal with the hearing of representative actions. The consumer rights provisions covered the legislation will be listed as a Schedule to the Act.

Representative Actions

To give effect to both the mandatory and discretionary elements of the Directive, as many as possible of the existing Rules, practices and procedures for High Court civil litigation will be followed in a representative action. It is proposed to designate the High Court as the court in Ireland to hear representative actions. This is because (a) the monetary value of a representative action brought by a large number of consumers may exceed Circuit Court jurisdiction and (b) the High Court has an inherent jurisdiction to direct cases and make orders to enforce its decisions.

Qualified Entities will be the claimant party in a representative action. The burden will remain on the Qualified Entity to satisfy the court that the matter at hand is an appropriate one for a collective action, and that the Qualified Entity is in conformity with all of the rules for designation and is free from conflicts of interest between the interests of the consumers and the interests of its financial backers (if any).

Once the court has determined that the matter is an appropriate one for a representative action then the Qualified Entity will be the claimant party with all of the responsibilities and rights that would normally accrue to any party bringing a contract or tort action before the High Court. The Qualified Entity, rather than the consumers, will manage a case. This is intended as a measure to protect consumers from bearing the costs and administrative burden of managing their case.

Putting the Qualified Entity in the position of the claimant party / plaintiff will minimise the need for new bespoke rules of court or the development of new court practices and procedures in the High Court. From the perspective of a defendant trader, the process of the litigation will be almost exactly the same as if defending a case brought by one consumer acting for themselves.

Any settlement agreement between the parties will require the approval of the court, and it is the court who will direct how any compensation is to be paid to consumers. This provides external oversight of the representative action and further protects consumers.

Designation of Qualified Entities

The most straightforward and practical means of designating Qualified Entities will be to centralise the process within the Department of Enterprise, Trade and Employment. It is proposed that regulations will be made to set out exactly how an organisation can seek designation and the procedural mechanisms which will be followed. The Bill includes mechanisms for review and appeal of a decision by the Department not to designate a body as a Qualified Entity.

Section 13 of the Bill transposes rules within the Directive regarding how and when a complaint may be made by the European Commission, another Member State or the Courts (or any other person) about whether a Qualified Entity designated in Ireland continues to be in compliance with the rules. The Bill allows the Minister to investigate these concerns and revoke designation, if so required.

It is intended that a Qualified Entity's designation will be reviewed at least every five years. This will ensure that the list of Qualified Entities in Ireland is maintained and that only those organisations which are in conformity with the designating criteria may bring representative actions.

Part 5: Cost-Benefit Analysis

European Commission impact assessment

In 2018, the European Commission prepared an impact assessment on the Directive.² These impact assessments examined the current position with respect to the capacity of consumers to enforce and exercise their consumer protection rights, policy options with respect to introducing a collective redress measure on a pan-EU basis, and the likely impacts on consumers, traders and the wider EU policy agenda of these options. The Directive being transposed by this proposed Bill is the outcome of these assessment exercises by the European Commission.

This section of the RIA complements this European Commission report by assessing the impact of the preferred means of transposing the Directive in Ireland.

Necessity for transposing EU Directives

As outlined in an earlier part of this RIA, timely transposition of the Directive into domestic legislation is a necessity to avoid potential infringement proceedings against Ireland by the European Union. Ireland currently has no collective redress or representative action mechanism in domestic law and therefore transposing the requirements of the Directive necessitates the creation of a new representative action mechanism into domestic law.

Any delay in the transposition of the Directive will have direct repercussions on the ability of Ireland to implement the requisite Ministerial Orders on the setting up of the designation process for Qualified Entities in Ireland. The Directive permits Ireland and other Member States a further six months from the transposition deadline (i.e., to 25 June 2023) to have the mechanisms in place to allow consumers and Qualified Entities to use the redress mechanism.

Thus, any delays in transposing the Directive now would not only result in an increased risk of reputational damage to Ireland (and consequent fines for late transposition) but also an inability for Irish consumers to exercise their ability to assert their consumer redress rights and provide them with access to justice.

Furthermore, as previously noted, the purpose of the Directive is to ensure there is a mechanism in each country for a representative action to be brought, either by a Qualified Entity designated in its own State, or by a Qualified Entity designated in another State to be able to work on a cross-border basis. Thus, by 25 June 2023, Qualified Entities designated elsewhere will have the right to bring a case to the Irish High Court, for assessment by the court of its admissibility under

² Available at: [https://ec.europa.eu/transparency/documents-register/detail?ref=SWD\(2018\)96&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=SWD(2018)96&lang=en).

the Directive. Late transposition will undermine the ability of Qualified Entities in other Member States to exercise those rights.

Impact on vulnerable groups

The purpose of the Directive is to allow consumers to defend their consumer rights against traders.

Consumers already have a number of rights; however, it is recognised by the European Commission that it is not always realistic that individual consumers will know those rights, or have the resources (money, time, inclination) to exercise them. The Directive allows consumers to exercise their rights on an efficient, cost-effective manner by harnessing the collective power of a Qualified Entity.

The current position provides an unfair advantage to traders who may escape redress because of the existing difficulties faced by consumers who want to exercise their rights. The proposed Bill will assist vulnerable consumers who are unable to speak for themselves but who would benefit from collective redress.

Impact on the environment

It has been noted by the European Commission in its impact assessment that many of the EU consumer rights provisions set out in the annex to the Directive and transposed into domestic law in Schedule 1 of the Bill, relate to energy efficiency and other environmental regulations.

While it is not expected that the creation of a collective redress measure for consumers will have any direct environmental impact, it is notable that the existence of a collective redress measure may act as a deterrent to traders who currently breach EU environmental measures.

Impact on business and consumer rights

Traders operating in Ireland and other EU Member States are already potentially subject to investigation and enforcement by statutory regulators. The transposition of the Directive will benefit traders in Ireland who are compliant with consumer rights regulations, as it will add an additional mechanism for consumers to take action against non-compliant traders.

The existence of collective redress, and its use by Qualified Entities, may encourage traders to respect consumer rights. The requirement of Qualified Entities to publish information on cases they have brought, or are intending to bring, may also act as a deterrent against breaches of consumer protection law.

Part 5: Cost-Benefit Analysis

The transposition of the Directive through legislation potentially makes consumers a more potent force when there is evidence that their consumer rights are being infringed. As mentioned previously, many consumers have a limited knowledge about their consumer rights and a poor understanding of how to seek compensation or redress where those rights have been breached by an errant trader. Collective redress will both increase the public understanding of consumer rights (through enhanced publicity from Qualified Entities) as well as reporting of high-profile cases, and also provide a financially efficient way for a consumer to obtain redress through a representative action led by a Qualified Entity.

This mechanism will allow consumers avoid the direct costs of commencing their solo case against a trader. Without risk of severe financial costs and the need to identify themselves as the primary litigant in a civil claim, consumers will be able to participate in a binding High Court action at modest cost by supporting a Qualified Entity who is prepared to act on their behalf against an errant trader. This means the existing body of consumer rights legislation can be exercised by more consumers more efficiently.

As the purpose of the legislation is specifically focused on assisting consumers to obtain redress, it will assist with the implementation of existing consumer rights legislation already on the statute books by having a collective redress mechanism which was not available to Irish consumers previously.

The proposed legislation does not impose additional obligations on traders; it provides a new route for consumers to enforce their existing rights before the High Court.

The goal of the Directive is to help the internal EU market to work better by promoting competition between compliant traders. Empowering consumers to exercise their rights will disincentivise malicious trading practice, contribute to the better function of markets in Ireland and across the EU, and therefore promote the better functioning of the single market.

Impact on the SME Sector

This procedural mechanism has no impact on traders who do not infringe consumer rights set out in the annex to the Directive, and which are transposed into the Schedule to the Act. This legislation does not interfere with the safeguards against exploitative or abusive litigation as is currently provided for in domestic law. These safeguards will be bolstered by empowering the Court to dismiss manifestly unfounded cases at any stage of proceedings.

For non-compliant SMEs, the presence of a representative action mechanism has a risk for reputational damage (arising from publicity about any successful case) and the costs of

Part 5: Cost-Benefit Analysis

defending a representative action. As per the existing rules of court, 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.

Ireland has decided to transpose a discretionary measure in the Directive to require Qualified Entities to communicate with a trader before commencing a representative action for injunctive relief. The goal of this communication requirement is to encourage the trader to cease the alleged infringement without the requirement of the Qualified Entity seeking a court order requiring them to do so. This is an opportunity for a trader to move into compliance without having to defend their actions in court.

A separate “SME Test Report” is appended to this RIA.

North-South, East-West impact

The decision of the UK to leave the European Union has had an immediate impact on consumer activity in Ireland, with a decline in cross-border online sales by Irish consumers of goods sold in the UK. For the purposes of the Directive, the UK is considered a third country, and therefore would be outside of the scope of the measures contained in the proposed legislation.

The growth of online trading by Irish consumers from traders based elsewhere in the EU means it is opportune to increase the public understanding of consumer rights and ensure that there are redress mechanisms in place on a cross-border basis throughout the EU.

Impact on human rights

Better consumer rights enforcement and redress opportunities will contribute to ensuring the right to an effective remedy for breaches of consumer rights legislation as well the bolstering the right of defence enshrined in Article 47 of the EU Charter of Fundamental Rights.

Compliance impact on third parties

The parties to a representative action will be the Qualified Entity (plaintiff/claimant party) and the trader (defendant). Consumers who have indicated their wish to be represented by the Qualified Entity may be considered a connected and interested third party for the purposes of this Regulatory Impact Analysis. The legislation will protect consumers from any costs incurred by the Qualified Entity, and any orders for costs made against the Qualified Entity will be paid by it.

Any costs order made against the trader will be binding on it. The High Court will be empowered to require any party to communicate the outcome of a case with the public or the consumers

Part 5: Cost-Benefit Analysis

affected, and to incur the costs of doing so. Again, it is intended that the normal established “loser pays” principle will apply.

The only circumstance in which an individual consumer may be ordered to pay any costs is where the court determines that costs have been incurred as a direct result of the behaviour of that individual consumer.

In order to improve the financial ability of a Qualified Entity to bring a case, the legislation will permit it to charge consumers a modest entry fee.

Part 6: Enforcement, Compliance, Review

Enforcement

With respect to enforcement of the outcome of a representative action, existing powers are available to the High Court to make orders against parties which fail to comply with those orders. Such penalties may include the form of a fine.

As previously noted, it is intended that the Department of Enterprise, Trade and Employment will oversee the process of designating Qualified Entities. Regulations will be made to set out exactly how an organisation seeks designation, and the criteria for designation are set out in the legislation.

Designation as a Qualified Entity will be reviewed at least every five years. The legislation includes mechanisms for review of decisions made by the Minister not to designate an organisation as a Qualified Entity.

Compliance

Concerns about an individual Qualified Entity's compliance with the designating criteria may be made to the Department. On receipt of these concerns, an investigation will be carried out and, should it be found that the Qualified Entity is not in compliance with any one of the criteria, designation can be revoked. Again, the legislation includes a review mechanism of that decision.

Concerns may be raised by any other EU Member State, the European Commission, or any other body. Concerns may be raised by the High Court at the commencement of any representative action about, inter alia, the Qualified Entity's independence from the funders of the action.

Review

The Directive requires the European Commission to carry out an evaluation of the Directive and its operation no sooner than June 2028. By that date, the European Commission must undertake a review of the operation of cross-border representative actions.

The Directive also requires Member States to provide the European Commission, for the first time by 26 June 2027 and annually thereafter, the following information:

- (a) the number and type of representative actions that have been concluded before any of their courts or administrative authorities;
- (b) the type of infringements which were the subject matter of the representative action and the parties to those representative actions;

Part 6: Enforcement, Compliance, Review

(c) the outcomes of those representative actions.

It is intended that Ireland will undertake its own internal mid-term review of the operation of the representative action mechanism in Ireland in 2025, so that any adjustments or reforms can be made in early course. Furthermore, in line with practice, the Department will complete a Post Enactment Report on the legislation 12 months after enactment.

Appendix 1: SME Test Report

What is the SME Test?

The SME test puts the “Think Small First” principle at the centre of policy-making. It is a component of the European Commission’s Better Regulation guidelines. The test encourages each Member State to include an appraisal of the burden on SMEs for relevant legislation and regulation.

What is its purpose?

The purpose of the SME test is to request policymakers to consider the negative impact of any new legislation or regulation which may create a burden on SMEs. The main aim of the test is to propose possible exemptions or less stringent requirements for smaller companies.

Points from an Irish SME test include exemptions, deadline variation/flexibility and simplifying regulation implementation.

Not only will these points reduce the burden on small business owners, but the simplification may increase compliance.

What is this SME Test focused on?

This SME test has been carried out by the Department on the Representative Actions for the Protection of the Collective Interests of Consumers Bill 2022.

Why is the Bill being developed?

The Bill transposes the Directive which was published in the Official Journal on the 4 December 2020. Member States have until the 25 December 2022 to transpose.

The Directive grew from a combination of events such as the 2015 “Dieselgate” scandal, the massive 2017 flights cancellation³ and European Commission initiatives such as the “New Deal for Consumers” package. The 2015 “Dieselgate” scandal and the massive 2017 flights cancellation affected hundreds of thousands of consumers across the EU and highlighted gaps in EU consumer rights law. Consumers did not have means to respond in groups to the breaches of EU consumer rights law. Following on from these mass harm events, the European Commission launched the “New Deal for Consumers” on 11 April 2018 with two aims: (1) to facilitate coordination and effective action from national consumer authorities at EU level, and (2) to

³ Commission, ‘Inception Impact Assessment: A New Deal for Consumers – revision of the Injunctions Directive’ (Commission 2018) page 1.

Appendix 1: SME Test Report

reinforce public enforcement action and better protection of consumer rights. The package comprised proposals for two new Directives, one of which was a proposal on representative actions for the protection of the collective interests of consumers. This proposal became the Directive and repealed the pre-existing Directive 2009/22/EC on injunctions for the protection of consumers' interests and aims to improve tools for stopping illegal practices and facilitating redress for consumers in a mass harm situation ('Directive 2009/22/EC'). The European Commission commented in its Inception Impact Assessment on the Directive 2009/22/EC that studies confirmed:

the insufficient effectiveness of both injunctive and compensatory collective redress mechanisms in the Member States and highlight[ed] the lack of direct effects of injunctions on affected consumers. Also the 2017 Justice Scoreboard highlights significant variations in functioning across national justice systems in terms of length of proceedings, including for injunctive relief.⁴

The Directive aims to ensure cheaper and more effective means to stop and remedy breaches causing simultaneous mass harm to EU consumers. As cross border commerce is at the heart of the European single market, the Directive allows Qualified Entities to be designated to take cross border representative actions in any Member State as well as national actions. Consequently, the Directive allows 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.

In preparing legislation to give effect to the Directive, four policy objectives have been identified:

1. Formulate a legislative structure to give effect to the Directive
2. Determine which approach to take with respect to the discretionary measures contained in the Directive
3. Determine a structure for representative action within the existing Irish civil litigation system
4. Lay down arrangements for administrative processes in Ireland for the designation of both domestic and cross border Qualified Entities.

Application of the SME Test:

- (1) Consultation;

⁴ Commission, 'Inception Impact Assessment: A New Deal for Consumers – revision of the Injunctions Directive' (Commission 2018) page 2 (footnotes omitted).

Appendix 1: SME Test Report

- (2) Identification of affected businesses;
- (3) Measurement of the impact on SMEs;
- (4) Assessment of alternative mechanisms and mitigating measures.

(1) Consultation

In March 2021 the Department of Enterprise, Trade and Employment launched a public consultation ascertain stakeholder perspectives on policy formulation to give effect to the discretionary aspects of the Directive.

17 submissions were received from a range of stakeholders including businesses. The outcome of the public consultation process has informed the General Scheme of Representative Actions for the Protection of the Collective Interests of Consumers Bill 2022

(2) Identification of affected businesses

The Bill provides no additional regulatory requirement on SMEs. SMEs are entitled to engage legal representation if they so wish and at their own cost.

(3) Measurement of the impact on SMEs

The Bill does not impose additional regulatory requirements for SMEs. The Bill aims to ensure cheaper and more effective means to stop and remedy breaches causing simultaneous mass harm to Irish and EU consumers. The introduction of the Bill will have insignificant costs for compliant SMEs and reduce costs for SMEs with cross-border activities because of increased harmonisation of national procedures.⁵ Furthermore, the Bill stipulates that Qualified Entities must enter into pre-litigation consultations.

The European Commission's SME Panel consultation found the majority of SME respondents agreed 'that stronger rules on penalties would contribute to a more level playing field'.⁶ European

⁵ Commission, 'Impact Assessment Accompanying Proposals for Directives of the European Parliament and of the Council (1) amending Council Directive 93/13/EEC, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules and (2) on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC' SWD(2018) 96 final page 79.

⁶ Commission, 'Impact Assessment Accompanying Proposals for Directives of the European Parliament and of the Council (1) amending Council Directive 93/13/EEC, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer

Appendix 1: SME Test Report

Commission surveys have directly linked stronger rules on penalties with 1 better compliance by business, 2 greater consumer trust, 3 more effective enforcement of EU consumer laws and 4 improved deterrence by EU consumer laws.⁷

The Bill and the Directive do not create new penalties for EU consumer law. The Bill creates a new way for Irish consumers to enforce their rights and therefore strengthen their ability to avail of the existing rules on penalties.

A well-functioning insurance market is a vital component of economic activity and financial stability. Encouraging greater use pre-litigation consultations and facilitating the addressal of similar issues at the one-time result in cost savings for SMEs.

(4) Assessment of alternative mechanisms and mitigating measures

The Bill requires Qualified Entities to engage with in pre-litigation consultations. Additionally, the Bill enables effective case management as traders can deal with large group represented by the Qualified Entity rather than lots of individual consumers.

The representative action proposed by the Bill is voluntary, and the consumer must provide consent to the Qualified Entity before the Qualified Entity can represent the consumer. Where a consumer chooses not to consent, the consumer can commence individual legal proceedings if they so wish.

Flexibility is afforded to traders and therefore SMEs that engage in the pre-litigation consultations. The Bill sets deadlines for pre-litigation consultations and allows for amendment of these deadlines where the trader engages in the pre-litigation consultation and if both consider the extension would be beneficial. Where the pre-litigation consultations are not successful the Court will expedite the bringing of the representative action.

protection rules and (2) on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC' SWD(2018) 96 final page 76.

⁷ Commission, 'Impact Assessment Accompanying Proposals for Directives of the European Parliament and of the Council (1) amending Council Directive 93/13/EEC, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules and (2) on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC' SWD(2018) 96 final Annex 7 page 46.

Appendix 1: SME Test Report

The Bill does not amount to the regulation of any particular business sector. The Bill aims to ensure cheaper and more effective means to stop and remedy breaches causing simultaneous mass harm to Irish consumers.

The introduction of pre-litigation consultation in the Bill does not amount to the regulation of a business. The pre-litigation consultation is intended to facilitate an increase in the number of claims settled without recourse to litigation and allows parties to try to reach a settlement and facilitate a resolution. The introduction of pre-litigation consultation, as an option offers a further opportunity to enhance the speedy non-adversarial approach of consumer law in Ireland.

Summary

Overall, the proposed Bill, including the introduction of pre-litigation consultation, should see a more cost-effective and time-efficient for addressing mass breaches of Irish consumer rights.

For SMEs which are compliant with consumer protection legislation these costs will not arise.

Appendix 2: Comparison of current Irish position, US class actions and EU representative actions

	Current position – Ireland	Class Action – US	Representative Action – EU
Who is the claimant party?	Each individual consumer must take their own case.	Led by for-profit organisations/lawyers	Led by designated not-for-profit organisations representing the collective interests of consumers.
How is the case created?	Each individual consumer must take their own case.	Class certification process for each action or case.	An organisation is designated as a Qualified Entity to take representative actions.
How do individuals become part of the case?	No provision in Irish law.	Automatically included but can choose to opt-out.	Not automatically included but can choose to opt-in.
Who is responsible for starting the legal action?	Each individual consumer must take their own case.	Individuals who suffered a wrong may choose to group together.	Individual consumers may opt into the case, thereafter the Qualified Entity manages the case.
Who is responsible for legal costs?	Each individual consumer is responsible for the legal costs and, if unsuccessful, will pay the winner’s costs	All the individuals that form the group or the class action.	The designated Qualified Entity. Individual consumers will not have costs orders made against them if the case is unsuccessful.
Does the “loser pays” principle apply?	Yes. If the consumer wins the case, its costs will be borne by the losing side.	No. In the main each party pays their own costs.	Yes. If the Qualified Entity wins the case, its costs will be borne by the losing side.

Appendix 2: Comparison of current Irish position, US class actions and EU representative actions

	Current position – Ireland	Class Action – US	Representative Action – EU
Can there still be an out of court settlement?	Yes. Settlement terms may be confidential.	Yes.	Yes, subject to the approval of the court.
Who gets compensation if it is awarded?	The individual consumer who brought the case.	All the individuals. Lawyer representing may get a portion of the compensation and or fees.	The Qualified Entity (not-for-profit) will recoup its expenses, and any award will be shared between the individuals who opted to the case.
How is the case funded?	Each individual consumer must finance their own case.	Outside funding is permitted – some states require disclosures but not all.	The Qualified Entity must publicly disclose their funding sources. Court may refuse a case if a conflict of interest exists between the interests of consumers and the funders. Qualified Entities can use entry fees from individuals who opt into the action as a source of income.
Are cases taken subject to Statute of Limitations?	Yes.	Yes.	No. The application of the Statute of Limitations is suspended while a Qualified Entity is taking a case for an injunctive measure on behalf of individuals

Appendix 2: Comparison of current Irish position, US class actions and EU representative actions

	Current position – Ireland	Class Action – US	Representative Action – EU
Is alternative dispute resolution possible or does the matter have to be taken to court?	Alternative dispute resolution is an option an individual consumer may consider.	The class action can choose to enter into alternative dispute resolution.	A Qualified Entity can engage in alternative dispute resolution. Before an injunctive measure can be brought the Qualified Entity must enter into consultations with the trader.
How do consumers get compensation?	The court determines the value of damages to be paid to the consumer by the trader.	The court determines the overall value of damages which is distributed amongst those who participate in the class action.	The court will determine the value of damages for consumers involved in the representative action, and how and when it must be paid.