CLIMATE BAR
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Enhancing Access to Environmental Justice: A New Class Action Procedure for Environmental Law in Ireland

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Introduction

1. Under Article 9(3) of the Aarhus Convention, Parties must ensure that 'members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities'[1] which contravene environmental law. This paper suggests that the lack of a class action procedure in Ireland hampers such access to the public, and that failure to introduce such a procedure will be a lost opportunity to enhance access to justice in environmental law as well as other areas. As will be discussed below, class actions facilitate the aggregation of small claims that would be too insignificant or costly to initiate individually, enhancing procedural economy, fairness and access to justice. This is of particular importance for environmental law, in which effective enforcement has been identified as an issue by stakeholders in the sector. Class actions would empower large groups of litigants to have their cases heard and their injuries compensated in private actions, as well as creating a new avenue for public-interest litigation.

2. Class actions (sometimes called 'multi-party actions', 'collective actions', 'representative proceedings' or a range of other related terms) were available in the Courts of Chancery in England for many hundreds of years but dwindled in the mid-19th Century and went into a hibernation from which they have never awakened.[2] Ireland inherited this wariness of multi-party litigation and the English Court's restrictive understanding of the 'same interest' requirement[3] which permits such actions only where the interest, injury and remedy are *exactly the same* as opposed to being merely common. Ireland is among the last of the major common law countries without a procedure for multi-party litigation, and indeed 21 of the biggest 25 economies in the world have some form of the procedure available.[4]

3. Calls for reform in this area have already been well made, including by a 2005 Report by Irish Law Reform Commission which provides a comprehensive description of the main issues and offers a recommendation on introducing a multi-party action (MPA) procedure.[5] A report by the EU Bar Association and Irish Society for European Law joined this call in 2020.[6] An EU Directive on 'Collective Redress' endorsed by the European Parliament in November 2020 compels all member states to create procedural mechanisms for allowing qualified entities to bring representative actions, and must be enforced domestically by 2023.[7] Although its purposes are quite divorced from this paper's, this demonstrates the rising tide in favour of collective ('class') procedures across Europe.

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[1] United Nations Economic Commission for Europe Convention on, 'Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters' (1998), art 9(3) [hereinafter Aarhus Convention (1998)].
[2] Stephen Yeazell *From Medieval Group Litigation to the Modern Class Action,* (Yale University Press 1987) 211.
[3] *Duke of Bedford v Ellis* [1901] AC 1.
[4] Deborah R. Hensler et. Al, *Class Actions in Context* (Edward Edgar Publishing 2013), 3.
[5] Law Reform Commission, *Report on Multi-Party Litigation* (LRC 76-2005).
[6] EU Bar Association and Irish Society for European Law, *Report relating to Litigation Funding and Class Actions* (2020).
[7] Council Directive 9223/20 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, 2020 O.J. [hereinafter Council Directive 9223/20].

4. This paper makes the case for a class action procedure in Ireland that will be effective for all claimants but in particular those seeking to enforce environmental law and be compensated for injuries and violations related to environmental matters. Section 2 provides an overview of the procedures available in Ireland and their shortcomings. Section 3 outlines the benefits of a class action procedure in light of the above. Section 4 examines the approach of other regimes, and Section 5 details how these comparisons can help build towards a comprehensive procedure for the Irish context.

5. Ahead of this, note the working definition of class actions for the purposes of this paper:

   'A class action is a legal procedure which enables the claims (or part of the claims) of a number of persons against the same defendant to be determined in the one suit. In a class action, one or more persons ('representative plaintiff') may sue on his or her own behalf and on behalf of a number of other persons ('the class') who have a claim to a remedy for the same or a similar alleged wrong to that alleged by the representative plaintiff, and who have claims that share questions of law or fact in common with those of the representative plaintiff ('common issues'). Only the representative plaintiff is a party to the action. The class members are not usually identified as individual parties but are merely described. The class members are bound by the outcome of the litigation on the common issues, whether favourable or adverse to the class, although they do not, for the most part, take any active part in that litigation.'[8]

The Irish Situation: Current Limitations

6. While there are currently no court procedures that directly facilitate class-action style lawsuits, there are a limited number of existing ways in which Irish courts allow multiple-parties to become involved with a single action.

7. Firstly, it is worth mentioning the 'test case' model, which circumvents the general prohibition on class actions in Ireland, with limitations. A case is taken by one individual as a generic case to 'test' whether liability can be established, and further cases can follow. Significant test cases in Irish legal history include the 'army-deafness' claims, and the procedure continues to be routinely used, most notably in recent times by pub owners challenging FBD's refusal to indemnify them for losses related to the Covid-19 pandemic.[9] Joanne Blennerhassett conceptualises test cases as one approach within a 'confusing array of alternative methods' used by the Courts to avoid using multi-party actions.[10] Inefficiency is a key problem with the method; in the famous *Social Welfare Equality Cases*, two cases were taken by women who had been denied equal treatment as a result of the government's failure to implement the 1978 Directive on Equal Treatment in Social Welfare. The state settled with the two respective plaintiffs, and made settlements with 2,700 out of the total 69,000 women who were affected. 8,500 other claims were initiated, and 70 women took yet another case and it was found that they too were entitled to relief. Eventually, the government resolved to make payments to the entire group of 69,000 women. A class action procedure would have made the process more efficient and straightforward, saving judicial and government resources and ensuring speedier relief for the persons affected. Other shortcomings of the procedure relate to 'suitability' and

[8] Rachael Mulheron, , *The Class Action in Common Law Legal Systems : A Comparative Perspective*, (Carl Baudenbacher, et al ed, Bloomsbury Publishing Plc, 2004) 3.
[9] Aodhan O'Faolain, 'Pubs win landmark test cases against FBD over Covid-19 coverage' *Irish Legal News* (Dublin, 5 February 2021) <https://www.irishlegal.com/articles/pubs-win-landmark-test-cases-against-fbd-over-covid-19-coverag e>
[accessed 10th December 2021].
[10] Joanne Blennerhassett, *A comparative examination of multi-party actions : The case of environmental mass harm* (Bloomsbury Publishing, 2006) 256.

'typicality' concepts; there is no way of knowing that a 'lead case' will be the most appropriate one to further the interests of all those that follow. A more formalised class action process which reflects these considerations, as with Rule 23 in the United States, would overcome this issue.

8. That said, the Irish judicial system is not totally silent on class ('multi-party'/ 'representative') actions. Order 15 of the Rules of the Superior Courts, Rule 9 states that *'Where there are numerous persons having the same interest in one cause or matter'*, one or more such persons may sue.[11] The procedure originated as a form of equitable redress in the Court of Chancery in England.[12] However, as described in the Law Reform Commission's 2005 Report on Multi-Party Actions, the limitations are so restrictive that they substantially limit the availability of a meaningful multi-party procedure.[13] As a result, Rule 9 has been invoked by Irish litigants on a limited number of occasions and with limited success.

9. One significant limitation within the Irish context is the requirement that the putative class authorise the plaintiffs to take the suit. In *Madigan v Attorney General,* the plaintiff sought to challenge the constitutionality of a residential property tax on her own behalf and on behalf of all 'assessable' persons within the meaning of the relevant legislative act. [14] She was refused on the basis that none of these persons had authorised the plaintiff to do so. A case of this nature is precisely the kind that would arise in environmental claims, in which a single or a few plaintiffs would take a case on behalf of a wider unnotified but affected group. In a later case, the Courts conceded that written authorisation is not strictly necessary, finding that a list of 1,392 farmers could be represented by five farmer plaintiffs leading a suit challenging certain government schemes.[15] This was because extensive debate between these farmers had taken place throughout the country and the same 1,392 farmers had contributed to a fund with the understanding that it would be used to bring proceedings on their behalf. Despite this flexibility, the requirement for authorisation in practice means that a plaintiff needs a close and pre-existing relationship with putative class members in order to be permitted to take a case in their name.[16] Such a rigid requirement could be made more flexible by borrowing features from class action regimes abroad.

10. Another key limitation is the strict interpretation the Courts have applied to the 'same interest' requirement. In the 1905 *Duke of Bedford v Ellis* case, Lord McNaughten famously articulated this element as requiring 'a common interest, a common grievance and relief in its nature beneficial to all.'[17] As can be seen in other jurisdictions, the question of defining 'the same interest' for the purposes of a class action is a difficult one and the certification stage during which the Court determines whether or not the class has sufficiently similar interests is often just as important (if not more so) as the substantive phase of the litigation.[18] In order for a class action procedure to be successful and effective, Courts must ensure that, *inter alia,* the class have the same or sufficiently 'common' interests, that the same relief will benefit every member of the class in the same way, and that no class members will be subject to individualised defences by the defendants. The Irish Courts' concern with these issues has meant that only

[11] The Courts Service of Ireland, 'Superior Courts Rules', <https://courts.ie/rules/parties> accessed 20 December 2021.
[12] Law Reform Commission, Consultation Paper on Multi-Party Action, (LRC CP 25-2003) Section 1(1)(3).
[13] Law Reform Commission (n 5) 10.
[14] *Madigan v Attorney* General [1986] ILRM 136, 148
[1515] *Greene v Minister for Agriculture* [1990] 2 IR 17.
[16] LRC (n 12) Section 1(1)(7).
[17] [1901] AC 1, 8.
[18] Benjamin Spencer, *CLASS ACTIONS, HEIGHTENED COMMONALITY, AND DECLINING ACCESS TO JUSTICE*, 93 (44) Boston University Law Review, 441-491, at 441 (noting that "The class certification decision is one of the most hard-fought battles in civil litigation").

very clear cases have been permitted, such as where a union sues on behalf of employees.[19] This paper contends that the Irish courts could and should develop a more sophisticated system for determining sufficient 'sameness' of interest, as their counterparts in other jurisdictions have done.

11. Another reason that Rule 9 is little-used is the fact that damages are not available under a representative action procedure. While injunctive and declaratory relief are appealing remedies in some environmental cases, it cannot be denied that pursuit of damages is a key motivating factor for both litigants and their lawyers. Following the consensus of the judiciary in England, the Irish Supreme Court has held since 1930 that representative actions under Rule 9 cannot apply to actions in tort.[20] In 2001, representative actions in tort suits were expressly forbidden under Order 6 Rule 10 of the Circuit Court Rules.[21] In addition, civil aid is not available to plaintiffs of class members in a representative action under the Civil Legal Aid Act 1995.[22]

12. As a result of the above, representative actions in Ireland are 'underused and largely overlooked'.[23] The Rule 9 procedure could certainly be utilised in some limited number of environmental actions where plaintiffs seek non-monetary relief for a group of persons with very similar interests. The usefulness of the procedure as it currently exists therefore warrants further exploration and experimentation by environmentally-concerned litigants and lawyers alike. However, this paper suggests that developing a more sophisticated procedure would yield great benefits for the Irish legal system as a whole, and proposals for same are discussed in sections that follow.

Reasons to Introduce a Class Actions Procedure

13. This section seeks to briefly submit some of the key reasons why existing procedures should be reformed or totally overhauled by specifically relating them to the emergent trend of environmental litigation.

14. The objectives discussed below might be thought of as proxies for the ultimate goal of deterring environmental wrongdoing, modifying behaviour of both private actors and government, and achieving enhanced environmental protection and conservation. Of course, reliance on private tortious liability in lieu of effective public regulation is an approach that has not taken hold this side of the Atlantic and this paper does not propose that it should. Nonetheless, there is no reason that civil liability cannot play a regulatory role in our scheme of environmental protection, and indeed there are already statutory provisions that provide for such liability.[24]

A Procedure for Current Context

15. Firstly, and to borrow from the Law Reform Commission's Consultation Paper on the same issue; 'the phenomenon of multiple suits involving the same or similar claims against one or more defendants is no longer rare or exceptional in modern society'.[25] To name a few, consumer protection and data protection are ever-expanding areas of law which demand common-sense and consistent procedures through which large groups of litigants can make claims. The Canadian Supreme Court has held that the growth of the class action procedure reflects 'the

[19] *Rafferty v Bus* Éireann [1997] 2 IR 424
[20] *Moore v Attorney General (No 2)* [1930] IR 471.
[21] Circuit Court Rules, 2001, S.I. No. 510/2001.
[22] Civil Legal Aid Act 1995, Art. 28(9)(a)(ix).
[23] Law Reform Commission (n 5), 10.
[24] See eg Waste Management Act 1996 (as amended), ss 57 and 58; Local Government (Water Pollution) Act 1977, s. 12; Air Pollution Act 1987, s 4. (quoted in Joanne Blennerhassett, 2016 (n 10)).
[25] Consultation Paper (n 12) Section 3(1)(1).

rise of mass production, the diversification of corporate ownership, the advent of the mega-corporation, and the recognition of environmental wrongs'[26]. The EU Directive on collective actions notes the threat of 'globalisation and digitalisation' putting large numbers of consumers at risk from unlawful practices.[27] A strict requirement for mere individual representation precludes effective litigation in modern conditions, and an effective class action procedure is necessary to fairly resolve many complex contemporary disputes.

16. As regards environmental litigation, the global 'explosion' of climate litigation[28] cases will be mirrored in Ireland and is of course manifested in the recent *FIE* case.[29] The first and most compelling reason for introducing class action reform is to facilitate this rising tide of litigation and to ensure that it occurs under the most fair and efficient conditions. This trend is of concern to both litigants, private actors and government alike, as all benefit from increased procedural efficiency and fairness, judicial economy, and certainty. For this reason, this paper proposes drafting comprehensive and textually grounded rules for class actions, as is described in Section 5, such that certainty prevails and further confusion and inefficiency are bypassed.

Procedural Fairness

17. It is of crucial importance for any legal system that people with similar injuries and grievances are treated fairly and equally and offered equal remedies. A key advantage of the class action procedure is that it provides a procedure with which both plaintiffs and defendants can become familiar and upon which they can rely, and provide a textual basis for fair and consistent judicial decisions. The existence of a formalised procedure enables all parties to deal with an issue on a principled basis, as opposed to through ad-hoc procedures, a fact that has been recognised by courts in other jurisdictions.[30] Because conducting multi-party litigation can be financially burdensome and intimidating, an element of predictability puts both potential litigants and their counsel at relative ease.[31]

18. From a defendants' perspective, it is important for fairness that one can defend themselves in a proceeding in which rules are known.[32] Existing possibilities for representative action do not provide this certainty and predictability; for example, test cases do not bind all parties and other cases and while courts usually continue to apply their findings, there is no legal framework governing same.[33] Both plaintiffs and defendants benefit from what U.S. complex litigation expert Samuel Issacharoff calls 'global peace' for all parties once litigation is aggregated and an issue is fully concluded in a single or very few cases.[34]

19. Of course, critics of class actions will argue that there is an inherent unfairness to representing class members who do not enjoy their day in Court. This analysis ignores the unfairness of such persons' rights and claims never being heard in Court at all, and the fact that other jurisdictions have been successful balancing between individual rights and the rights of groups of parties to litigate claims in an effective manner.[35] As will be discussed, provisions relating to choice of

[26] *Western Canadian Shopping Centres Inc v Dutton* [2001] SCC 46 (SCC) 26.
[27] Council Directive (n 7).
[28] Peel, J., and H.M. Osofsky. 2018. *A Rights Turn in Climate Change Litigation? Transnational Environmental Law* 7 (1): 37–67.
[29] César Rodríguez-Garavito, ed. *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization can Bolster Climate Action*. (Forthcoming, Cambridge University Press 2021).

[30] *Hollick v. Toronto* (City) [2001] SCC 68.
[31] Blennerhassett (n 10) 85.
[32] Mulheron (n 8) 48.
[33] Jillaine Seymour, *Representative Procedures and the Future of Multi-Party Actions* (1999) 62(4) *The Modern Law Review*, 565.
[34] Samuel Issacharoff, *Rule 23 and the Triumph of Experience* (2020) 84 Law and Contemporary Problems 161, 181.
[35] Blennerhassett (n 10) 81.

lead plaintiff, notice and opt-ing out, and wide discretion afforded to judges in assessing fairness for all parties and for absent class members are sufficient safeguards to allay these concerns.

Procedural Efficiency

20. A desire for procedural efficiency, sometimes also referred to as 'judicial economy', is a leading motivation for class action reform across jurisdictions studied. It is easy to understand why a single case capturing the claims thousands of absent claimants is a more efficient means of litigating meritorious claims than thousands of individual cases flowing through the courts. This applies even where all claimants might share legal representation, as the Law Reform Commission explained in its 2005 Report: 'Whether there are numerous legal representatives acting on behalf of a single litigant or whether a single legal representative has many cases to cover, the cost will naturally be much greater than if a single representative is acting on behalf of the group.'[36]

21. While the 'test case' procedure addresses this issue somewhat, the LRC's Consultation Paper on Multi-Party Action conceded that the test case 'may be less of a boon in terms of judicial economy than popularly imagined'.[37] For one, it is necessary in the 'test case' paradigm that each claimant jump through the various procedural hoops of launching a separate action, even though the main legal issues are settled. Judges and their staff must spend time dealing with claims that are effectively already decided. Further, as the *Social Welfare Cases* discussed in Section 2 exemplify, the reality of the test case approach is often more complex than its theory would reveal. In that example, (executive) government resources were also expended determining payments to be made to the affected women welfare claimants and following a complex piece of litigation that occurred over many different stages. A single class action would have saved resources and time, not to mention minimise the costs and efforts required of the claimants whose rights had been violated.

22. What is of course crucial is that the class action process does not become so procedurally burdensome as to become inefficient itself, and that courts can be sure that resolution on a group basis is more appropriate than individual litigation. Efficiency is offended if unviable claims are made and resources are wasted, and defendants should be protected from unmeritorious claims.[38] Thoughtful rules will assure this, such as the use of subgroups where claims differ in a meaningful way, and of course by creating a robust certification process such that no class actions are initiated for which individual actions would have sufficed or for which individual issues predominate.

Access to Justice

23. Access to justice is a key justification for introducing class actions which is well articulated in various reports and analysis both in other jurisdictions and at home in Ireland. The Irish Society for European Law's 2020 report on the issue opens with the following words of The Hon. Ms Justice Susan Denham:

    "It is probable that the less well off, those disadvantaged in our society, would be the main beneficiaries of a new procedure enabling multi-party action...."[39]

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[36] LRC (n 5) 1.52.

[37] LRC Consultation Paper (n 12) at 34.

[38] Mulheron (n 8) 56-7.

[39] ISEL (n 6) quoting: 'Court Service record of The Hon. Ms Justice Susan Denham' *Launch of the Report on Multi -Party Litigation by The Law Reform Commission* (27 September 2005) <https://www.lawreform.ie/_fileupload/Speeches/Denham%20JClassActionsReport.pdf> accessed 21 December 2021.

24. Class actions provide access to justice for those unable to afford the legal costs of individual actions or whose claims are too small to justify such costs, or indeed those who do not know that they have claims at all. In addition, and in conjunction with amended rules on standing, class actions empower groups of litigants to pool together resources to hold government or public bodies accountable for contraventions of environmental law (including international environmental law) and violations of 'diffuse' or 'collective' rights which affect every person in a society or those within a certain demographic. Evidence has pointed to low-income and minority communities bearing a disproportionate burden of pollution,[40] and examples of class actions empowering these groups to obtain some compensation are abound (see the famous toxic torts class action taken in Hinkley, California depicted in the *Erin Brockovich* movie for one famous example.[41])

25. Experts abroad have long pointed to this factor as a crucially important one in the class actions debate. In the UK, Lord Woolf MR's *Final Report on Access to Justice* outlined that a key feature of multi-party actions was the provision of 'access to justice where large numbers of people have been affected by another's conduct, but individual loss is so small that it makes an individual action economically unviable'.[42] The U.S. Supreme Court has spoken many times on the important role class actions play in facilitating small claims.[43] When class action reforms were introduced in Australia, the Federal Attorney General spoke of the same issue of small losses and providing a 'real remedy' in spite of high costs.[44] The goal is one of three (cited alongside judicial economy and behaviour modification) that have consistently guided courts in Canada in implementing their relatively new procedure.[45] Further, the term 'access to justice' also featured heavily in the EU Commission Recommendation on Collective Redress.[46]

26. Rachael Mulheron outlines four aspects of access to justice addressed by a class action procedure. Firstly, it creates a venue for litigating rights where one might previously not exist. Rights are illusory unless they can be litigated effectively, and so empowering group claimants by providing them with the facility gives substantive law 'teeth' that it otherwise would lack.[47] Secondly, the procedure facilitates overcoming cost-related barriers and vindicate meritorious claims for low amounts of damages. The U.S. Supreme Court has described vindicating the rights of people who individually 'would be without effective strength' as the 'policy at the very core of the class action mechanism'.[48] A third element is that claimants who group together adopt a more powerful posture in adversarial proceedings against large defendants with extensive economic means.[49] This point is of interest in relation to public law actions; the size of the class might not strictly matter because in these cases because it only takes one person to

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[40] Blennerhassett (n 10) 116.
[41] Steven Soderbergh, 'Erin Brockovich' (Universal Pictures 2000). *For overview see:* Venturi, 'PG&E Hit With Class Action Lawsuit Over Lingering Hinkley Contamination', *San Bernardo County Sentinel* (23 September 2013) < https://sbcsentinel.com/2013/09/pge-hit-with-class-action-lawsuit-over-lingering-hinkley-contamination/> accessed 31 December 2021.
[42] Lord Woolf, 'Access to Justice, Final Report' (London, HSMO, 1996) at Ch 17(2).
[43] *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 186, 94 S. Ct. 2140, 2156 (1974) (Douglas, dissenting in part) ("The class action is one of the few legal remedies the small claimant has against those who command the status quo."); Phillips *Petroleum v. Shutts*, 472 U.S. 797 (1985); *Deposit Guaranty National Bank v. Roper,* 445 U.S. 326, (1980).
[44] Commonwealth, Parliamentary Debates , House of Representatives, 14 November 1991, 3174 (Mr Duffy— Federal Attorney General).
[45] For example, see *Carom v Bre-X Minerals* (1999) 44 OR (3d) 173 (Gen Div).
[46] The European Commission, '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).
[47] Mulheron (n 8) 53.
[48] *Amchem Products Inc v Windsor* 521 US 591, 617.
[49] Mulheron (n 8) 54.

make a general civil rights claim, but there is a certain persuasive power to having many hundreds or thousands of group members involved in a case holding government to account. Finally, class actions enhance timeliness in accessing justice, and their association with judicial economy means that justice is done, and seen to be done, quickly.[50]

27. For our purposes, access to justice is a particularly important factor weighing in favour of class actions. Under Article 9(3) of the Aarhus Convention, Parties must ensure that 'members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities'[51] which contravene environmental law. It is crucially important that violations of environmental rules and failures to meet relevant obligations are punished. While other avenues for environmental activism exist, this paper submits that class actions are one important option 'in a suite'[52] of others available to environmentalists, and indeed to ordinary people who suffer environment-related injuries.

28. Recall also that under current 'representative action' rules in Ireland, civil legal aid is not available.[53] More in-depth discussion on provisions for legal aid and for funding class actions more generally is outside the scope of this paper, but it should be noted that this compounds issues surrounding access to justice, and the LRC's Consultation Paper recommended removing this bar to representative actions or at least not extending it to any new multi-party action procedure.[54]

Comparatives: Class Actions Abroad

29. This section offers useful overviews of class action procedures available in other jurisdictions with reference to some of the issues outlined above. This paper will recommend lifting specific elements from a few of these with a view to forming a regime that is comprehensive, robust, and achieves the aims outlined earlier in the paper in relation to environmental justice.

30. The jurisdictions of the United States of America, Canada, and Australia are particularly important for our purposes. Like Ireland, these legal systems have derived from the English common law regime and inherited its suspicion of actions in which absent persons are purportedly represented, a concept which offends the adversarial-individualist legal tradition. The section also briefly discusses how the United Kingdom has dealt with the issue of collective claims, both historically and with the more recent innovation of 'Group Litigation Orders (GLOs)', but this paper submits that these developments are not sufficient in dealing with the wave of environmental litigation that is anticipated in the near future.The U.S.A has used class actions in some form since the 19th Century and Canada and Australia have only introduced the procedure in more recent memory. These experiences have much to offer in terms of inspiration for Irish drafters.

31. Lessons from European civil law jurisdictions including France, the Netherlands, Spain and Belgium are also examined, alongside some interesting approaches from Latin America. While the latter do not contribute to this paper's ultimate proposal, they raise some pertinent issues to which drafters should pay attention.

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[50] Mulheron (n 8) 54-55.
[51] Aarhus Convention (1998), Art 9(3).
[52] Blencow, Hardwick and Lewis (2018) 'Carving Out The Role for Environmental Class Actions in Australia' *Australian Environment Review* (Jan 2018) 237-242, 240.
[53] Civil Legal Aid Act 1995, s 28(9)(a)(ix).
[54] LRC (n 12) – (section on Civil Legal Aid).

UK

32. As previously mentioned, the United Kingdom has been wary of class actions and, unlike many of the common law countries which inherited its legal system, it has not legislated for a procedure to manage multi-party proceedings within the definition of 'class actions' used in this paper. Since the aforementioned *Dukes v Bedford*[55] case in 1901, the 'same interest' requirement has been strictly construed and the courts have refused to develop any leniency on this point. In the recently decided consumer rights case *Lloyd v Google*, the UK Supreme Court refused to allow a collective suit of around 4 million UK consumers affected by Google's alleged workaround of iPhone privacy settings.[56]

33. Group Litigation Orders (GLOs) are possible under Rule 19.11 of the Civil Procedure Rules.[57] These empower courts to manage claims giving rise to common or related issues of fact or law. Claimants who have been found to have similar claims can 'opt-in' to the GLO register and will be bound by the agreement. Where, for example, 90,000 Volkswagen vehicle owners took claims over cars' engines being able to cheat emissions compliance tests, the High Court dealt with many of these claims in a GLO.[58] While this is a useful innovation by the UK courts, it lacks the procedural efficiencies of the pure class action as it only deals with already-pending cases and does not permit one or a few litigant(s) to represent a class.

USA

34. Collective litigation lost favour in English common law, fading away as an individualized justice system took hold,[59] and it is an irony that the United States of America, a jurisdiction known for its ideological devotion to individualism, went the other way and developed a comprehensive procedure. Class actions have long been available in the U.S. system, first acknowledged textually in 1833 but taking its modern form following the oft-discussed reforms of 1966, during which Rule 23 of the Federal Rules of Civil Procedure was born.[60] In alignment with other jurisdictions studied, a key motivation behind this development seems to have been facilitating the spread of litigation costs between large groups, according to the U.S. Supreme Court's conception.[61] The class action procedure is also designed to create 'private attorney general litigation' that assists the government in enforcing laws[62] which somewhat replaces, or at least enhances, regulatory efforts by the state.[63] While this paper does not suggest that class actions should replace other government regulation or enforcement of environmental law, it would certainly create an avenue for those private actors wishing to place a role and similarly 'enhance' these efforts.

35. It is also worth noting the historical context for the reforms of Rule 23 in the 1960's. Advisory Committee members have cited the 'echo of race relations'[64] on the minds of reformers during this period of intense social upheaval in the U.S. Looking to empower a new generation of litigants fighting discrimination in employment, education and elsewhere, the Advisory

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[55] *Duke of Bedford v Ellis* [1901] AC 1.
[56] *Lloyd v George;* see for overview: Natasha Lomas, 'Google wins appeal against UK class action-style suit seeking damages for Safari tracking' (*TechCrunch,* 10 November 2021) https://techcrunch.com/2021/11/10/google-wins-appeal-against-uk-class-action-style-suit-seeking-damages-for-safari-tracking/ accessed 13 December 2021.
[57] UK Justice Department, 'PART 19 - PARTIES AND GROUP LITIGATION' <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part19#III> accessed 20 December 2021.
[58] *The VW NOx Emissions Group Litigation* [2019] EWHC 783.
[59] Deborah Hensler, et al., '*Class Action Dilemmas: Pursuing Public Goals for Private Gain'* (RAND 2000), 10.
[60] *Ibid.*, 12.
[61] *US Parole Comm v Geraghty*, 445 US 388, 402.
[62] Mulheron (n 8) 64.
[63] Samuel Issacharoff, 'Governance and Legitimacy in the Law of Class Actions' (1999) The Supreme Court Review 337, 338.
[64] Hensler et. Al (n 59), 12.

Committee sought to develop a procedure that would resolve uncertainties in the previous procedure[65] and create a tool for fighting injustice.[66] It is this paper's contention that, in conjunction with amended rules on standing and the introduction of key environmental principles into Irish law, a class action procedure could facilitate transformative change in the field of environmental law.

36. With a view to drafting a class action procedure for Ireland, Rule 23 of the Federal Rules of Civil Procedure[67] is herein examined, with the hope of extracting its most effective provisions. Firstly, Rule 23(a) outlines the 'prerequisites' for certification of a class before a case can even begin. This contrasts with the more lenient approach in Australia, where courts do not require pre-trial certification for fear of extra costs and delays (see IV below). This paper will submit that, although pre-trial certification adds some extra steps, it produces both the certainty and procedural fairness that should be central to a class action procedure. The perquisites are as follows:

    a. the class is so numerous that joinder of all members is impracticable; **['numerosity']**
    b. there are questions of law or fact common to the class; **['commonality']**
    c. the claims or defenses of the representative parties are typical of the claims or defenses of the class; **['typicality']** and
    d. the representative parties will fairly and adequately protect the interests of the class.[68] **['adequacy']**

37. A challenge inherent in the class action procedure is the sacrifices that it entails as regards individual party autonomy and the rights of absent class members. The general presumption is that an action will be taken by individual parties (or small groups in joinders) and certain criteria should be satisfied before transforming it into a *class* action. The numerosity requirement is the most basic – for obvious reasons, a class should be so numerous as to justify a class action. In the U.S., courts usually require 40 class members or more, and groups of between 21 and 40 will receive 'varying treatment'.[69]

38. Perhaps the most contested criterion is 'commonality'. Courts are looking for common issues of law or fact amongst the class members, and the requirement that all have suffered the same injury. In *Wal-Mart v Dukes*[70], the leading case on this matter, the Supreme Court refused to order certification of a group of 1.5million women working for Wal-Mart on the basis of alleged company-wide practices of gender discrimination. Because the class members' specific injuries and their causes varied within this large group, the Court would not accept that they suffered the 'same injury'.[71] Such a restrictive understanding of commonality creates a significant barrier for plaintiffs and putative classes, but is necessary to prevent class actions that are unwieldy and which deal with many different issues at once (an inefficiency that flies in the face of the procedural economy justification for having them at all). For our purposes, this stringency might cause issues in public-interest environment claims (e.g. claims relating to 'the right to a healthy environment') as the claims will be so diffuse that they might not satisfy strict commonality. In the proposals in Section 5 below, it is suggested that this criterion is included

[65] Michael Murphy and Edwin Butterfoss 'Need Requirement: A Barrier to Class Actions under Rule 23(b)(2)' 1979) 67 (5) Georgetown Law Journal 1211, 1214.
[66] *Amchem* (n 48), 614.
[67] Federal Rules of Civil Procedure, Rule 23(a) (USA).
[68] *Ibid.*
[69] *In re Modafinil Antitrust Litig.,* 837 F.3d 238 (2016), 250.
[70] *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, (2011) .
[71] *Walmart* (*ibid.*), 348.

in the Irish procedure but relaxed where the claim is in the public interest. Also worth noting is the possibility for U.S., judges to order the creation of subclasses to deal with different parts of issues or small variations in the situation of class members.[72]

39. The third and fourth requirements, typicality and adequacy, are designed with absent class members in mind. 'Typicality' refers to the need for the lead plaintiff's claims to be 'typical' of the claims of all other members of the class, and relatedly, 'adequacy' refers to the lead plaintiff's ability to fairly represent them. This ensures that the lead plaintiff's case will be fairly representative of the cases of the other members of the class, and that their interests will be represented to the best extent possible. This would not be satisfied where, for example, a lead plaintiff is subject to particular unique defences to which other class members would not be subject.[73] These safeguards are a robust means of protecting the class and mitigating the impact on the autonomy by class members by virtue of not being present for the suit, and provide a good model for a new class action regime in Ireland.

40. The second part of Rule 23 important for our purposes is 23(b), which details the types of class actions that may be initiated:

41. 'A class action may be maintained if Rule 23(a) is satisfied and if:
    (1) prosecuting separate actions by or against individual class members would create a risk of:
        (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
        (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;
    (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
    (3) the court finds that the questions of law or fact common to class members 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 controversy.'[74]

42. In short, (b)(1) classes are to prevent a risk of inconsistent or dispositive adjudications, for example where different actions would create a risk of incompatible standards of conduct to different litigants, or where there is a 'limited fund' to pay damages so that later claims would be prejudiced by earlier ones as the fund becomes diminished.

43. The other two forms are more common: (b)(2) is for injunctive or declaratory relief and (b)(3) are cases for damages. Because (b)(3) actions implicate the monetary entitlements of absent class members, they have extra requirements of 'predominance' (common issues predominating over individual ones) and 'superiority' (that a class action is superior to individual actions). For the same reason, (b)(3) actions require notice to all class members and

[72] Federal Rules of Civil Procedure, Rule 23(c)(5) (USA).
[73] See, for example, *Spann v. AOL Time Warner, Inc*. 219 F.R.D. 307 (S.D.N.Y. 2003).
[74] Rule 23(b).

that they are given the option to 'opt-out'.[75] An Irish procedure might be mapped along similar lines.

Canada

44. Canadian courts have interpreted the jurisdiction's relatively new class actions procedure's objectives as achieving three key goals: judicial economy, access to justice and behaviour modification.[76] As the class action procedure differs between various provinces and the federal government, there are common requirements that must satisfy the court, including the presence of an identifiable class of two or more persons, a suitable representative plaintiff, and that class proceeding is a preferable procedure for the resolution of the issues common to the issues.[77] As Canadian class actions do have to be certified but that certification procedure is relatively less onerous than the U.S.'s Rule 23, it might be considered a suitable middle-ground between these two jurisdictions. There is some variation in the rules' application among the various provinces of Canada; Quebec, for example, does not require 'preferability' i.e. that the class action is preferable to individual actions.[78]

45. In general, the requirements of the Canadian system are not stringent in comparison with its common-law counterparts. For example, a class being 'identifiable' means that a person can be identified as being a class member or not, but it does not require that a total quantity of class members can be determined, or that all of their identities be known.[79] A class must just not be 'unnecessarily broad' and there is no need to show that all class members share the same interest in the resolution of a common issue.[80] A lead plaintiff does not have to be 'typical' of all class members as is required by Rule 23(a) in the U.S., and participants do not have to affirmatively opt-in, but may opt-out.

46. Also of note is that Federal Rules in Canada specific grounds upon which a court *may not* rely in order to refuse to certify a class proceeding under Rule 334.18. It is submitted that any similar Irish procedure should similarly preclude such justifications for refusal. Some echo the approach in other jurisdictions; for example, certification cannot be denied where claims require individual assessment for damages (the U.S. has applied the same rule in practice, albeit while more wary that this weighs against 'predominance' of commonalities[81]). Canada's Federal Rules also specifically permit certification even where different remedies are sought by different class members or where the relief claimed relates to separate contracts involving different class members.[82] This more flexible approach strengthens and brings more immediate clarity to a class action procedure, and the text from Rule 334.18 is included in the proposed text in the Section that follows.

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[75] Rule 23(c)(2).

[76] Christopher Naudie and Éric Préfontaine, 'Class/collective actions in Canada: overview' (2016) (*Thompson Reuters Practical Law,* 1 December 2016) https://content.next.westlaw.com/2-618-0466?__lrTS=20200920131404993&transitionType=Default&contextData=(sc.Default)&firstPage=true accessed 20 December 2021.

[77] Yves Martineau and Adrian Lang, in Paul G. Karlsgodt (ed.) *World Class Actions : A Guide to Group and Representative Actions Around the Globe* (Oxford University Press USA, 2012).
Canada essay in Karlsgodt book: World Class Actions(2012), 65

[78] Gouvernement du Québec, Code of Civil Procedure, Art. 1003(a).

[79] Blennerhasssett (n 10) 162.

[80] David I. W. Hamer & Elizabeth Stewart, *Defending Class Actions in Canada*, 2d ed. (Toronto: CCH Canadian Limited, 2007), 157.

[81] *McLAUGHLIN v. AMERICAN TOBACCO CO.* 522 F.3d 215 (2nd Cir. 2008), quoting Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 18:27 (4th ed. 2002).

[82] Canada Rules of Civil Procedure, 'Class Proceedings' (section 334.18) < https://laws.justice.gc.ca/eng/regulations/SOR-98-106/page-17.html?wbdisable=true> accessed 19 December 2021.

47. Outside the constraints above, the courts in Canada enjoy wide discretion, for example in determining the preferability of the class action, which should be done in consideration of the goal of procedural efficiency and judicial economy.[83]

Australia

48. An effective procedure for multi-party actions was not available in Australia until 1992, save for a 'representative action' flowing from old English rules which faced similar constraints to those experienced in Ireland (specifically the 'same interest' requirement).[84] A 1988 report by the Australian Law Reform Commission (ALRC) on the issue recommended introducing a 'representative proceedings' procedure.[85] The Report found that introducing such a procedure 'enhances respect for the law by enabling access to a remedy and thus enforcing the law' and that benefits sufficiently outweigh costs insofar as procedural safeguards are in place.[86]

49. Under the 1992 reform, which applies only in federal courts, 'a person may bring an action as representing a group of seven or more persons where all have claims against the same person. The claims must give rise to a substantial common issue of law or fact requiring determination and arise out of the same, similar or related circumstances'.[87] The consent of absent class members is not required, but they may opt-out and must be given notice of their right to do so.[88] Assuming these criteria are met, any lead applicant can commence a class action. Representative proceedings in Australia are 'opt-out' in nature such that absent class members do not have to offer consent prior to proceedings commencing. While the innovation received some critical response initially, a report on *Managing Justice* in 1999 reviewed the new procedure in a positive light[89] and it continues to be used today, albeit with some difficulties for which reforms have been proposed.[90]

50. In contrast to the U.S., Australia adopted a less stringent approach to class action certification and the barriers to certification are not as burdensome as those found in Rule 23. Indeed, Australia's regime is one of the most liberal in the world and as a result performs well against others in terms of enhancing access to justice.[91] The ALRC recommended against a certification procedure similar to the U.S.'s Rule 23 because of concerns surrounding costs and delay,[92] which are admittedly not unfounded as the class certification phase has arguably become a more important and onerous stage of the U.S. class action than the main phase of the litigation examining merits. The lack of a formal certification process at the pre-trial stage means that there has been a rise in competing class actions (i.e. multiple parallel class actions arising out of the same event) which is a management challenge for the Australian judiciary and a threat to the judicial-efficiency rationale for introducing the representative proceedings in the first place. In the recent case *Wigmans v. AMP Limited & Ors*[93], the High Court of Australia offered some limited clarification on how courts should decide which in a slew of parallel cases best

[83] *Hollick v. Toronto (city),* [2001] 3 S.C.R. 158, 2001 SCC 68.
[84] Blennerhassett (n 10) 175.
[85] Australian Law Reform Commission, 'Report on Grouped Proceedings in the Federal Court' (1988) ALRC 46.
[86] *Ibid.,* 147.
[87] Federal Court of Australia Amendment Bill 1992.
[88] *Ibid.*
[89] Australian Law Reform Commission, 'Managing Justice: A Review of the Federal Civil Justice System' (1999) ALRC 89, at 7.93.
[90] For critical view of Australian representative proceedings regime, see: U.S. Chamber Institute for Legal Reform, 'Ripe For Reform: Improving the Australian Class Action Regime' (2014) <https://instituteforlegalreform.com/wp-content/uploads/media/RipeForReformUS_web1.pdf> accessed 18 December 2021.
[91] Blennerhassett (n 10) 187.
[92] ALRC Report (n 85) at 147.
[93] [2021] HCA 7.

represents class members' interests in an attempt to quell confusion and related inefficiencies on same.

51. Australian courts have also been more flexible than the U.S. on other matters such as whether to permit claims against several respondents even if not all class members have claims against every respondent.[94] It is also not required that a lead plaintiff be 'typical' of the class, nor that common issues 'predominate' over individual ones. The trade-off proposed by the ALRC in light of this flexibility was that Australian judges have extensive case management powers that it was believed would suffice in the absent of formal pre-trial certification, such that the interests of unidentified parties are taken into account.[95] In the Federal Court of Australia, judges enjoy:
    a. broad powers to discontinue representative proceedings;
    b. the power to substitute a lead applicant who is not adequately representing the interests of group members;
    c. the power to order that notice of 'any matter' be given to group members;
    d. the ability to decline or approve settlements; and
    e. the power to make any order it thinks appropriate or necessary to ensure that justice is done in the proceeding.[96]

52. These capabilities empower Australian courts to manage multi-party actions and to ensure fairness and efficiency in all proceedings. This paper proposes that similar powers should be explicitly afforded to judges as part of the development of a new multi-party action regime in Ireland.

53. One unique feature of Australia's regime worth addressing is the dominant role of commercial litigation funding in the Australian class action landscape.[97] This is a controversial feature of the regime and raised concern about abuse of process and entrepreneurialism in the litigation process, but the High Court has explicitly permitted it[98] and a large market of third-party funders has proliferated.[99] A critical issue in relation to this model is how it precludes a true 'opt-out' approach, as all group members enter into contracts with third-party funders in a manner that looks more like opting-in.[100] Further consideration of this funding model is outside the scope of this particular research, but it is an option that Irish policymakers might consider in increasing access to justice and ensuring that claims are heard even where class members lack sufficient funding and are wary of our 'loser pays' costs system.

Civil Law Jurisdictions

54. There are a range of other approaches available across Europe and Latin America which will be briefly discussed.

55. In France, only accredited associations, of which there are a limited number, can take representative actions. This procedure was introduced in 2013[101] and is very narrow in scope: it can only remedy losses related to consumer and competition law breaches, and requires an

[94] *Cash Converters International Limited v. Gray* (2014) 223 FCR 139.
[95] ALRC Report (n 85) at 157.
[96] Robert Johnston, Nicholas Briggs and Sara Gaertner, 'The Class Actions Law Review: Australia' (2021) 5 The Class Actions Law Review <https://thelawreviews.co.uk/title/the-class-actions-law-review/australia#footnote-037-backlink> accessed 18 December 2021.
[97] Hensler et. al (n 4), 189-190.
[98] *Campbells Cash and Carry Pty Ltd* [2006] HCA 41.
[99] Hensler et. al (n 4), 210
[100] Blennerhassett (n 10) 186.
[101] Law No. 2014-344 of 17 March 2014 (France).

'opt-in' by class members as the retention of the right to determine how one's interests should be represented is very important in France.[102] No environmental actions have been taken using this procedure, and indeed only around 20 cases overall by November 2020.[103]

56. Across Europe, class actions are limited to associations and groups of private individuals cannot initiate the procedure. This is true in France, as noted, as well as in Belgium, the Netherlands and Spain.[104] This can be implemented in a more lenient fashion, however, such as in the Netherlands. Prior to reforms in 2020, Article 3:305a of the Dutch Civil Code permitted anyone to establish a foundation with a mandate to protect the public interest and to institute proceedings in that interest in pursuit of declaratory or injunctive relief[105] and it is on this basis that the Dutch regime has been lauded as an exemplar for facilitating climate litigation.[106] The Dutch Supreme Court in the landmark *Urgenda* climate case noted that 'especially in cases involving environmental interests…legal protection through the pooling of interests is highly efficient and effective'.[107] This relatively open approach makes it very easy for plaintiffs interested in instituting proceedings in the public interest, and for eNGO's to obtain standing to make claims against government for injunctive and declaratory relief. Group members can contribute towards an association or fund and sign on as co-plaintiffs to the litigation. In terms of a traditional class action according to our definition from Section 1, however, the Dutch and European approach is lacking. This paper submits that reformed rules on standing would empower public-interest groups and NGOs to take claims in European-style class actions, but these reforms are outside the scope of this contribution. Notably, the EU Collective Redress Directive obliges all member states to introduce such procedures for consumer law by 2023, and policymakers might consider making this procedure trans-substantive to include, among other areas, environmental law.[108]

57. Brazil and some Latin American jurisdictions have features worth noting. Class actions were introduced to Brazil in 1985 with the purpose of facilitating actions 'to protect the environment, the consumer and properties of artistic, aesthetic, historic, touristic and landscape value'.[109] In 1990, this was followed by the Consumer Code, which provided for procedures for class actions seeking individual damages in consumer law.[110] Notably, the Brazilian regime differentiated between 'diffuse' or 'collective rights' enjoyed by all of society and 'homogenous individual rights' i.e. violations for which individuals could seek redress and damages.[111] This paper bases its recommendations on the rules of common law jurisdictions and cannot outline the Brazilian rules in detail, but it is submitted that these two types of rights should be kept in mind in thinking about the types of claims a class action facility should accommodate, and this will be reflected in the proposals in the Section that follows.

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[102] Jed Rakoff et. al 'Class Actions in France: Lessons Learned From Securities Class Actions in the U.S. and Other Jurisdictions' (2013) 1 Revue Trimestrielle de Droit Financier, 11.
[103] Fages et. al, 'How Will the EU Representative Action Directive Affect France's Class Action Regime?' (2020) Latham & Watkins Client Alert (9 December 2020).
[104]Alexander Stöhr, 'The Implementation of Collective Redress – A Comparative Approach' (2020) 21 German Law Journal 1606.
[105] Burgerlijk Wetboek Boek 3, Artikel 305a (Netherlands).
[106] Otto Spijkers, 'Public Interest Litigation Before Domestic Courts in The Netherlands on the Basis of International Law: Article 3:305a Dutch Civil Code' (*Blog of the European Journal of International Law,* 6 March 2020) <https://www.ejiltalk.org/public-interest-litigation-before-domestic-courts-in-the-netherlands-on-the-basis-of-international-law-article-3305a-dutch-civil-code/> accessed 15 December 2021.
[107] *Urgenda Foundation v. State of the Netherlands*, [2015] HAZA C/09/00456689, at 5.9.2.
[108] The European Commission (n 46).
[109] LEI N. 7.347, DE 24 DE JULHO DE 1985 (Brazil).
[110] LEI Nº 8.078, DE 11 DE SETEMBRO DE 1990 (Brazil).
[111] Antonio Gidi, 'Class Actions in Brazil: A Model for Civil Law Countries' (2006) 51 American Journal of Comparative Law, 311, 328.

Towards Reform: Issues and How to Resolve Them

58. This section identifies two key issues to consider in drafting a class action procedure and provides solutions drawing from the experience of the jurisdictions studied. Proposed text for an class action procedure follows in the Annex, with reference to the origin of each piece of text.

Issue 1: Party Autonomy and Protecting Absent Class Members

59. Objectors to the development of a class/ representative action procedure commonly refer to the important principle of party autonomy which underlies our adversarial legal system.[112] Flowing from this is the understanding that parties who are not present in a set of proceedings should not be bound by a decision, and that every person is entitled to 'have their day in Court'. However, excluding application to class members who are not present would offend the principle of *res judicata*; defendants should be confident that a settlement or decision is final and be able to enjoy a 'global peace' as regards a certain legal issue once it is resolved.[113]

60. It is true that class actions complicate this otherwise settled and widely accepted premise of modern litigation, but it would be foolish to accept this as an unmovable barrier to the development of such a procedure in Ireland when so many other jurisdictions with similar structures have successfully adopted it. The drafters of the transformative amendments to the United States' class action procedures in 1966 were aware of the dangers of eroding party autonomy, and were made to 'think outside the box' to minimise negative impacts.[114] In the context of wanting to facilitate aggregated claims for civil rights of African-Americans during this transformative era, American lawmakers allowed some loss of party autonomy as the cost of 'class cohesiveness', especially where only injunctive or declaratory relief is sought.[115] This paper suggests that a similar transformation of judicial thinking is necessary to facilitate the unique nature of environmental claims.

61. This paper submits that having a **(1) robust class certification procedure** following the U.S. Rule 23(a) perquisites approach and **(2) wide discretion for judges to manage cases** as in Australia will combine to overcome losses in individual autonomy and ensure fair outcomes.

Proposal 1.1: Class Certification

62. As discussed in Section 4 of this paper, Rule 23 of the U.S. Rules of Federal Civil Procedure require numerosity, commonality, typicality and adequacy in order to certify a class. All of these, but in particular the third and fourth prerequisites, act as protections for absent class members and ensure that the class action procedure (with its compromise of party autonomy as acknowledged above) is necessary and is conducted in a manner that does not prejudice the entitlements of those parties who are not present.

63. While this paper does not seek to impose burdensome procedural constraints on class certification, it should also be noted that a lack of such comprehensive certification requirements in counterpart jurisdictions Canada and Australia has caused some confusion for litigants that formal class actions proceedings are intended to allay. Imposing these four prerequisites brings necessary clarity to a new class action procedure in Ireland. However, it is

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[112] LRC (n 12), at 4(2)(1).
[113] Samuel Issacharoff, 'Rule 23 and the Triumph of Experience'(2020) 84 *Law and Contemporary Problems* 161-182, 181.
[114] Suzette M. Malveaux, 'The Modern Class Action Rule: Its Civil Rights Roots and Relevance Today' (2017) 66 University of Kansas Law Review, 325, 347.
[115] *Ibid.,* 348.

proposed that the 'numerosity' requirement is amended to require 7 class members, as is the requirement in the more lenient jurisdiction in Australia. *See (1) below.* Federal courts in the U.S. have slowly developed the terms of concepts such as commonality, and this paper further suggests providing an explicit lists of reasons that *cannot* be invoked by judges to preclude a class action certification, drawing from a similar list in the Canadian rules. *See (2) below.* Typicality and adequacy are useful protections for absent class members in ensuring that they are adequately represented by plaintiffs who are 'typical' to them i.e. are similar in terms of law and fact. Class certification precludes abuse in the class action regime and mitigates its negative impacts on party autonomy.

Proposal 1.2: Case Management

64. As discussed elsewhere in this paper, jurisdictions such as Australia offer wide discretion to judges in class actions, who undertake a duty to protect class members who are not present for the litigation. As discussed below, the specific level of care required should depend on the type of right being addressed, but as a baseline protection, judges should be explicitly afforded adequate case management powers to safeguard the interest of absent class members and ensure that the suit as a whole is fair and well-managed. *See (5) below.*

Issue 2: Types of Class Actions

65. In jurisdictions where a class action procedure is available, rules usually permit it being used for any type of action.[116] The key requirement in most jurisdictions is that class members shared some common interest and that the class action will be superior to separate individual actions, which of course *de facto* excludes certain types of claims.[117] As noted elsewhere in this paper, some civil law jurisdictions in Latin America make distinctions between different 'classes' of rights or interests; collective rights, homogenous rights and diffuse rights. Depending on the type of right asserted, different procedural requirements apply and different remedies are available.[118] While this paper's proposal does not include explicit mention of these distinctions, it is useful to think about the different sorts of claims that might flow through a class action procedure, the remedy that should be made available for each, and the procedural requirements that are most appropriate in each case.

66. The first type of litigation of interest to this paper is the 'traditional paradigm'[119] of class actions: group actions for damages against corporate or business defendants. These types of class actions are most common in the U.S., and are usually initiated under Rule 23(b)(3). (b)(3) classes can pursue monetary damages but face the extra procedural hurdle of proving that a collective action will be 'superior' to parallel individual actions, and that common issues 'predominate' over individual ones. An action with this scope demands more robust procedural protections for absent class members, whose individual claims for damages are being litigated without them and who will not be permitted to pursue their own claims once the class action is finished. This paper proposes that notice to all class members be obligatory for this form of action, and that such notice includes information on how class members may express a choice to 'opt-out' of proceedings. Courts may wish to follow jurisprudential guidance from the U.S. on the concepts of 'predominance' and 'superiority'.

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[116] Kaplan et al, (n.d.) 'Class Action Developments Overseas' in *Product Liability Litigation: Current Law, Strategies and Best Practices*, 7-1.
[117] *Ibid.,* 7-5.
[118] *Ibid.,* 7-5.
[119] Hensler et. Al (n 59), 68.

67. The second type is so-called 'public-interest' class actions, in which government bodies are defendants. For these claims, a so-called 'diffuse' right or claim of general applicability to all of society is made with the aim of compelling government action or condemning government inaction. This has been more common in Europe, where NGOs or public-interest bodies either fund or act as lead plaintiff in proceedings. In the U.S., individual litigants have struggled to establish standing for public-interest environmental claims, finding that 'generalized harms' do not create cognizable individual injuries for the purposes of standing and that 'citizen suits' cannot have the purpose of ensuring proper administration of laws.[120] The paper on standing accompanying this one will address how standing rules might be relaxed for environmental claims in the public interest, including how NGOs could be explicitly empowered to take such claims, and the question is outside the scope of this paper.

68. Presuming that either NGOs or individuals will be able to establish standing to challenge government action, a specific procedure will need to be created in the Irish class action regime for when the relief claimed is injunctive and/or declaratory. Since this action does not prejudice the monetary entitlements of class members, safeguards need not be as onerous as in damages actions above. In the U.S., (b)(2) classes do not require notice or allow for opting-out, and this paper proposed the same for an Irish regime.

69. With a view to drafting appropriate and effective procedures for different circumstances, paper suggests **(1) creating two separate types of action** for non-monetary and monetary relief respectively and **(2) providing mandatory notice and opt-out options in damages claims.**

Proposal 2.1: Two types of class action procedures

70. The proposed provision below refers to two different types of procedures: *see (3) below*.

71. The first refers to claims for injunctive or declaratory relief, and will usually apply where the defendant is a public body or government. This procedure is reflected in *(3)(1)* below which borrows the text of (b)(2) classes in Rule 23 of the U.S. Federal Rules of Civil Procedure. Paired with standing reform, this would empower public-interest defendants. To enhance access to justice and remove a barrier that exists to public-interest litigation in the U.S., *section (4)* requires that the 'commonality' requirement be relaxed such that claims relating to diffuse rights, such as that to a healthy environment, can be heard via this facility (an approach inspired by the Brazilian rules).

72. The second provision, in *(3)(2),* follows the approach of the Rule 23 (b)(3) damages class action from the U.S. Rules. Unlike the above, the remedy is not restricted to injunctive or declaratory relief and plaintiffs can seek damages on behalf of the entire class. Because this type of action implicates the resources of both the defendant and the entitlements of plaintiffs and class members, more robust procedural safeguards are imposed.

Proposal 2.2: Opt-Out and Notice

73. This paper diverges from the view of the 2005 Law Reform Commission Report by suggesting an 'opt-out' procedure instead of 'opt-in'. Because comprehensive certification procedures have been proposed, absent class members will be sufficiently protected and should not need to explicitly authorise their involvement in the suit. The procedure is more effective when large classes are 'behind' proceedings and in the age of cheap and instantaneous technological

[120] *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

communication, contacting class members is logistically easier than ever before and 'absent' class members will be able to organize and oversee proceedings.[121]

74. For *(3)(2)* damages classes, invoking 'homogenous individual rights' (in the Brazilian conception) it is proposed that notice to class members be mandatory and that the notice includes an opportunity to opt-out of proceedings. In the proposed provision below, language is borrowed from U.S. rules obliging courts to provide notice to (3)(2) classes. *See (5) below*. Judges may still order notice for (3)(1) classes on a discretionary basis using their powers under *(6)(3) below*.

[121] For discussion, see Elizabeth J. Cabraser and Samuel Issacharoff, 'The Participatory Class Action' (2017) 92 (4) New York University Law Review 846, 849.

Annex: Proposed Text

This text comprises Part 4 of the Environment Code/Cóir Dlí proposed by the Climate Bar Association.

Part 4:Class Actions/Cásanna Grúpaí

12.–(1) One or more members of a class may apply for certification to initiate proceedings, in the Commission or the ordinary courts, as representative parties on behalf of all members of that class, only if:

(a) the claim relates to the protection of the environment, this Act or the environmental legislation contained in the Schedule;
(b) the class in question has 7 or more members;
(c) there are questions of law or fact common to the class;
(d) the claims of the representative parties are typical of the claims of the class; and
(e) the representative parties will fairly and adequately protect the interests of the class.

(2) A Judge, or an Environmental Commissioner, as appropriate, shall not refuse to certify a proceeding as a class proceeding solely on one or more of the following grounds:

(a) the relief claimed includes a claim for damages that would require an individual assessment after a determination of the common questions of law or fact;
(b) the relief claimed relates to separate contracts involving different class members;
(c) different remedies are sought for different class members;
(d) the precise number of class members or the identity of each class member is not known; or
(e) the class includes a sub-class, whose members have claims that raise common questions of law or fact not shared by all of the class members.

(3) Once subsection (1) is satisfied, the class proceedings may proceed only if the court or the Commission is satisfied that:

(a) the proposed respondent to the proceedings has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
(b) the court or the Commission finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact.

(4) For any class certified under subsection (3)(a), the court will have discretion to relax the requirement of subsection (1)(b) where it is satisfied that it is in the public interest to do so.

(5) For any class certified under subsection (3)(b), the court or the Commission must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members, who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(a) the nature of the action;
(b) the definition of the class certified;
(c) the class claims or issues;
(d) that a class member may enter an appearance through a firm of solicitors if the member so desires;
(e) that the court will exclude from the class any member who requests exclusion;
(f) the time and manner for requesting exclusion; and
(g) the binding effect of a class judgment on members.

(6) The powers of a court or the Commission in relation to all class proceedings instituted under this Section shall include, but are not limited to:

(a) the power to discontinue the class proceedings where the requirements of subsections (1) and (2) are not satisfied or where the interests of absent class members are otherwise not sufficiently protected;
(b) the power to substitute a representative party who is not adequately representing the interests of class members in accordance with the requirements of subsection (1);
(c) the power to order that notice of 'any matter' be given to class members;
(d) the ability to decline or approve settlements; and
(e) the power to make any order it considers appropriate or necessary to ensure that justice is done in the proceeding.

Explanation of Text

Section	Origin	Content	Purpose	Note
(1)	U.S. Federal Rules of Civil Procedure, Rule 23(a)	Certification Prerequisites	Ensure class coherency, protect absent members	Amended to minimum of 7 class members in (b) (Australian approach)
(2)	Canada 334.18	Prohibited grounds for refusal	Remove uncertainty, ensure liberal procedure	
(3)	U.S. Rule 23 (b)(2) and (b)(3)	Types of classes and remedies available	Different procedures with different remedies, protections, etc	
(4)	N/A	Relax commonality for public interest classes under (c)(1)	Remove barriers from U.S.	
(5)	U.S. Rule 23 (c)(2)	Notice and Opt-Out for damages classes under (c)(2)	Extra protections for monetary claims	
(6)	Summary from Class Actions Law Review Article on Australia[122]	Court powers of management	Court as fiduciary of absent class members/ ensuring fair proceedings	From summary list, not from existing text

[122] Robert Johnston, Nicholas Briggs and Sara Gaertner (n 89).