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**Commission's Proposal for a
Directive on Representative Actions:
Key Issues**

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Who?

Who can sue?

- Qualified Entities:
 - “properly constituted”
 - has a “legitimate interest in ensuring that provisions of Union law covered by this Directive are complied with”
 - “non-profit making character”
- Consumer organizations, independent public bodies, *ad hoc* litigation vehicles
- Can sue anywhere

Who do they represent?

- Up to the QE’s
- Do not need any contact with consumers to initiate
- Member States can choose to require mandate later (i.e. opt-in)
- But for certain cases no mandate can ever be required (no opt-in, but also no opt-out)

Who can be sued?

- Any trader
- Includes private and public bodies

What?

What claims can they make?

- Breach of any of 59 EU laws
 - Consumer protection
 - Data protection
 - Energy and environment
 - Financial services
 - Healthcare
 - Passenger rights and tourism
 - Product liability
 - Telecommunications and media services

What awards can be sought?

- an injunction (a declaration that the law has been broken and should cease)
- A restorative remedy, such as damages.
 - alternatively, if damages “complex” can “irrefutably establish” that the law has been breached

What categories of damages?

- **“identifiable consumers”** where consumers are identifiable and suffered comparable harm – direct award to them
- **“small individual loss”** where consumers have suffered a “small amount of loss” and “disproportionate to distribute the redress” money paid “to a public purpose serving the collective interests of consumers”.

Incentives?

Can lawyers and litigation funders share the damages?

- Yes, no limits on lawyer contingency fees
- Funding permitted, but - QE's must
 - declare the source of the funds used to support the action
 - Funder cannot “influence decisions of the QE”

Where will the money go?

- No requirement that consumers paid first
- No limit on QE's costs/fees
- No limits on pay-outs to lawyers, consultants, investors, backers
- Payment to “public purpose” in some cases

Settlement?

- No focus on ADR
- Settlements can be approved by court and consumers can opt to accept or not
- But no finality, so no incentive?

Issues?

Weak Safeguards

- QE category too open
- No admissibility step
- No certification step
- No “opt in” (even made opt-in illegal?)
- No limit on lawyer incentives
- No effective limit on funder incentives
- Payments to “consumer interest” = punitive?
- No loser pays

System Chaos

- On top of, not instead of, existing class action laws
- In practice not limited to 59 EU laws
- Possible multiple overlapping claims
- Limitation period chaos
- One-sided discovery system
- Forum Shopping likely

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