UN Draft resolution on consumer guidelines

FEDMA position paper on the United Nations Draft resolution for consideration by the General Assembly Consumer Protection


Overall, FEDMA agrees and supports the new additions to the UNGCP. The data-driven marketing industry relies on consumer trust and therefore, strives in its relations with consumers to preserve this trust at all times. The industry also respects the wishes of individual consumers, for example if he or she chooses not to allow personal information to be shared with other organisations or not to be contacted for direct marketing purposes.

The current EU data protection framework, the Data Protection Directive (1995/46 Directive) has been adopted by many countries outside Europe as the basis for their own data protection legislation.

More specifically, FEDMA wishes to share the following comments;

Putting the consumer first

Most of the privacy provisions provided in point 11 for conducting online and offline commercial activities are already required under EU data protection legislation. Furthermore, the current EU data protection legislation is being revised in the light of technological developments since 1985.

In parallel to this legislative revision, FEDMA is preparing to update its European Code of Practice for the Use of Personal Data in Direct Marketing and the accompanying Online Annex approved by the Article 29 Working Party (the European Data Protection Authorities) which were based on the 1995 Directive. FEDMA is the only data-driven marketing association to have such codes of conduct approved by the Article 29 Working Party, which is comprised of senior members from the national data protection authorities of EU Member States.

Regarding the protection of privacy (point 11.e), FEDMA considers that it is essential to reach a balance between the interests of consumers to have their privacy protected and the interests of business to operate in the global data driven economy.
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The EU legislation (current and future) recognizes that the disclosure of information to third parties can be done not only based on the individual’s consent, but also using other legal grounds. The EU Directive provides 6 legal grounds on which data can be processed, including consent, and the controller’s legitimate interest to process information. In our view, it is important that the United Nations Guidelines should recognize the many legal grounds available to process information, rather than solely referring to the individual’s consent. For example, the data-driven marketing industry is able to rely on the legitimate interest ground to process data, which allow organization to promote goods and services not only to existing customers but also to prospects, while respecting the individual’s right and interests.

Furthermore, FEDMA would like to bring to the attention of the UN that in many cases, for example fraud prevention and the protection and detection of crime, organisations must be able to disclose personal information to others without their client’s knowledge or consent. If the client were aware that their personal information was being passed on to other organisations they may be alerted to the fact that they are under investigation.

FEDMA would strongly recommend point 11.e to not refer to the notion of consent which is only one of the several legal basis on which information can be disclosed. Also, FEDMA considers that all businesses should protect personal information, not only businesses related to commerce. Therefore, we suggest the following wording:

"Businesses engaged in online and off-line commerce should protect personal information through appropriate control and security mechanisms and should take steps not to disclose information without client knowledge and consent a legal basis to do so."

Respecting consumers’ choice

Regarding the requirement of fair, honest and equitable treatment (11.a) and commercial behaviour (11.b), the EU legislative framework provides for effective consumer protection against unfair commercial practices (2005/29 Directive).

Moreover, individual citizens of the EU have the right to unsubscribe/ opt from receiving unsolicited direct marketing communications across all marketing channels. An unsubscribe /opt-out regime allows a balance to be struck between the interest of organisations, particularly SMEs and new entrants to the market to contact interested consumers about their new and existing products and services, while at the same time respecting individual consumer choices to say no to direct marketing."
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In the case of unsolicited email and SMS marketing, the general rule under the Privacy and Electronic Communications Directive 2002/58 is that consumers must subscribe/opt-in to receiving such communications.

This Directive was further amended in 2010 to introduce new rules on cookies. The data-driven marketing Industry joined in the European Interactive Digital Advertising Alliance (is the organisation responsible for enacting key aspects of the self-regulatory initiative for Online Behavioural Advertising (OBA) across Europe [http://www.edaa.eu/] which aims at educating and empowering the consumer with choice and control over their cookies ([www.youronlinechoices.eu](http://www.youronlinechoices.eu)). This Online Behavioural Advertising (OBA) programme provides for best practices regarding OBA including limitations on sensitive segmentation.

Consumer information

FEDMA asks for the interests of consumers to protect their personal information to be balanced with the interest of business to operate in a global data-driven economy. This means that information requirements should be adapted to the media channel (post, telephone, email, mobile). A good example of this is the 160 character limit on simple SMS messages. For this reason, FEDMA strongly recommends the following change to reflect the specificities of media channels in point 11 c on disclosure and transparency:

**Business should ensure easy access to this information and not impose unnecessary inconvenience, especially to the key terms and conditions, regardless of the technological means used taking into consideration the channel used.**

The EU consumer-protection laws already provide for extensive information requirements (21 requirements for the Consumer Rights Directive alone). Regarding information, it is important to remember that sometimes “less is more” and Member States should avoid information overload, where the consumer ends up not read or paying attention to the information shared with him/her. FEDMA recommends to draw attention to Member States to this risk:

**Member States should could, where appropriate and taking into account the risk of overloading the consumer with information, review existing consumer protection laws and frameworks to accommodate the special features of e-commerce, and ensure that consumers and businesses are informed and aware of their rights and obligations in the digital marketplace**

Consumer interest

FEDMA is unsure as to the final intent of section 11.g, and consider that the wording might lead to misleading interpretation. While organisations are looking at consumer’s interests, it seems
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difficult to consider the organization as being responsible of consumer’s interest, as such interest might go far beyond the organization’s abilities. For this reason, FEDMA would like to suggest the deletion of this section. FEDMA would like to suggest the following changes:

Point 11.g

(g) Conflict of interest

Businesses and their authorized agents should have working in the interests of consumers and being responsible for upholding consumer protection as objectives.

Providing dispute resolutions

As a business association, FEDMA recognizes the importance of consumer trust, which is essential to establishing a mutually beneficial relationship between the trader and the consumer, especially in an increasingly international online commercial environment.

We understand from your amendments that the Consumer may seek informal and amicable dispute resolution with the business or industry groups (voluntary mechanism). The Consumer may address his dispute to a public authority (administrative resolution), to a neutral third party (alternative dispute resolution) or to the court (judicial resolution). FEDMA recommends the following change to point 38 to simplify the wording of this article:

Members States should, as appropriate, encourage the development of fair, effective and transparent mechanisms to address consumer complaints arising from business-to-consumer transactions, through judicial and non-judicial proceedings administrative, judicial and or alternative dispute resolution, including for cross-border cases.

We believe that alternatives to judicial redress for all types of consumer disputes, with increased consumer awareness should play an important role in re-enforcing consumer trust. FEDMA believes that this enhanced consumer trust will contribute to unlocking the full potential of national and cross-border e-commerce. FEDMA and its members encourage the use of voluntary mechanism or administrative or ADR systems. ADR mechanisms are effective and cheap solutions for the consumer. If these solutions fail, the consumer may seek judicial redress. For these reasons, FEDMA does not consider collective redress mechanisms as a necessary tool in the advertising sector. FEDMA would strongly recommend for point 39 to be understood as referring to individual redress and not collective redress:

Member States should consider how to ensure effective (individual) redress for victimized consumers in cases involving fraudulent, deceptive or misleading advertising commercial practices.
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FEDMA would strongly recommend for point 41 that collective resolution procedures not be presented as mandatory:

**Member States, which offer collective resolution procedures, should ensure that collection resolution procedures are transparent, efficient, speedy, affordable, and fair to both consumers and businesses (...).**

Companies and business organisations have invested considerable resources to set up voluntary or alternative schemes to judicial redress. FEDMA is a member of the European Advertising Standards Alliance whose standards are enforced by national Self-Regulatory Organisations (SROs). These SROs help consumers against fraudulent, deceptive and misleading advertising commercial practices, including in cross-border disputes. If the SRO fails to resolve the dispute in a satisfactory manner, the consumer may seek resolution through alternative solutions (administrative, ADR or judicial). Alternative solutions should only arrive at the second stage when the consumer has already contacted the trader, in particular its customer service and the latter is unable to provide satisfactory solution. The contribution of civil society should be encouraged and acknowledged. FEDMA recommends the following changes to point 43:

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**Member States should encourage and acknowledge businesses and industry group efforts to provide consumers with voluntary mechanisms to informally, and at the earliest possible stages, resolve disputes and obtain redress, or compensation as appropriate.**

Businesses are happy to provide input regarding consumer awareness programmes. However, we consider that these programmes are of the financial responsibility of the Member States. FEDMA recommends the following changes to point 44 which limit the role of businesses to consultation:

**Member States should co-operate consult with businesses, industry groups, and consumer groups in furthering on ways to further consumer and business understanding of how to avoid disputes, of dispute resolution and redress mechanisms available to consumers, and of where consumers can file complaints. In designing education and awareness initiatives on this topic, special consideration should be given to the needs of disadvantaged or vulnerable consumers.**
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FEDMA also draws a clear distinction between legitimate marketers and rogue traders. We support international co-operation in the fight against rogue traders.

Promoting ecommerce

FEDMA agrees that UN member states should promote the new and substantial benefits of ecommerce offered to consumers and they should harness the opportunities offered by ecommerce.

FEDMA does not believe that there is any need for UN member states who are also members of the EU to review, where appropriate, existing consumer protection laws. This is because the current EU consumer legislation on unfair and misleading commercial practices and pre-contractual information does not need further updating.

Conclusion

FEDMA looks forward to working with the UN General Assembly as it develops this Resolution and its work in the consumer protection area.

Co-Chairs of FEDMA

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