FEDMA supports the Fitness Check exercise of the Consumer Acquis. To unleash the full potential of the Single Market, legislation must be efficient, effective and coherent. This is line with the Commission’s objective of “Better Regulation”, being big on big things and small on small things.

FEDMA stands for 22 national Direct Marketing Associations from all over Europe, representing more than 5,000 organisations, and for more than 40 organisations, representing all parts of the value chain in the data-driven marketing industry (e.g. communication agencies, list brokers, postal operators). FEDMA covers both online and offline channels (e.g. online behavioural advertising, email, telemarketing, SMS/MMS, door drop, direct mail). Through its many activities, FEDMA is dedicated to building the business of cross-border data-driven marketing. FEDMA is a member of the European Advertising Standards Alliance and of the European Digital Advertising Alliance.

FEDMA welcomes the progress that the European Commission has been making in the Digital Single Market strategy. Some of these proposals and initiatives highlight the benefits of self-regulation, an indispensable tool for effective, legal, ethical use and access to data. FEDMA is already working on interpretations of the General Data Protection Regulation and is engaged in producing a new code of conduct adapted to the new rules and to the industry practices of the future.

“There is still a lot of work ahead to ensure a thriving Digital Single Market. FEDMA looks forward to helping the institutions in this task. It is indeed very important to reach the right balance between industry and consumer needs and also to combine effectively the on and offline worlds of commerce” said Sébastien Houzé, FEDMA Secretary General.

“Fostering the data-driven economy is key for competitiveness, as well as job security in Europe. FEDMA looks forward to help unlocking the potential of Big Data, while striking a good balance between economic interests and consumer’s right to data protection.” said Dr Sachiko Scheuing, FEDMA Co-Chairwoman.

**Overall comments regarding the Fitness check:**

- The effectiveness of the Consumer Acquis

**A priori, very few legal gaps need to be filled.** UCPD and MCAD have been taking into account in self-regulation. The Ecommerce directive (which is not covered by this fitness check) provides in any case that “all commercial communications shall be clearly identifiable as such”. Moreover, FEDMA wishes to stress that the recent studies on “the Cost of Non-Europe in the Single Market” 1 part III and Part V highlight that there are no real legal gaps in terms of consumer protection legislation with regards to the advertising and marketing provisions. More specifically, referring to the questionnaire, should **online platform providers** inform consumers about the criteria used for **ranking the information** presented to consumers? FEDMA tends to disagree with this prerequisite. Some legislation already requires further transparency. For example, from a data
perspective, the GDPR provides for further transparency and privacy notices in plain language. It is therefore important for the industry to be given the opportunity through self-regulation and best practices to implement this regulation and develop solutions to provide more transparency to consumers. We remind the Commission that the algorithm is protected by intellectual property. Should the notions of "vulnerable consumers" and “average consumer” be reviewed/updated? Under current EU law, vulnerable consumers are those that are particularly vulnerable to unfair commercial practices because of their mental or physical infirmity, age or credulity. The average consumer, as interpreted by the European Court of Justice, is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors.

If a commercial practice is directed at a particular group of consumers (such as vulnerable categories of consumers), then an average member of that group is the benchmark. FEDMA considers that the current principle-based definitions are sufficiently broad and flexible to protect vulnerable consumers who need to be protected. For example, most European self-regulatory organisations in EASA membership have developed additional rules aimed at protecting children, including recommendations to not advertise products to children that are deemed unsuitable, such as alcoholic beverages, gambling, or foods and drinks that are high in fat, sugar and salt. FEDMA would like to draw the attention of the Commission to the risk of disproportionality broadening the scope of vulnerable consumers. What suits vulnerable consumers or least experienced consumers should not become the de facto norm for the average consumer. Most consumers are more and more educated and empowered for example via the internet and by education by consumer associations and other educators in Member States. If this criterion were to be generalised to the marketing message itself, the marketing industry would be reduced to bland mass marketing. As an industry, we seek to maintain a balance between vulnerable or least experience consumers and the industries marketing freedom. For better enforcement measures (individual remedies and EU injunctions), FEDMA tends to disagree. Firstly, we call for respect of existing self-regulatory and national solutions which are already efficient. Secondly, for bought goods and services, the ADR/ODR systems have just been implemented and need further time to gain in efficiency. The ADR system has the advantage of being a flexible, speedy and cheaper procedure than the judicial system. Finally, historically, enforcement is the competence of member states. Harmonisation should be done on broad principles, avoiding the field of member states’ competence. If enforcement measures were nevertheless to be taken at European level, it may be wiser to consider the enforcement measures which have the most national consensus around them. FEDMA will continue to reflect on these enforcement measures.

**Self-regulation plays an important role which must be continually recognised and encouraged by the European Institutions.** Indeed, the role of self-regulation has been acknowledged by the European Commission in its Better Regulation package. Self-regulation is very effective for protecting the rights of the consumer. EASA, the European Standards Advertising Alliance, covers unfair and misleading commercial practices. FEDMA is a member of the European Advertising Standards Alliance whose standards are enforced by national Self-Regulatory Organisations (SROs). EASA currently has 25 SROs members in 23 EU Members States plus Turkey, Switzerland and 11 corresponding members from outside Europe. This far-reaching network enables the exchange of experience and information on handling complaints and cooperation on cross-border cases. Self-regulation works in collaboration with national legislation and provides an essential
complement to the national legislation in place to govern advertising. It has a crucial role in maximising consumer confidence in advertising. Self-regulation must always be in compliance with the law, and no part of the self-regulatory process should deprive a consumer of the protection provided by the law. These SROs help consumers against fraudulent, deceptive, unfair 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. 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. An independent and impartial jury is responsible for interpreting the code, once a complaint regarding an advertisement has been filed by either the general public or competitors. The jury is responsible for deciding on sanctions. These include amendment or withdrawal of an advertisement (a very costly process for the advertisers), publication of decisions (which generates adverse publicity for advertisers), compulsory pre-clearance for advertisers who frequently breach the rules, expulsion from trade organisations, and in extreme cases referral to the relevant authorities. In 2014, on average 39% of complaints resolved were upheld. In these cases the responsible SRO jury considered the advertisement complained about in breach of the advertising code. Conversely, 33% of complaints were not found to be in breach of the relevant advertising code and were therefore not upheld. Finally, the EDAA (European Digital Advertising Alliance) with the program “Youronlinechoices” provides the consumer with information on online behavioural advertising. FEDMA is a member of the EDAA.

- The efficiency and relevance of the Consumer Acquis

**FEDMA recommends to focus on simplifying the consumer acquis.** This might decrease legal cost for business and increase legal certainty by avoiding overlaps. E.g. information requirements to give consumers are split between different texts. Marketing/pre contractual information requirements currently included in the UCPD, Price Indication Directive and CRD could be regrouped and streamlined to facilitate their understanding without adding new requirements. Moreover, in the case of invitations to purchase (article 7.4 of the UCPD), FEDMA strongly agrees that the information requirements be simplified in view of the Consumer Rights Directive. It’s important to reach the right balance between insufficient and excessive information, to avoid situations, such as for credits, where the consumer does not listen to the mandatory information given. The information given to consumers at the advertising stage should focus on the essentials whilst more detailed information should be required only at the moment before the contract is concluded. However, FEDMA tends to disagree with the presentation of pre-contractual information to consumers in a simplified, binding and uniform model. Business should remain free to adopt the model of the Commission or not.

**Taking into account the medium so as to sustain a pleasant consumer experience;** FEDMA strongly agrees that the information given to consumers at the advertising stage should focus on the essentials whilst more detailed information should be required only at the moment before the contract is concluded. Indeed, the industry needs to be able to communicate in a flexible, layered and user friendly manner all the information requirements otherwise the consumer/data subject will be confused and overburdened. A good example of this is the 160 character limit on simple
SMS messages. The business should be free to provide the right information, at the right time, on the relevant channel (website, telephone, direct mail, email).

- **Coherence of the Consumer Acquis**

The world is omnichannel and this should be reflected in the Consumer Acquis. It’s important to ensure coherence between the off and online worlds. This implies aligning the Sales Directive on the current tangible goods directive proposal.

It seems important to clarify the scope of the Consumer Acquis. New contracts may be created with counter-performance in personal data. If the proposal is adopted including counter-performance in data, it would be interesting to have an analysis of national implementations to understand which rules apply to contracts where there is no monetary payment (Consumer Rights Directive? Unfair contractual terms directive?). Does the consumer acquis apply to the collaborative economy?

**Specific comments regarding certain legislations:**

- **Unfair Commercial Practices Directive**

As encouraged in article 10, the provisions of the UCP Directive and the so-called black-list have been included in the self-regulation industry codes of conduct in many Member States. By doing this, the industry has turned these rules into real standards for the advertising and marketing industry, being effectively enforced by self-regulatory authorities which have also developed a consumer complaints system. Moreover, the EASA Digital Marketing Communication Best Practice from 2008 was updated in 2015 to provide clearer guidance to SROs to determine if the content is a commercial communication or not. It also recommends digital marketing communication practices for example for game advertising, in app advertising and social media advertising. Therefore, **FEDMA considers self-regulation as highly effective tools for contributing to the better enforcement of the UCPD.** Self-regulation is often cheaper, more flexible and faster to implement than legislation. A priori, **there is no need to extend the black list which should remain principle driven.**

Only 4 member states (Germany, Sweden, France, Austria and potentially Luxembourg) apply parts or all of this Directive to B2B relations. FEDMA considers that, due to the different nature of the relation B2B compared to B2C, the UCPD should not be extended per se to B2B relations. FEDMA recognizes the need of protection for B2C transactions where bargaining power is imbalanced, however, we think that similar rules are not necessary for B2B transactions where terms of contract can be more often individually negotiated between the two traders. B2C rules often imply pre-negotiated deals, precisely when business prefer to negotiate the terms and conditions. Moreover, business often don’t need the same information requirements as consumers.

- **Misleading and Comparative Advertising Directive**

**Misleading advertising is an important issue for SMEs.** Indeed, most business in Europe are SMEs therefore, B2B advertising and marketing, including MCA, concerns mostly SMEs. Moreover, MCAs
can be an important issue for SMEs as they do not have a financial control system and safeguards as developed as big companies. Nevertheless, a balanced approach must be adopted since many SMEs work within the B2B sector and B2B marketing is worth an estimated 5.07 billion pounds a year according to UK DMA in the UK alone (Source: the SME voice, 2010 by B2group).

In 2013, there were discussions regarding the possible revision of the MCAD, particularly due to the legal uncertainty regarding certain MCAs such as fake invoices, misleading directories. The MCAD does not target all marketing practices and techniques as it initially targeted advertising. Nevertheless, some countries may have included some of these misleading practices and techniques in their national laws (e.g. fake invoices). Belgium expanded its law on MCA to include misleading directories. Moreover, it could be simpler to create guidance to clarify the scope of application of the MCAD rather than to revise the Directive. In any case, a revised definition of misleading advertising to include misleading practices needs to be balances otherwise it could heavily impact SMEs. **Therefore, a revision is not absolutely necessary.**

In case a revision of the Misleading and Comparative Advertising Directive still takes place, **FEDMA** considers that a blacklist would have a limited result and recommends maintaining a broad definition of MCA which sets out the concept and criteria of MCAs which will in the long term be more effective than a blacklist. If a black list is considered necessary, it should be targeted and set in the proposal (not further established by delegated acts). We recommend the status quo for comparative advertising.

**Solutions to improve the enforcement of this directive should respect effective national implementing systems and self-regulation.** Indeed, in some member states (e.g. Germany), some effective solutions exist without national authorities. **FEDMA** equally supports the self-regulation system of EASA.