



FEDMA position paper on the Consumer Protection Cooperation network

FEDMA supports the objective of the Digital Single Market to give better access to goods and services across Europe. FEDMA is fully supportive of the ambitious goals set out by President Juncker for the 2015 Commission. In line with President Juncker's statement "By creating a connected Digital Single Market, we can generate up to € 250 billion of additional growth in Europe in the course of the mandate of the next Commission, thereby creating hundreds of thousands of new jobs, notably for younger job-seekers, and a vibrant knowledge-based society", we believe that the European Union can strongly benefit from the development of the digital economy.

FEDMA stands for 22 national Direct Marketing Associations, directly representing more than 5 000 organisations, it also has more than 50 organisations as members, representing all parts of the value chain in the data-driven marketing industry. Through its many activities, FEDMA is dedicated to building the business of cross-border data-driven marketing, both through its vast network of contacts and businesses within and beyond Europe and by representation within the institutions of the European Union.

The data-driven marketing industry uses personal information and data to effectively match customers' needs with relevant brand offers. The industry aims to create and maintain an individual and interactive relationship between organisations, institutions and their customers (both prospective and existing). The industry allows organisations to target customers with a personalised message, to generate sales both online and in store in a cost effective way to build long-lasting relationships with customers and raise brand awareness. It is an essential driving force of the EU economy and the EU Digital Single Market.

FEDMA supports better enforcement of the Consumer Acquis. We notably support non-judicial solutions on the basis of industry self-regulation and of ADR mechanism. However, FEDMA considers that clarification is needed on the relation between the CPC proposal and the Eprivacy Regulation. FEDMA calls for the CPC to remove its reference to the Eprivacy Directive.

Clarification needed between the CPC and ePrivacy proposals

Currently, the CPC Regulation 2006/2004 provides in its Annex that it applies to the article 13 of the ePrivacy Directive 2002/58. This is the article on unsolicited communications.

The eprivacy Directive mentions competent national authorities but without designating which ones are responsible for the implementation of the ePrivacy Directive. In certain member states, consumer authorities are responsible. These consumer authorities could be part of the CPC network to better coordinate for cross border cases.



However the proposed ePrivacy regulation clearly designates the Data Protection Authorities as competent authorities (Article 18) and indicates that the cooperation and consistency procedures under the General Data Protection Regulation shall apply mutatis mutandis.

This means that for unsolicited communications, the ePrivacy Regulation excludes consumer authorities as competent authorities and provides clear procedures, including cross border, based on the GDPR. Maintaining a reference to the unsolicited communications in the CPC would lead to the overlapping of two different authoritative systems with different cooperation procedures and sanctions.

To avoid any legal incoherence or confusion, FEDMA urges the European Institutions to remove the reference to article 13 of the ePrivacy Directive from the annex of the Consumer Protection Cooperation Proposal currently under discussion.

The importance of self-regulation

FEDMA supports better enforcement of the Consumer Acquis notably through non-judicial solutions on the basis of industry self-regulation and of ADR mechanism.

FEDMA considers that self-regulatory enforcement of unsolicited communications also sustains consumer trust. Direct Marketing Associations across the EU support the enforcement of the opt-in and opt-out rules for email and telephone marketing. Non respect of the Codes of Conduct can lead to termination of the membership to the DMA and in some countries, reporting to the authorities. In cross-border scenario, FEDMA encourages its DMAs to drive their members to respect other DMAs code of conduct, including their Preference Lists.

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.

The European Commission adopted recently the [ADR Directive and the ODR Regulation](#). When consumers have a **problem with a trader** regarding a product or service they bought, they can settle their dispute out-of-court through an **Alternative Dispute Resolution** procedure. 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. The ODR platform is only accessible since the 15th February 2016.

FEDMA recommendations regarding authorities' powers

FEDMA supports the Council general approach which provides for further proportionality and subsidiarity of the minimum powers of the authorities and for more member state's choice.



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Member States must remain free to determine the most adequate distribution of powers among national authorities. FEDMA nevertheless draws caution on the following points:

- interim measures to prevent risk of serious harm (FEDMA draws caution towards this measure which could be seriously disproportionate),
- on-site inspections (should require prior judicial authorisation (FEDMA believes that judicial authorization is necessary according to the majority of national laws. This requirement cannot be substituted by a European regulation),
- publications of final decisions (FEDMA believes that this power should be used in a proportionate manner and so only in cases of serious breaches or infringements),
- Finally, FEDMA draws your attention to the fact that only 11 countries offer their enforcement entities the power to take down websites/domains. This is a not a common practice at European level. It is potentially harmful of the company's right to defend itself. Therefore, it should not be included in this regulation.

Regarding the amendments of the Internal Market and Consumer Protection committee, FEDMA supports amendments 282 and 283 which provide for member states to determine the most adequate distribution of powers among national authorities. FEDMA calls for the Parliament to continue working on the proportionality and subsidiarity of the minimum powers. For these reasons, FEDMA supports amendments:

- 290: this rewriting takes better into account the format of the data held by the trader.
- 294, 296, 297: these amendments aim at better targeting the scope of the inspection. Importantly, they provide for a prior judicial authorisation which FEDMA supports.
- 303: this amendment better targets the scope for interim measures
- 321, 332, 336: these amendments remove powers which are not proportionate, nor wide spread at national level, nor in line with national legal cultures.
- 342 and 343: for the publications of only final decisions (not interim).
- 349: on the trader's right to self defence
- 351, 354 and 365: these amendments introduce more proportionality and respect for national procedural requirements.



Annex: Amendments supported by FEDMA

Amendment 282 **Andreas Schwab**

Proposal for a regulation **Article 8 – paragraph 1**

Text proposed by the Commission

(1) Each competent authority shall have the investigation and enforcement powers necessary for the application of this Regulation and shall exercise them in accordance with this Regulation and national law.

Amendment

(1) Each competent authority shall have the investigation and enforcement powers necessary for the application of this Regulation and shall exercise them in accordance with this Regulation and national law. ***The granting of investigative and enforcement powers to all competent authorities shall remain a matter reserved for Member States.***

Amendment 283 **Richard Sulík, Vicky Ford**

Proposal for a regulation **Article 8 – paragraph 1**

Text proposed by the Commission

1. Each competent authority shall have the investigation and enforcement powers necessary for the application of this Regulation and shall exercise them in accordance with this Regulation and national law.

Amendment

1. Each competent authority shall have the investigation and enforcement powers necessary for the application of this Regulation and shall exercise them in accordance with this Regulation and national law. ***Member States shall remain free to determine the most adequate distribution of powers among national authorities.***

Amendment 290 **Kaja Kallas, Dita Charanzová**

Proposal for a regulation **Article 8 – paragraph 2 – point b**

Text proposed by the Commission

Amendment



(b) require the supply by any natural or legal person, including banks, internet service providers, domain registries and registrars and hosting service providers of any relevant information, data or document in **any** format or form **and** irrespective of the medium **on which** or the place **where they are stored**, for the purpose of among others identifying and following financial and data flows, or of ascertaining the identity of persons involved in financial and data flows, bank account information and ownership of websites;

(b) require the supply by any natural or legal person, including banks, internet service providers, domain registries and registrars and hosting service providers of any relevant information, data or document in **the** format or form **in which it is stored**, irrespective of the medium or the place **of storage**, for the purpose of among others identifying and following financial and data flows, or of ascertaining the identity of persons involved in financial and data flows, bank account information and ownership of websites;

Amendment 294
Anna Maria Corazza Bildt

Proposal for a regulation
Article 8 – paragraph 2 – point d

Text proposed by the Commission

(d) carry out the necessary on-site inspections, **including in particular the power to enter any premises, land or means of transport or to request other authorities to do so in order to examine, seize, take or obtain copies of information, data or documents, irrespective of the medium on which they are stored; to seal any premises or information, data or documents for a necessary period and to the extent necessary for the inspection; to request any representative or member of the staff of the trader concerned to give explanations on facts, information or documents relating to the subject matter of the inspection and to record the answers;**

Amendment

(d) carry out the necessary on-site inspections **of business** premises or means of transport, or request other authorities to do so;

Or. en

Justification

The proposed on-site inspection is too far-reaching. The power in the current regulation is sufficient. The proposed power would require the involvement of police and criminal procedures and would only be used when the infringement constitutes a criminal offense.



It is thus not necessarily an appropriate and proportionate power for ensuring consumer protection.

Or. pt

Amendment 296
Richard Sulík, Vicky Ford

Proposal for a regulation
Article 8 – paragraph 2 – point d

Text proposed by the Commission

(d) carry out the necessary on-site inspections, including *in particular* the power to enter any premises, land or means of transport or to request other authorities to do so in order to examine, seize, take or obtain copies of information, data or documents, irrespective of the medium on which they are stored; to seal any premises or information, data or documents for a necessary period and to the extent necessary for the inspection; to request any representative or member of the staff of the trader concerned to give explanations on facts, information or documents relating to the subject matter of the inspection and to record the answers;

Amendment

(d) carry out the necessary on-site inspections, including, *in accordance with any requirements under national law to obtain prior judicial authority authorisation*, the power to enter any premises, land or means of transport or to request other authorities to do so in order to examine, seize, take or obtain copies of information, data or documents, irrespective of the medium on which they are stored; to seal any premises or information, data or documents for a necessary period and to the extent necessary for the inspection; to request any representative or member of the staff of the trader concerned to give explanations on facts, information or documents relating to the subject matter of the inspection and to record the answers;

Or. en

Amendment 297
Kaja Kallas, Dita Charanzová

Proposal for a regulation
Article 8 – paragraph 2 – point d

Text proposed by the Commission

(d) carry out the necessary on-site inspections, including in particular the

Amendment

(d) carry out, *on the basis of a prior judicial authorisation*, the necessary on-



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power to enter any premises, land or means of transport or to request other authorities to do so in order to examine, seize, take or obtain copies of information, data or documents, irrespective of the medium on which they are stored; to seal any premises or information, data or documents for a necessary period and to the extent necessary for the inspection; to request any representative or member of the staff of the trader concerned to give explanations on facts, information or documents relating to the subject matter of the inspection and to record the answers;

site inspections, including in particular the power to enter any premises, land or means of transport or to request other authorities to do so in order to examine, seize, take or obtain copies of information, data or documents, irrespective of the medium on which they are stored; to seal any premises or information, data or documents for a necessary period and to the extent necessary for the inspection; to request any representative or member of the staff of the trader concerned to give explanations on facts, information or documents relating to the subject matter of the inspection and to record the answers ;

Amendment 303

Richard Sulík, Vicky Ford

Proposal for a regulation

Article 8 – paragraph 2 – point g

Text proposed by the Commission

(g) adopt interim measures to prevent the risk of serious and irreparable harm to *consumers, in particular the suspension of a website, domain or a similar digital site, service or account;*

Amendment

(g) adopt interim measures to prevent the risk of serious and irreparable harm to *collective interests of consumers;*

Amendment 321

Andreas Schwab

Proposal for a regulation

Article 8 – paragraph 2 – point l

Text proposed by the Commission

(l) *close down a website, domain or similar digital site, service or account or a part of it, including by requesting a third party or other public authority to implement such measures;*

Amendment

deleted

Or. de



Justification

Closing down a website is a very far-reaching measure that considerably constrains a website provider's right to freedom of expression. Under this provision, even minor violations could result in a website being closed down.

Amendment 332 **Andreas Schwab**

Proposal for a regulation **Article 8 – paragraph 2 – point n**

Text proposed by the Commission

Amendment

(n) order the trader responsible for the intra-Union infringement or widespread infringement to compensate consumers that have suffered harm as a consequence of the infringement including, among others, monetary compensation, offering consumers the option to terminate the contract or other measures ensuring redress to consumers who have been harmed as a result of the infringement; **deleted**

Amendment 336 **Andreas Schwab**

Proposal for a regulation **Article 8 – paragraph 2 – point o**

Text proposed by the Commission

Amendment

(o) order the restitution of profits obtained as a result of infringements, including an order that those profits are paid to the public purse or to a beneficiary designated by the competent authority or under national legislation; **deleted**

Amendment 342 **Andreas Schwab**

Proposal for a regulation **Article 8 – paragraph 2 – point p**

Text proposed by the Commission

Amendment



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(p) publish any final decisions, *interim measures or orders*, including the publication of the identity of the trader responsible for the intra-Union infringement or widespread infringement;

(p) publish any final decisions, including the publication of the identity of the trader responsible for the intra-Union infringement or widespread infringement;

Or. de

Amendment 343 **Kaja Kallas, Dita Charanzová**

Proposal for a regulation **Article 8 – paragraph 2 – point p**

Text proposed by the Commission

(p) publish any final decisions, *interim* measures or orders, including the publication of the identity of the trader responsible for the intra-Union infringement or widespread infringement;

Amendment

(p) publish any final decisions, *final* measures or orders, including the publication of the identity of the trader responsible for the intra-Union infringement or widespread infringement;

Amendment 349 **Andreas Schwab**

Proposal for a regulation **Article 8 – paragraph 2 a (new)**

Text proposed by the Commission

Amendment

2a. Any natural or legal person who is obliged to provide information in accordance with points (b) and (d) of paragraph 2 shall have the right to remain silent and the right not to incriminate himself or herself.

Or. en

Or. en

Amendment 351 **Andreas Schwab**



Proposal for a regulation Article 8 – paragraph 2 b (new)

Text proposed by the Commission

Amendment

2b. *When a decision is being made whether to impose a sanction and on the amount of the fine to be imposed in each individual case, due regard shall be given to the following:*

(a) the nature, gravity and duration of the infringement, taking into account the number of consumers affected and the level of damage suffered by them;

(b) the intentional or negligent character of the infringement;

(c) any action taken by the trader to mitigate the damage suffered by consumers;

(d) any relevant previous infringements committed by the trader;

(f) the degree to which the trader has cooperated with the competent authority in order to remedy the infringement and mitigate the possible adverse effects of the infringement.

Amendment 354 Vicky Ford

Proposal for a regulation Article 9 – paragraph 1 – introductory part

Text proposed by the Commission

Amendment

1. The competent authorities shall exercise the powers set out in Article 8 in accordance with this Regulation and national law either:

1. The competent authorities shall exercise the powers ***in a proportionate manner and ensure that the powers exercised are adequate taking into account the nature and overall harm of the infringement in question. Those powers are*** set out in Article 8 in accordance with this Regulation and national law ***and shall be exercised*** either:



Justification

It is important that the new cooperation mechanism has a minimal impact on the existing practices of national courts.

Amendment 365
Richard Sulík, Vicky Ford

Proposal for a regulation
Article 9 – paragraph 2 a (new)

Text proposed by the Commission

Amendment

2a. *The exercise of powers set out in Article 8 in application of this Regulation shall be proportionate and in accordance with this Regulation, Union and national law, and shall include applicable procedural safeguards and respect the principles of fundamental rights. Investigation and enforcement measures adopted in application of this Regulation shall adequately reflect the nature of the infringement and the overall actual or potential harm caused by it.*