



FEDMA position paper on proposal on representative actions for the protection of the collective interests of consumers

FEDMA stands for 22 national Direct Marketing Associations, representing more than 5 000 organisations, and members, representing all parts of the value chain in the direct marketing industry. The direct marketing industry uses information and personal data to effectively match customers' needs with relevant brand offers. The industry allows organisations to target customers (both prospective and existing) 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 and GDPR. We support non-judicial solutions on the basis of industry self-regulation and of ADR mechanism, as they truly are beneficial for consumers and industry. Therefore, FEDMA strongly calls for the proposal to be reviewed to avoid impacting non-judicial solutions, in order to avoid confusion with the GDPR, and to take better into account safeguards which had been highlighted in the Commission Recommendations.

Avoiding impact on non-judicial solutions

Our priority is for industry self-regulation and ADR solutions to remain attractive, to industry and consumers, to improve legislative compliance and enforcement. We ask legislators to therefore take the time to consider how collective representation could undermine; firstly, the educational role of self-regulation, which pushes industry to be better aware of legislative requirements and best practices and secondly, the industry's incentive to support out of court solutions which are effective, faster and cheaper solutions for both consumers and industry. Self-regulation works best within different legal frameworks and it enables self-regulation to be a first port of call and deal with straight forward and simple cases, while organisations who fall outside of the legal scope (e.g. illegal activities, repeat offenses, serious cases causing harm) are dealt with by the courts. Self regulatory bodies are closer to consumers and industry, therefore have a better understanding of markets and players. We also ask legislators to take into account the recent Consumer Protection Cooperation Regulation which provides consumers with administrative solutions in European cases.

FEDMA considers that self-regulatory enforcement of direct marketing 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. In cross-border scenario, FEDMA encourages its DMAs to drive their members to respect other DMAs code of conduct, including their Preference Lists. FEDMA is the only association with an approved **Code of Conduct for the processing of personal data for marketing purposes** by the article 29 Working Party. FEDMA is updating its current Code of Conduct to be GDPR compliant. Non-respect of self-regulation can lead to termination of the membership to the DMA and in some countries, reporting to the authorities. Being excluded from a Direct Marketing Association can have serious consequences on the organisation as other organisations will not wish to transfer personal data to it.

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). Most SROs monitor compliance on already published advertisements and all SROs have free, accessible and easy complaint systems for consumers who wish to express their concerns. In the field of advertising today, legal action is the ultimate resort for SROs in cases where an advertiser refuses to comply and deliberately harms consumers.

Avoiding contradiction and confusion with GDPR

The current Injunctions Directive does not apply to the data protection and privacy sector. The proposal provides for availability of injunctions and representative actions for the GDPR and the ePrivacy legislation (a directive today and a regulation in the near future). FEDMA struggles to understand how this proposal (a directive) can co-exist with GDPR and the future ePrivacy (regulations) with a higher level of harmonisation and direct applicability. We ask legislators to therefore take the time to consider the inconsistencies between these two legislations, and reach the conclusion that the proposal does not need to apply to GDPR or ePrivacy. Indeed, the following measures from the GDPR already enable for strong enforcement and data subject protection;

- **On judicial competence**, the data subject has the right to lodge a complaint for judicial remedy under article 79 of the GDPR (the judicial remedies, the procedures and proof requirements depend on national procedural law). In article 79, GDPR goes further than the current proposal by providing that the proceedings against a controller or processor shall be brought before the courts of the member state where the controller or the processor has an establishment. Alternatively, such proceedings may be brought before the courts of the member state where the data subject has his or her habitual residence. This current proposal refers to Brussels I¹.
- Regarding **injunctions**, Data Protection Authorities already have injunction powers under article 58.2(f) of the GDPR. Member states may also provide additional powers to their supervisory authority (article 58.6). Moreover, an entity (with or without mandate) can lodge a complaint under article 80 of the GDPR, to obtain judicial remedies for example to obtain injunctions. It is therefore not necessary to extend the scope of the injunctions directive to GDPR and ePrivacy. Moreover, in Germany, the Bundestag adopted a resolution which requires the government to put forward a proposal to protect SMEs

¹ Brussels I provides that in principle, individuals should sue in front of the jurisdiction of the member state of the domicile of the defendant. Exceptions apply to insurance, consumer law and employment contracts but a priori not for collective cases.



against abusive injunction procedures for minor infringements. It is crucial to find the right balance here, particularly in the context of the GDPR. Implementing the GDPR is more complex than a simple tick the box exercise. It is an on-going and extensive process which requires support from all employees right up to the CEO. FEDMA asks legislators to reflect on how to protect organisations, especially SMEs, from abusive injunction procedures which do not reflect infringements of the types described under article 83 of the GDPR (e.g. grave, long lasting, repetitive breaches).

- **On damages and compensation**, any person who has suffered material or non-material damage as a result of an infringement of the GDPR shall have the right to receive compensation from the controller or processor for the damage suffered (article 82 of the GDPR). The compensation for damages will depend on national law.
- **Regarding the opt-in requirement**, a mandated entity can lodge a complaint on behalf of a data subject under article 80 of the GDPR and can exercise on behalf of the individual the right to receive compensation under article 82 of the GDPR. The GDPR provides for a representative action which can be individual (one mandate) or collective (several mandates), leading to injunctions and compensation, as provided by member state law. This **mandate requirement** clearly contradicts the proposal which bans member states from requiring mandates for small claims.
- A mandated entity can **independently of the mandate of a data subject**, lodge a complaint for effective judicial remedy against a legally binding decision of a supervisory authority and against an infringement of the GDPR. This means that the GDPR provides for member states to create a mechanism of **representation action**, which does not require a mandate, to claim judicial remedies (as provided by national law) for example injunctions. In this article, no reference is made to compensation requests. Furthermore, recital 142 of the GDPR provides that the entity “may not be allowed to claim compensation on the data subject’s behalf independently of the data subject’s mandate.” The consequence of this is that opt-in principle or at least proof of damages, applies in the case of collective actions with representation to request for compensation. This is in direct contradiction with this proposal for representation action which bans the requirements of mandates in the case of small claims. Finally, the Regulation does not provide a small claims procedure, also in direct contradiction with the proposal. There is therefore a major cultural difference between the GDPR (where the procedure are based on mandates, no small claims and referring to national legislations for remedies) and the proposal (banning mandates for small claims and creating an additional procedural tool compared to national law). How can these two texts co-exist, especially when one is a sector specific regulation? Should sector specific regulation not prevail above general directives, like this proposal?
- The **mandated entity** must respect certain criteria which are not identical to the ones provided in this proposal. The entity in GDPR can be a “not for profit, organisation or association” while under the current proposal it can be “in particular consumer organisations and independent public bodies”, “ad hoc” or “consumer organisations that represent members from more than one member state”. In addition to the criteria provided in the proposal, the entity must also according to GDPR “be active in the field of data protection of data subject’s rights and freedoms with regard to protection of their personal data”. Therefore, there is a risk of contradiction and incoherence between the two texts. In Germany, the Land of Bavaria submitted a draft law to the Bundesrat plenary on 6 July under article 80 of the GDPR to insist on civil actions by entities having to comply with the strict GDPR conditions. This proposal will be examined now in the competent



Bundesrat committees. It also insists that entities should not be able to launch complaints for formal errors concerning e.g. information obligations under GDPR. The Bavarian Government issued on 5th June 2018 a decision asking for a soft implementation of the GDPR which is understandable for citizens and SMEs so that the GDPR finds wide acceptance. This supports our request to protect organisations, especially SMEs, from abusive procedures which do not reflect infringements of the types described under article 83 of the GDPR (e.g. grave, long lasting, repetitive breaches).

Providing more safeguards

According to the study “A 'Fair Deal' for Consumers?”, 67 percent of EU consumers believe that the European Union should not mandate collective action lawsuits without safeguards against abuse². FEDMA calls for more and stronger safeguards as was described in the 2013 Commission recommendation on collective redress, notably for the judicial verification of claims, mandates, lack of coordination mechanism for overlapping claims, third party litigation funding, one sided discovery rules.

FEDMA is concerned by the criteria for establishing qualified entities. According to the Commission, one of the strongest safeguards against abuse is that representative actions will not be open to law firms but only to qualified entities such as consumer organisations that are non-profit and fulfil eligibility criteria monitored by public authorities. Firstly, there are no safeguards regarding the governance, financial resources, capacity, representativeness and standing. Secondly, FEDMA is concerned that the national safeguards to approve qualified entities could be undermined by cross-border, actions from qualified entities in other countries, because courts are obliged to accept these collective representation cases. Although the law applicable to the case does not depend on the member states of the qualified entity, it still means that organisations cannot rely on national safeguards regarding qualified entities which can simply be circumvented.

FEDMA is also troubled by the absence of incentive for organisations to settle claims. The consumer has the choice to accept or not the settlement. In this context, the lack of legal certainty may discourage many organisations from settling. Any settlement should have an erga omnes effect. This means that if it is reached by the parties under judicial control, the settlement should put an end to the dispute and close the possibility of obtaining, by any other means, redress for the same infringement. Any settlement that is not binding upon all parties is discouraging.

Finally, FEDMA is worried by the absence of mandates for small claims, as previously mentioned.

² <https://www.instituteforlegalreform.com/research/eu-consumer-survey-2018>