FEDMA position paper

November 2018

FEDMA amendments 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 previously strongly called 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. Some improvements have been suggested. We support some of these amendments and make a few additional suggestions.

Avoiding impact on non-judicial solutions

Effective implementation of law requires a balanced approach between self-regulatory systems and judicial systems; injunctions (to stop infringements) and redress actions (enabling consumers to obtain repair and compensation for their damages). Our priority is for industry self-regulation and ADR solutions to remain attractive, to industry and consumers, to improve legislative compliance and enforcement. Self-regulation facilitates industry education to prevent infringements. 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.

FEDMA supports amendments which ensure a good balance between non-judicial and judicial solutions, injunctions and redress mechanism.

Preferably, FEDMA supports amendments on redress which provide for this proposal to focus on serious cross border redress cases with a minimum number of consumers (e.g. 100) and countries (e.g. 2) (**Amendment 218, 229 and 236**).

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Alternatively, FEDMA understands that the draft report of MEP Didier brings more balance between redress and injunction actions, thereby also driving a better balance between judicial and non-judicial solutions. We therefore also support the introduction of **amendment 6 and 8** which focus the proposal on redress "representative actions brought against infringements with a broad public impact by traders" representing the interests of "minimum 50 consumers". This will ensure a balanced overall enforcement of law where self-regulation and judicial collective actions complete each other.

These options support 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). Indeed, The Handelsverband Deutschland (Business association of Germany) is calling for the German collective injunction proposal not to apply to small GDPR infringements.

Avoiding contradiction and confusion with GDPR

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. The EDPS also raised its concerns in its opinion.

Excluding the GDPR and ePrivacy from the scope of this Directive is the easiest solution. Therefore, we support amendments which support this exclusion (**amendment 530**).

In combination, or alternatively, the Directive could focus only on serious cross-border cases. If the Directive focuses solely on serious cross border cases (e.g. minimum 100 affected consumers in at least 2 countries, identified consumers), then member states could still be free to decide at national level if they wish to use the framework provided in the GDPR for collective actions and how. FEDMA therefore also supports **amendments 218, 229 and 236**.

Alternatively, we understand that the current proposal and draft report will enable national systems to co-exist with a European one but require all member states to have collective actions. Three scenarios would exist in the data protection sector;

1: a member state already is compliant with article 80 of the GDPR and does not need to change its law on the basis of this proposal,

2: a member state has no representative action for data protection and decides to adopt a law based on article 80 of the GDPR,

3: a member state has no law enabling representative action for data protection and does not plan to adopt a law on article 80 of the GDPR, in which case this proposal applies and provides consumers with a representative action in the scope of data protection. This is FEDMA's least preferred solution because it requires safeguards to avoid contradiction with the GDPR. In this case, FEDMA would support **amendment 6 and 8** of the draft report which provides for the directive to apply to "broad public impact" with a minimum of 50 cases.

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Providing more criteria for qualified entities and more safeguards

FEDMA supports better criteria for establishing qualified entities and more safeguards to ensure that this proposal is better balanced.

We call for additional requirements for qualified entities:

- provision that qualified entities have to have a clear objective to act in the interests of consumers and to preferably have a reference in their statutes to defend the interests protected by one or more of the legal acts foreseen in Annex 1 (**amendment 14, 255, 257, 262**),
- minimum number of years of experience (**amendment 10, 255, 257**);
- experience in collective redress cases (**amendment 12**),
- a minimum number of members (**amendment 11**, **274**);
- qualified entities cannot be financed by, or to have lucrative agreements with plaintiff law firms (**amendment 13, 267, 268, 385, 387**),
- suppression of ad hoc qualified entities (**amendment 16, 283**),
- sufficient capacity in terms of human ressources and legal expertise to represent multiple claimants acting in their best interests (**amendment 274, 292**)
- procedure to avoid conflict of interest (**amendment 28**, **267, 268, 385, 387**)
- the governance structure must provide complete independence from third parties (amendment 9 and 28).

We call for more procedural safeguards:

- consumer mandates (**amendment 21 and 24, 362**),
- the redress awarded should not exceed what would have been rewarded in the context of an individual claim (**amendment 27, 379**)
- claims must be ascertainable and uniform and there is a commonality in the measures sought. **(amendment 303**)
- Collective action must be the most suitable way to resolve the claims of the multiple consumers **(amendment 303**)
- No other action has been brought before a court or administrative authority regarding the same practice, the same trader and the same consumers and prevention of double jeopardy (being prosecuted twice for same thing) (**amendment 18 and 31, 374**)
- A judicial decision establishing the non-existence of the infringement should have the same effect as the one declaring infringement.
- No punitive damages (**amendment 26 and amendment 27, 379**)
- settlements are binding when majority of consumers giving their mandate, agreed (**amendment 32**)
- Loser pays principle (**amendment 29**)
- option for member states to ban third party funding in general or in some cases (**amendment 30, 267, 268, 385, 387**).
- On transparency (**amendment 443**)

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