

FEDMA position paper

5th January 2016

FEDMA's answers European consultation on regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy

FEDMA supports the Commission in its efforts to consult the industry to fully assess the complexities of the online markets and to understand the benefits of platforms and online intermediaries. FEDMA draws attention to the huge benefits of platforms and online intermediaries. Indeed, 270 billion euros is the total value of services and goods purchased through online intermediaries by private households and public sector in 2014¹. Online intermediaries are key contributors to the EU Growth, as 60% of private consumption of goods and services is through online intermediaries. Online intermediaries help SMEs overcome barriers to growth such as costs, scalability, increasing productivity and embracing innovation. 61% of European SMEs use social media. We encourage the Commission to refer to the Copenhagen Economics study mentioned in footnote 1 which highlights numerous and essential benefits of online intermediaries.

FEDMA asks the Commission to work with the industry to define a workable scope to this consultation within which the Commission can assess the benefits of platforms and online intermediaries and market failures. Clarity as to the scope of what we are analysing and consistency of definitions across EU documents is essential. According to the consultation, the scope of the consultation is "online platforms" as referring to an undertaking operating in two or multisided markets, which uses the internet to enable interactions between two or more distinct but interdependent groups of users so as to generate value for at least one of the groups. Certain platforms also qualify as intermediary service providers. Copenhagen Economics highlights that online intermediaries do not all belong to the same sector and they cover a vast array of user industries (ecommerce platforms, social networks, search providers, entertainment services, search providers, comparison tools/agents). **FEDMA highlights the different types of intermediaries operating online and calls on the Commission to take these differences into account in its analysis of the scope of the consultation.**

Many issues were highlighted in the consultation and in discussions around the consultation. Issues range essentially from competition to liability to data protection. We call on the Commission to focus on identifying market failures and finding non legislative solutions to positively shape markets baring the numerous benefits of platforms in mind. FEDMA calls on the Commission to leverage better current competition law, Ecommerce Directive, Consumer Acquis and Data Protection framework.

¹ [Online Intermediaries Impact of the EU economy by Copenhagen Economics](#) October 2015

Competition law is effective and major investigations are ongoing. Competition law can be used to prevent abuse of market dominance. Currently, the Commission is already investigating since April 2015 Google for abuse of dominant position in web searches accusing it of diverting traffic from its rivals to favour its own products and services, particularly websites for shopping. Since June 2015, the Commission also investigates Amazon into whether the company used its dominant position in the region's e-books market to make it harder for rivals to offer lower prices. European competition officials confirmed in April that they had sent questionnaires to music labels and rival music streaming companies in an attempt to gather evidence and decide whether to open an antitrust investigation into Apple's new music service. Regarding the risks around their potential capacity to create new market barriers, special legislation for platforms will not be the solution according to ITIF2. In any case, **solutions should not harm SMEs and should not impact the benefits that SMEs get from platforms.**

Regarding platforms, their algorithms and competition, FEDMA draws the Commission attention to the internal market sub-committee of the UK House of Lords in their inquiry on online platforms and the EU Digital Single Market³ discussions. Experts highlighted that such **algorithms are protected by Intellectual Property**. The solution is not in the access to the maths but in more transparency around the collection and use of data. The consumer has the possibility to complain and can ask the organisation to reassess the outcome. Ultimately, the consumer is free to like and use the outcome or not. **We urge the Commission to focus on clarifying and improving current legislation.** As concluded by the House of Lords inquiry⁴, "basically the rules exist in principle and it is a question of applying them to the new market". For example, regarding competition law, the procedures can be assessed to find solutions to accelerate the procedures. French competition authorities are using interim measures. FEDMA draws attention to the General Data Protection Regulation which reinforced data subject rights such as the right to access to data and erasure, and ensured the right to portability.

Regarding responsibility, FEDMA calls to continue using the E-commerce Directive as the legislative basis for determining the role of platforms in cross-border trade online. The Ecommerce Directive clarifies the responsibility of online intermediaries. Better enforcement as well as the development of technological solutions to improve the notice and take down procedure could be further reflected on. **Regarding piracy, the advertising industry is developing best practices.** For example, ad servers can use clear terms and conditions referencing advertising guidelines to their partners. Organisations can be signatories to charters to fighting against piracy on the internet, for example in France. Ad servers can work with partners which can check the content of sites where advertising is served. Ad servers can have a complaint system. As soon as they have knowledge of a partner who is proposing potentially illegal content, they stop serving advertising, can even stop working with them. Furthermore, on 1 July 2014, the Commission published a [Communication](#) on their Action Plan to renew efforts to enforce Intellectual Property Rights. Action 3 provides that the "the Commission will facilitate the development of further

² "[Why internet platforms don't need special regulation](#)" by ITIF October 2015 "there is therefore little need at this point for new laws or regulatory actions solely at platforms per se".

³ Evidence session 14, questions 137-145

⁴ Evidence session 13, questions 123-136

voluntary Memoranda of Understanding to reduce the profits of commercial scale IP infringements in the online environment, following Stakeholder Dialogues involving advertising service providers, payment services and shippers”. Finally, the Commission also published a [consultation](#) on the evaluation and modernisation of the legal framework for the enforcement of intellectual property rights (IPR). Therefore, best practices against piracy are being discussed.

The Consumer Acquis already provides necessary transparency requirements. For example, according to the Unfair Commercial Practices Directive, platforms are required to explain how reviews of consumers work. The Commission is working on a UCPD guidance. The Consumer Acquis, notably the UCPD, will be submitted a Refit exercise. The UCPD guidance or the Refit exercise will be the opportunities to clarify how current legal requirements apply to online platforms and how to better enforce these current rules.

Taking into consideration the French legislative proposal, the proposal seems premature since the EU discussions are starting. A finalised European discussion seems preferential. Moreover, for all the reasons mentioned hereabove, FEDMA doubts of the added value of a general obligation of “loyalty” as set forward by the French legislative proposal sets forward⁵. Furthermore, the French suggestions regarding data portability and privacy must be aligned with the requirements under the GDPR⁶.

Regarding data and data ownership, the General Data Protection Framework clarifies who has the right to use the data and how to process it lawfully. The GDPR covers all types of personal data processing. It is designed to be technology neutral and therefore covers also platforms and their use of data.

Data plays a significant role in many online platforms. Personalisation of marketing is fundamental to the modern data economy and is a primary driver of added value in the economy. Consumers are becoming more open about the data economy as DMA research ‘[what the consumer really thinks](#)’ has shown. The research was conducted in 2012 and 2015 and it has shown a societal shift away from ideological opposition to sharing data towards a more open data sharing society. More people are becoming data pragmatists, consumers are willing to share data with companies on a case-by-case basis based on the merits of sharing that data. The biggest factor influencing a consumer’s decision whether to share data is trust. The biggest risk is that businesses, that abuse this trust, erode the enormous potential of a free and open data economy.

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 on how, when and why their data is collected and processed. For example, FEDMA is updating its code of conduct on processing of data for marketing purposes which was approved by the article 29 working party⁷. According to the Microsoft study “[the Consumer Data Value Exchange](#)”, when consumers are made aware of the tangible benefits that data can provide, their

⁵ Article 22 Projet de loi pour une République numérique EINI1524250L/Bleue-1

⁶ Articles 21 and 26

⁷ More information at www.fedma.org

attitude to sharing can change significantly.⁸ FEDMA fully supports the principle of transparency and the data subject's right to be given all necessary information relating to the processing of his or her data in the legislative framework⁹. Organisations are improving their privacy notices and data collection notices to raise consumer awareness of the collection and use of data. Organisations are becoming more transparent and at the same time educating consumers, thus benefiting both parties. Beyond strictly legal requirements, organisations are also seeking to highlight better the concrete benefits of the data for the consumers. Reputational loss can deeply affect organisation's bottom line if the organisation were to suffer a security breach or a lack of consumer trust regarding their privacy processes. The industry is becoming more and more transparent. Two relevant examples are:

- The Guardian [Why your data matters to us video](#) is such an example. This short one minute video concisely explains the value exchange and reassures consumers that their personal data will be secure and not sold on to a third party.
- The Channel 4 video [our viewer promise'](#) works in a similar vein to the Guardian video and explains how information is collected, why it is collected and what Channel 4 does with it. Channel 4's viewer database has garnered over 11 million registered users, which suggests consumers have a clear understanding of the value exchange when using Channel 4's services such as, 4oD.

Regarding further transparency on Online Behavioural Advertising, consumers can easily receive more information regarding OBA and opt-out of receiving targeted advertising through the website "Youronlinechoice"¹⁰.

The GDPR equally provides for a right to portability for consumers. Some solutions and initiatives are already developing to foster consumer control and consumer choice. For example, the UK Midata scheme¹¹, **which allows customers to compare current accounts using their own data. It is equally important to let the industry further work on interoperability of data to facilitate data portability and facilitate consumer choice. FEDMA considers that the concept of B2B portability may be premature and in any case, requires further reflections into its economic impact and technical feasibility.** FEDMA remains concerned about the wider effects of the provision on sectors and business models beyond typical social network model. We wish to stress that the imposition of one single format for the transfer of data would stifle innovation and become costly for businesses. Furthermore, the scope of portability must be narrowed to cover only data provided by the data subject directly and the data that is actually needed in order to change providers. The right to data portability should not apply if disclosing personal data would infringe intellectual property rights in relation to the processing of those personal data, nor

⁸ Also experienced by the European Digital Advertising Alliance: 54% of consumers in Portugal and 43% in Spain are more favourable towards Online Behavioural Advertising presented with the YOurlinechoices programme.

⁹ Within the context of the GDPR discussions, FEDMA calls for consideration of space limitation in the offline world, when information is provided on paper (printed media), or in the online world, for space limited media (i.e. SMS). The controller should benefit from some flexibility as to how the information is provided.

¹⁰ <http://www.youronlinechoices.eu/>

¹¹ For more information: <http://www.which.co.uk/news/2015/03/midata-which-first-look--399235/>



business confidentiality, and competition rights. Finally, a small fee could be requested to cover administrative costs.

Regarding the reuse of private data, FEDMA suggests to the Commission to focus on public open data. FEDMA encourages initiatives such as the two open data portals [European Data Portal](#), a website which aggregates all public sector data in the EU and translates it in 23 languages and the [open data website of the EU institutions](#). Indeed, public open data initiatives can help SMEs. Public data is very important as it enables organisations to enrich their market analysis and profiling of their customers. Open public data can help organisations understand and identify better the needs of markets. Open public data ensures a better level playing field for SMEs in competition with dominant players. Within this context, legitimate interest as a legal basis for data processing for marketing purposes is also crucial.

In parallel, **FEDMA encourages the Commission to continue helping companies scale up in the EU.** The start-up Europe initiative provides funds to support starts-ups, which is crucial for the Digital Single Market. **FEDMA also calls on the Commission to continue facilitating innovation and the development of new technologies** as these foster competition among platforms and the more traditional industry. Vice President Ansip highlighted these aspects to the internal market sub-committee of the UK House of Lords in their inquiry on Online platforms and the EU Digital Single Market, providing as an example the financial technology platforms based in London¹².

FEDMA urges the Commission to continue working on the principles of Better Regulation and working on the basis of evidence. FEDMA encourages the Commission to consult and work with organisations as much as possible for example by creating a working group just like for the proposal on consumer rules for online purchase.

Finally, FEDMA calls on the European Institutions to maintain an open mind regarding the benefits of platforms and Big Data so as to reach the right balance between consumer and industry needs. The EDPS introduced its 7/2015 opinion on meeting the Challenges to Big Data by reminding that “Big data, if done responsibly, can deliver significant benefits and efficiencies for society and individuals not only in health, scientific research, the environment and other specific areas”. Indeed, as highlighted recently at the European Data Forum¹³, Big Data can provide numerous societal benefits; such as energy efficiency within smart cities¹⁴, business information for retailers of any size¹⁵, public transport efficiency and sustainability in London¹⁶. Other benefits can be the improvement of the road conditions as highlighted in a case study of Data Now campaign¹⁷.

FEDMA supports the objective of the Digital Single Market to give better access to goods and services across Europe. FEDMA considers that it is important to focus on effective consumer

¹² Evidence session 15, question 146-157

¹³ Program and presentations can be found here: <http://2015.data-forum.eu/program>

¹⁴ Smart Data THE driving force for industrial applications by Siemens

¹⁵ How to create value from financial data? By BBVA

¹⁶ [Innovations in London's transport: Big Data for a better customer experience](#)

¹⁷ http://data-now.eu/case_study/3/keeping-the-european-auto-sector-competitive



choice which must be supported as long as there is a balance between business and consumers interests. Indeed article 16 of the Charter of Fundamental Rights lays down freedom of enterprise. Furthermore, article 52.1 of the Charter provides that limitations to the rights in the Charter must be based on the principle of necessity and proportionality.

More information about FEDMA:

FEDMA stands for 22 national Direct Marketing Associations, directly representing more than 5 000 organisations, and for more than 50 organisations, 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 data-driven marketing industry aims to create and maintain an individual and interactive relationship between businesses, institutions and their customers (both prospective and existing). The data-driven marketing industry allows retail businesses to target people 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.

