

AIM response to questions raised in Commission Green Paper on Unfair Trading Practices 31/1-13

A. The Concept of Unfair Trading Practices	AIM response
<p>1) <i>Do you agree with the definition of UTPs?</i></p> <p>2) <i>Is the concept of UTPs recognised in your Member State? If yes, please explain how.</i></p> <p>3) <i>In your view, should the concept of UTPs be limited to contractual negotiations or should they include the pre- and/or the post-contractual phase as well?</i></p> <p>4) <i>At what stage in the B2B retail supply chain can UTPs occur?</i></p> <p>5) <i>What do you think of the concept of "fear factor"? Do you share the assessment made on this issue? Please explain.</i></p>	<p>The concept of unfair trading practices is well described in section 2.1 of the Green Paper and in line with the set of voluntary principles and examples of fair and unfair practice defined by a group of members of the B2B Platform in 2011.</p> <p>N/A to AIM.</p> <p>As stated on page 6 of the Green Paper, “UTPs can occur at any stage of the B2B relationship. They can be employed when negotiating a contract, can be part of the contract itself or can be imposed in the post-contractual phase (e.g., retro-active contractual changes)”. It would therefore make little sense to limit the concept to one or the other of these phases.</p> <p>UTPs can occur at any stage in the B2B retail supply chain.</p> <p>When asked, companies point to fear of commercial retaliation as the main reason for not taking action when confronted with unfair commercial practices, according to research done by AIM and FoodDrink Europe in March 2011 (this was presented to the B2B Platform).</p>
<p>B. Examples of Unfair Trading Practices</p>	

<p>6) <i>In your experience, to what extent and how often do UTPs occur in the food sector? At which stage of the commercial relationship do they mainly occur and in what way?</i></p> <p>7) <i>Are UTPs present in non-food retail sectors as well? If so, please provide concrete examples.</i></p> <p>8) <i>Do UTPs have an adverse impact in particular as regards the ability of <u>your company</u> to invest and innovate? Please provide concrete examples and quantify to the extent possible.</i></p> <p>9) <i>Do UTPs affect consumers (e.g., through influencing prices, product choice or innovation)? Please provide concrete examples and quantify to the extent possible.</i></p> <p>10) <i>Do UTPs have an impact on EU cross-border trade? Do UTPs result in a fragmentation of the Single Market? If yes, please explain to what extent UTPs impact the ability of your company to trade cross-border.</i></p>	<p>Companies face a high level of exposure to unfair practices. For details see the AIM/FoodDrink Europe survey.</p> <p>According to the AIM/FoodDrink Europe survey, unfair practices are also experienced in the grocery non-food sector.</p> <p>Unfair practices have substantial negative effects on innovation according to the above mentioned survey.</p> <p>A reduced capacity to invest in innovation as a consequence of unfair practices leads to less product choice for consumers.</p> <p>UTPs do not as such result in a significant fragmentation of the Single Market. They might have an indirect impact on cross-border trade because they can limit the supplier's financial ability to produce for and engage in other markets, especially for non-food products, which are often less national or regional than food.</p>
<p>C. Legal frameworks on Unfair Trading Practices</p>	
<p>11) <i>Do the national regulatory/self-regulatory frameworks in place sufficiently address UTPs in some Member States? If not, why?</i></p> <p>12) <i>Is the lack of specific national regulatory/self-regulatory frameworks addressing UTPs a problem in jurisdictions where they do not exist?</i></p> <p>13) <i>Do measures that seek to address UTPs have effects only on domestic markets or also on cross-border trade/provision of services? If so, please explain the impact on the ability of <u>your company</u> to trade cross-border. Do</i></p>	<p>Given the different business models and negotiating cultures in EU member states it is only natural that national frameworks (be they regulatory or self-regulatory) differ. Whether they sufficiently address UTPs nationally can better be answered by national associations/companies.</p> <p>Again this depends on the specific national situations and should be answered by national associations/companies.</p> <p>Different national regimes could in principles have cross-border effects, but AIM is not aware of any such effects in practice.</p>

<p><i>the differences between national regulatory/self-regulatory frameworks in place result in fragmentation of the Single Market?</i></p> <p>14) <i>Do you consider further action should be taken at EU level?</i></p> <p>15) <i>Where it exists, does UTP regulation have a positive impact? Are there possible drawbacks/concerns linked to introducing UTP regulation, for example by imposing unjustified restrictions to contractual freedom? Please explain.</i></p>	<p>For AIM the best option for EU level action is the voluntary framework for the implementation and enforcement of the Principles of Good Practice in the food supply chain adopted in November 2011. It is a flexible approach that can deliver results much faster than a legislative initiative. The voluntary B2B approach should be given a fair chance to work. The implementing framework was designed for and is open to organisations representing the entire food supply chain.</p> <p>Any general regulation of B2B unfair trading practices would add cost and potential complexity to business. Where significant issues are identified by a public authority, practices should be addressed on a targeted basis, focused on the areas of greatest concern.</p> <p>This question needs to be answered for individual countries based on the experience with national UTP legislation. This can best be done by national associations/individual companies.</p>
<p>D. Enforcement rules against Unfair Trading Practices</p>	
<p>16) <i>Are there significant discrepancies in the legal treatment of UTPs between Member States? If this is the case, are these discrepancies hindering cross-border trade? Please provide concrete examples and quantify the impact to the extent possible.</i></p> <p>17) <i>In case of such negative impacts to what extent should a common EU approach to enforcement address the issue?</i></p> <p>18) <i>Should the relevant enforcement bodies be granted investigative powers, including the right to launch ex officio actions, impose sanctions and to accept anonymous complaints?</i></p>	<p>Recent information about such discrepancies should be available to the Commission as a result of the study it conducted in 2012.</p> <p>Enforcement is done nationally on the basis of national UTP regulation. This question therefore seems premature from an EU angle. European rules should clearly be accompanied by effective enforcement instruments if introduced at some point in the future.</p>

<p>E. Types of Unfair Trading Practices (see separate table)</p>	
<p>19) Does the above list detail the most significant UTPs? Are there other types of UTPs?</p> <p>20) Could setting up a list of prohibited UTPs be an effective means to address the issue? Would such a list have to be regularly updated? Are there possible alternative solutions?</p> <p>21) For each of the UTPs and corresponding possible fair practices identified above, please:</p> <ol style="list-style-type: none"> a. Indicate whether or not you agree with the analysis of the Commission. If applicable, provide additional information. b. Explain whether the UTP is relevant for the sector in which you are active. c. Explain if the corresponding possible fair practice could be applied across the board in different sectors? d. Explain if the UTP should be prohibited per se or its assessment should be made on a case by-case basis. <p>22) As regards specifically Territorial Supply Constraints, please explain:</p> <ol style="list-style-type: none"> a. What would you consider to be objective efficiency grounds justifying 	<p>In the course of the work on a voluntary framework conducted in 2011, the stakeholder group has provided definitions of unfair commercial practices. They are set out in the ten principles as well as the examples of fair and unfair practices. The Commission’s description of UTPs in the Green Paper seems to aim at the same range of practices even if structured in a different way. AIM does <u>not</u> agree with defining territorial supply constraints as a UTP, see below under question 22 and documents in annex.</p> <p>Market operators tend to seek way around black lists unless the regulation is so clear and narrow that avoidance is difficult. The strength of the voluntary stakeholder framework is that it leaves room for an on-going interpretation and publication of guidance according to needs.</p> <p>AIM broadly agrees with the Green Paper’s description of UTPs, except concerning territorial supply constraints, see below under question 22. We can confirm that UTPs are relevant to the various categories in the fast moving consumer goods sector, whether food or non-food.</p> <p>Where UTPs are regulated, it can make sense to work with a per se prohibition for certain serious practices.</p> <p>AIM sees no reason to extend the discussion of territorial supply constraints beyond the existing EU competition law framework and its interpretation by the ECJ (for details see <u>attached</u> “AIM</p>

<p>a supplier not to supply a particular customer? Why?</p> <p>b. What would be the advantages and disadvantages of prohibiting territorial supply constraints (as described above)? What practical effects would such a prohibition have on how companies set up their distribution systems in Europe?</p> <p>23) Should the above possible fair practices be embodied in a framework at EU level? Would there be any disadvantages to such an approach?</p> <p>24) If you consider further action should be taken at EU level, should this be a binding legislative instrument? A non-binding? A self-regulatory initiative?</p> <p>F. General remarks</p>	<p>position on competition law aspects of territorial supply constraints”).</p> <p>AIM fundamentally disagrees with the assumption that territorial supply constraints belong in a context dealing with unfair trading practices. The conclusion of a study commissioned from RBB Economics to analyse thoroughly the economic effects of territorial supply constraints shows that the question is far more complex than the Green Paper is seeking to portray. “Contrary to what the Green Paper implies, cross-border price differentials, where those occur, often reflect the efficient functioning of markets, the characteristics of which considerably differ between Member States. Indeed economic theory indicates that so-called “price discrimination” is often welfare-enhancing. Blanket measures aimed at reducing cross-border price differentials are likely to have a number of adverse long-term consequences that are likely to harm consumers.”</p> <p>The study is <u>attached</u>.</p> <p>On the question of practical effects on companies’ distribution systems, AIM would refer to responses by individual companies.</p> <p>Embodying fair practices in a framework at European level is what the stakeholder principles of good practice do. AIM is of the opinion that the voluntary B2B approach should be given a chance to work before any other initiatives are proposed by the Commission (see above under reply to question 14).</p> <p>As stated above, a self-regulatory initiative is already well underway. According to it, companies in the food and drink chain are even encouraged to apply the principles throughout their organisations independently of the nature of the product if similar conditions exist (e.g. similar chain composition; similar product groups or similar procurement policies), and the framework can serve as a model for handling UTPs more broadly.</p>
---	---

25) This Green Paper addresses UTPs and fairness of B2B relationships in the B2B food and non-food supply chain. Do you think that any important issues have been omitted or under-represented in it?

29 April 2013

Avenue des Gaulois 9
B-1040 Brussels
Belgium

Tel: +32 2 736 0305
Fax: +32 2 734 6702

www.aim.be