

AIM contribution to the European Commission
consultation on

**FITNESS CHECK OF EU CONSUMER AND
MARKETING LAW**

SEPTEMBER 2016

AIM Contribution to the Consultation on Fitness check of EU consumer and marketing law

Background

In the context of the 'Fitness Check' of EU Consumer and Marketing Law directives the Commission seeks views on whether these rules are still up to date and fit for purpose.

Six directives are covered by this exercise:

- Unfair Contract Terms Directive [1993/13/EEC](#);
- Consumer Sales and Guarantees Directive [1999/44/EC](#);
- Unfair Commercial Practices Directive [2005/29/EC](#);
- Price Indication Directive [1998/6/EC](#);
- Misleading and Comparative Advertising Directive [2006/114/EC](#);
- Injunctions Directive [2009/22/EC](#).

The Consumer Rights Directive [2011/83/EU](#) is evaluated separately but will feed into the conclusions of the Fitness Check.

In addition to this public consultation, the European Commission commissioned studies and created a specific stakeholder and support group.

The results of this public consultation will also feed into the ongoing legislative process on the Commission Proposal for a Directive on certain aspects concerning contracts for the online and other distance sales of goods.

Position of AIM

AIM's membership comprises corporate members and national associations that have a similar but more local constituency. Altogether, AIM ([link](#) to our website) represents directly or indirectly some 1,800 companies ranging from SMEs to multinationals, accounting for some 450 billion euro in sales and two million jobs in Europe alone. Branded products manufacturers are united in their purpose to build strong, evocative brands and as such place the consumer at the heart of what they do.

Consumer trust is a condition for thriving modern economies, and therefore a key lever to get Europe back towards economic prosperity. The bond of trust between brands and consumers is fundamental to AIM's members. AIM published in 2015 a study on [“Brands and consumer trust: The nature of trust, how it is built and its implications for companies and the economy”](#). Creating that trust is a shared responsibility of public authorities and responsible market players. AIM has always supported policies strengthening consumer trust, especially against misleading commercial practices. As an enthusiastic advocate of the single market, AIM supports clear and harmonized consumer rules, which would not result in legal fragmentation and consumer confusion when shopping cross border. However, fully aware of the limits of consumer law to generate trust, AIM and its members have engaged a structured dialogue with BEUC - the European Consumer Organisation - and participated in the multistakeholder dialogues of the European Commission on comparison tools and green claims.

In our contribution, we will:

- Present the principles adopted in 2003 and followed by AIM members to increase consumer trust and how they relate to the Fitness Check of EU Consumer and Marketing Law
- State possible margins for improvement in current legislation, especially to improve the enforcement of key provisions and their implementation in the digital environment to increase consumer trust when shopping online
- Answer the most relevant questions in the online public consultation.

PRINCIPLES UNDERLYING ANY AIM RESPONSE ON EU CONSUMER LAW

In 2003, AIM developed ten principles, which explain the nature of the bond of trust between consumers and brands.

1. **CONDUCT** AIM members conduct their business with integrity and openness.
2. **CONSUMER BENEFITS** The brands of AIM members provide:
 - value in terms of price and quality,
 - choice from diversity,
 - convenience from availability and recognition,
 - relevance by meeting evolving needs,
 - reassurance from reliability and trust,
 - satisfaction from identification with the brand itself.
3. **REDRESS** AIM members believe that means of appropriate redress should be easily available.
4. **SAFETY** AIM members are committed to providing brands which are safe for their intended use.
5. **INNOVATION** AIM members are committed to the pursuit of innovation that meets the evolving needs and expectations of consumers.
6. **COMMUNICATION** AIM members are committed to communication that enables consumers to make informed purchasing decisions.
7. **COMPETITION** AIM members seek to create an environment of fair and vigorous competition for brands guaranteeing maximum value to consumers.
8. **PRIVACY** AIM members seek the trust of consumers by respectful use of personal information.
9. **RESPONSIBILITY** In their relationship with consumers, AIM members recognize their responsibility to take into account wider societal interests.
10. **DIALOGUE** AIM members are committed to dialogue with consumers, their representatives and other stakeholders in order to strengthen the dynamic relationship between brands and consumers.

When applied to the Fitness Check, these principles translate into two linked objectives:

1. A common level of consumer protection

AIM supports a common level of high and proportional consumer protection across the EU. Most of the directives under review have mainly set minimum standards to which Member States added new layers of rules resulting in a fragmented regulatory framework and different levels of protection. For example, the transposition of the Consumer Sales and Guarantees Directive led to at least six different national regimes of legal consumer guarantees. In addition, AIM considers that in the specific case of consumer law, where there is a national best practice, the EU should consider whether that best practice should be adopted across the EU. Finally, AIM considers that where there are national differences in consumer protection law, those differences need to be rigorously justified.

2. Consumer protection that is simple to understand

AIM believes that informed consumers are better protected consumers. Consumer law needs to be simpler to understand and definitions must be consistent.

In 2010, AIM and BEUC, the European Consumer Organisation, adopted common principles for consumer information [link](#). AIM and BEUC share the view that the provision of information to consumers should be effective, empowering consumers and enabling them to make informed choices, and efficient, keeping the cost of providing that information in proportion to its usefulness. Both AIM and BEUC are concerned that the growing number and complexity of mandatory information requirements might not necessarily respond to consumers' information needs and their usefulness and added value is not always supported by evidence. The provision of too much, complex, or conflicting information can leave the consumer not better informed, undermine consumer confidence and add unnecessarily to producers' costs. AIM and BEUC implemented these principles via a joint initiative on "smarter logos, better informed consumers", which includes recommendations for public authorities ([link](#)).

POSSIBLE IMPROVEMENTS IN THE CURRENT REGULATORY FRAMEWORK

- AIM supports the objective of the European Commission to correct any inconsistencies between the directives and remove the provisions which are no longer fit for purpose.
- More than new rules, European consumers and companies operating in the Single Market need coherent interpretation, implementation and enforcement to provide a common level of consumer protection and a level-playing field.
- AIM supports the use of guidance/interpretation guidelines as tools to reach a more uniform interpretation of EU law. AIM sent a written contribution to the consultation on the new guidelines on the Unfair Commercial Practices Directive (UCPD) and actively participated in the multi-stakeholder dialogue groups to adopt principles on comparison tools and compliance criteria on environmental claims.
- If needed, legislative amendments should be introduced in a targeted manner.
- For example, in its answer to the consultation on the Cross-border enforcement and cooperation regulation (CPC), AIM highlighted the study by Hogan Lovells commissioned by the European Commission in 2012¹ identifying the diversity of interpretation and implementation of the UCPD across the EU on parasitic copying. Parasitic copies are products mimicking the packaging of famous brands, thereby misleading consumers. The author pointed out in its conclusions that *"...the different treatments afforded to parasitic copies across the European Union could amount to a barrier to trade within the internal market of the European Union..."*. The European Commission attempted to clarify repeatedly Article 6, paragraph 2 of the UCPD and how it applied to parasitic copies. However, AIM considers that the Fitness Check offers the opportunity to introduce targeted modifications to the UCPD and MCAD to solve this issue for good:
 - Parasitic Copying, while being mentioned in the list of banned practices (Annex 1, Clause 13) is also raised in one of the Recitals (14) in a way the creates confusion. Recital 14 currently states *"It is not the intention of this Directive to reduce consumer choice by prohibiting the promotion of products which look similar to other products"*

¹ Study on Trade Secrets and Parasitic Copying (Look-alikes) MARKT/2010/20/D Hogan Lovells (2011)

unless this similarity confuses consumers as to the commercial origin of the product and is therefore misleading." This limits the scope of the Directive in relation to parasitic copying, which cannot be the intention. Indeed, the new guidelines on the UCPD published in May 2016 define 'misleading' as causing confusion over origin **and** outright confusion **and** confusion over equivalence / quality (page 65). Therefore, this part of the recital should be deleted to ensure consistency with other misleading practices

- Regarding enforcement, the author of the study points out divergence of enforcement as in some countries the companies affected can complain against parasitic copying under the UCPD while in others only public authorities or consumer associations have this right. As pointed out by some consumer associations, companies are often the best enforcers against misleading practices targeting consumers of their products. Therefore, AIM would suggest amending Article 5 of the MCAD and Article 11 of the UCPD to make it obligatory for Member States to provide the possibility of private enforcement, rather than it being optional.
- AIM considers that it is essential to boost consumer trust online by making sure that they enjoy the same level of protection as for offline shopping. The European Commission is aware of this issue and strived to clarify the due diligence obligations of online intermediaries/platforms when they act as traders. However, we share the concerns of some consumer associations that it will not be enough to generate consumer confidence. Indeed, the new guidelines state that the responsibility of online intermediaries should be assessed on a case by case basis. This provision will be neither clear nor simple for consumers as it will be difficult for them to evaluate in each case whether the platform they are dealing with has responsibilities towards them. This issue was illustrated in the recent case Groupon vs UFC Que Choisir in 2015 ([link](#)). Leading platforms might rely on their strong brands to reassure consumers but it will not be the case for smaller platforms. AIM is also concerned that the new geoblocking proposal could create some legal uncertainty with existing sectoral regulations.

REPLY TO THE MOST RELEVANT QUESTIONS FOR AIM IN THE ONLINE CONSULTATION

In your view, to what extent are the following EU consumer and marketing rules beneficial to consumers?

- Right to be protected against misleading or aggressive commercial practices – **very beneficial to consumers**
- Right to get adequate information about the goods and services offered, i.e. the main characteristics, the total price, the delivery, time etc. – **very beneficial to consumers**
- Right to get information also about the unit price of goods (i.e. for one kilogramme, one litre etc.) - **very beneficial to consumers**
- Right to be protected against unfair clauses in the 'small print' (the 'right to fair standard contract terms') - **very beneficial to consumers**
- Right to have a defective good repaired or replaced for free or to obtain a price reduction or refund during the legal guarantee period (in most EU countries 2 years from delivery; longer in some EU countries) - **very beneficial to consumers**

Explanation: AIM considers the right to get adequate information particularly important in the online environment with comparison tools sometimes focussing on prices and overlooking important aspects such as quality, performance and sustainability.

Regarding the unit price of goods, as brand manufacturers have concentrated their products to reduce the size of their packaging for environmental reasons, AIM considers that indicating the price per number of uses that the consumer can make out of the product is becoming more and more relevant (e.g. laundry products or detergents. See more detailed answer below p.7).

Finally, regarding legal guarantees, AIM is in favour of setting a fully harmonised 2 year guarantee period at the EU level for all consumer contracts. This would mean extending the relevant provision of the recent Commission proposal on online sale of goods (December 2015) also to the offline environment.

How important are the following problems for protecting the rights of consumers?

- Consumers don't know/don't understand their rights – **very important**
- Traders don't know/ don't understand consumer protection rules – **rather important**
- Traders don't comply with consumer protection rules – **rather important**
- Consumer law is too complex – **very important**
- There are significant differences between national consumer protection rules across EU countries – **very important**
- National authorities responsible for enforcing consumer rights are not active enough – **very important**

Explanation: SME brands with fewer resources may have more difficulty in understanding the full scope and following the evolution of EU consumer protection rules. This generates fears when selling across borders or online.

Leading brand manufacturers have sometimes to go beyond compliance obligations to protect their reputation and meet consumer expectations. For example: a consumer buys a branded product on an online market place in a country in which the manufacturer had no intention to sell it. The consumer misreads the label in a language he does not understand and misuses the product. He then turns against the brand manufacturer instead of the reseller.

AIM considers that national authorities responsible for enforcing consumer rights have a huge responsibility to build consumer trust in the market. However, many of them will not have the time and resources to tackle effectively all misleading practices, especially in the current context of dwindling public budgets and austerity measures. Therefore, AIM promotes the responsible behaviour of economic operators and private enforcement as companies have an interest in protecting consumers of their products and services from misleading practices.

How effective for protecting the rights of consumers are self- and co-regulation initiatives by businesses at national or EU level, under which businesses establish standards as to how they deal with consumers (e.g. industry trust marks)?

- **Very effective**

What is your opinion on the following statements?

- Business can trade across the EU easily thanks to the harmonised EU consumer and marketing rules – **Strongly disagree**

Explanation: The European Single Market remains fragmented. There is minimum harmonisation in several areas of the EU consumer and marketing acquis. E.g. the Consumer Sales and Guarantees Directive or the Consumer Rights Directive provided EU Member States with too much flexibility in the transposition on certain provisions, de facto creating different regimes.

- Businesses are well protected against misleading marketing practices of other businesses – ***Strongly disagree***

Explanation: Brand manufacturers and their consumers still suffer from parasitic copying. In 2013, *Which?* The UK consumer association published a report on uncovering products in major UK retailers that appear to borrow from leading brands. Typically, these were in categories where there are well-established and distinctive brands, such as crisps, biscuits and toiletries. In some cases, *Which?* thought that the resemblance was so close that it could cause consumers to accidentally buy the own-label product without realising it. ([link](#) to the press release).

This is connected with the issue of market power. Premarket access to innovations from brands and control over the supply chain which the major retailers now enjoy means that by developing lookalike products they may have the opportunity to exploit unfairly and anti-competitively the image and goodwill that brand manufacturers have developed through careful and continual product and marketing investment.

This, in turn, could distort the way and the extent to which manufacturers compete, enhance retailer control over the supply chain. In the process, this could undermine manufacturer branded goods which smaller retailers traditionally rely on, thus weakening their competitive position and resulting in further concentration of retail markets and less choice of store types and product varieties for consumers.

The continuing absence of a rapid and effective legal remedy to prevent the rewards from brand investment being misappropriated by imitators means that such action will likely continue, with the upshot that manufacturer and retailer competition may be distorted to the detriment of consumer welfare and the public interest.

- *Businesses are well protected against unfair comparative advertising of other businesses*
Tend to disagree

Explanation: Some retailers seem to engage more and more in marketing campaigns comparing their own private labels and leading brands with headlines such as “same as brands, only cheaper”. Not only can this kind of campaign mislead consumers about the quality of the private labels, but they also discredit the brands by implying that they make an undue margin, which is not based on quality, taste or performance. The last example of such a campaign can be found in France [link](#).

In your view, what are the benefit for businesses from complying with EU consumer and marketing law?

- Consumers whose rights are respected come back
- Consumers whose rights are respected bring/attract other consumers (by word of mouth, online endorsements)
- On the contrary, consumers whose rights are not respected discourage other consumers (damage to reputation)

Positive/negative impact of EU consumer and marketing law on the following aspects?

- Amount & relevance of information available to consumers to compare and make informed purchasing choices – **rather positive impact**

Explanation: In line with AIM-BEUC principles and the joint initiative on “smarter logos, better informed consumers”, AIM considers that when interpreting existing consumer information requirements it is important to reach a balance between the amount of information and its relevance for the purchase decision. Indeed, AIM and BEUC recognize the risk of information overload and knowledge deficits. In the case of logos, it is especially important when the logo aims to activate certain behaviours to protect consumers.

- A level playing field amongst EU-based businesses – **rather positive impact**

Explanation: AIM appreciates that the European Commission strived to clarify in the new UCPD guidance the due diligence obligations of online intermediaries/platforms when they act as traders. However, we share the concerns of some consumer associations that it will not be enough to generate consumer confidence.

- Protection of consumers against unfair commercial practices – **rather positive impact**
- Availability and choice of products – **rather positive impact**

Explanation: Unfair comparisons by comparison tools will mislead consumers into buying one specific product, thereby distorting and reducing choice.

- Increase of e-commerce across EU Member States – **rather positive impact**

How effective are the following consumer redress/enforcement mechanisms in protecting consumer rights in cases of breach of EU consumer and marketing rules?

- An individual consumer gets redress through direct negotiations with the trader – **very effective**
- An individual consumer gets redress through an alternative dispute resolution mechanism - **very effective**
- An individual consumer gets redress through a court action – **rather effective**
- A court issues an injunction which stops an infringement of consumer rights - **very effective**
- **Other:**
 - An affected company gets redress on behalf of consumers – **very effective**

How strongly do you agree or disagree with each of the following statements about the potential areas to improve EU consumer and marketing rules for the benefit of consumers?

- The marketing/pre-contractual information requirements currently included in the Unfair Commercial Practices Directive (UCPD), Price Indication Directive and Consumer Rights Directive should be regrouped and streamline - **tend to agree**

Explanation: AIM supports coherent EU Directives with no contradictory or unnecessary overlapping requirements, which can give rise to legal certainty.

- The information given to consumers at the advertising stage should focus on the essentials whilst more detailed information should be required only at the moment before the contract is concluded – **strongly agree**.

- The presentation of pre-contractual information to consumers should be simplified by applying a uniform model, e.g. using icons – **tend to disagree**

Explanation: Simplification is essential to help reaching out to consumers. Uniform models such as the use of icons or logos should be encouraged but not imposed for all information requirements across sectors. This would be difficult to achieve. In any case, logos should follow the recommendations of AIM-BEUC report “smarter logos, better informed consumers”

- The obligation to display also the price per unit (e.g. 1 Kg. 1 l) of the goods should apply to all business irrespective of their size - **Strongly agree**

Explanation: AIM believes that some aspects of the Price Indication Directive 98/6/EC could be improved. It is not possible in all member states for traders to fulfil their obligation according to the directive by displaying, instead of price per unit (per litre of kg), the price in a different single unit of quantity which is “widely and customarily used in the Member State concerned (Article 2b of the Directive). This is the case of detergents. Apart from Austria, Belgium, Czech Republic, Denmark, Germany, Greece, Spain, Sweden and the UK, other member states do not allow for the indication of *price per wash*. This measure is more accurate and enables consumers to better compare and make more informed choices. A unit of measurement other than the price-per-wash load may be misleading in relation to the choice of laundry products (e.g. normal, concentrated, environmentally friendly). Allowing price per wash would also have the advantage of ensuring coherence with the Detergents Regulation (648/2004/EC), already requiring traders to clearly indicate the price-per-wash on the pack. An assessment is necessary whether this option should not be extended to all Member States in different sectors.

- Consumer protection against unfair contract terms should be strengthened by introducing a “black list” of terms that are always prohibited – **strongly disagree**
- The presentation of key standard Terms and Conditions to consumers should be improved by applying a uniform model, e.g. using icons – **tend to disagree**

Explanation: AIM supports the Commission’s intention to raise awareness of consumers about key standard Terms and Conditions. Various nudging techniques could be used but a uniform model using icons might not be the best solution as “key standard Terms and Conditions” vary from sector to sector.

- The legal guarantee period for goods should depend on their characteristics – **tend to disagree**

Explanation: The existing two year guarantee period is already a fair balance between the interests of consumers and businesses.

- The period during which the defect is presumed to have existed already at the time of delivery of the good (reversal of the burden of proof) should be extended. It is 6 months under current EU law but longer in a few EU countries – **strongly disagree**

Explanation: The existing 6-month period of reversal of burden of proof already represents a balanced approach between the interests of consumers and traders.

- The notion of "vulnerable consumers" should be reviewed/ updated. Under current EU law vulnerable consumers are those that are particularly vulnerable to unfair commercial practices because of their mental or physical infirmity, age or credulity – **tend to disagree**

Explanation: The current definition seems to be still relevant. In the case of parasitic copying, recent researches showed that more and more consumers are visually impaired and confuse more and more often the packaging of the brands and the packaging of retailers' brand mimicking the packaging of the brand² ([link](#)).

- EU consumer and marketing rules should be further harmonised to make it easier for traders to offer their products/services cross-border and for consumers to rely on the same level of protection across the EU – **Strongly agree**
- EU consumer and marketing rules should be simplified by bringing them into a single horizontal EU instrument – **tend to agree**

² Para-sight! Using eye movements to understand the effect of parasitic brands on shopper attention, Dr Tim Holmes, 2014