

## AIM POSITION

**Consultation of the European Commission on its Inception Impact Assessment to improve the food supply chain by tackling unfair trading practices and increasing market transparency**

**21 AUGUST 2017**

## Introduction

AIM welcomes the continued commitment of the European Institutions to tackle effectively **Unfair Trading Practices (UTPs)**. **These practices adversely affect companies' capacity to innovate and invest for the long term.** Innovation and investment are needed to improve constantly value to consumers and fulfil the EU's objective to create smart, sustainable and inclusive growth. Therefore, it is valuable to assess regularly the situation in light of market and regulatory developments to decide whether additional tools would deliver better results.

In light of the background information below, AIM considers that:

- There is no compelling evidence that another layer of legislation at EU level would improve the situation (options 3 and 4), except if it would aim to tackle UTPs that have per se a transnational impact, such as UTPs by European Retail Alliances.
- As Member States develop new tools to tackle UTPs and increase their enforcement activities, there is an urgent need for coordination mechanisms for Member States' authorities and annual reporting (mentioned in options 2 and 3). This will be especially useful to find an EU-wide solution to a commercial issue that bears legal effects in several EU countries.
- The inception impact assessment should take more into account the most recent developments on the regulatory front, such as the strengthening of the Supply Chain Initiative via the appointment of an independent Chair, additional regulatory tools at national level to tackle UTPs and increased enforcement activities of national enforcement authorities in several Member States. While AIM acknowledges that a few Member States still do not have effective tools in place and that additional enforcement and controls are needed, the European Commission should recognize progress made and support new initiatives at national level.
- The reference for any initiative should be the list of manifestly unfair trading practices unanimously agreed by representatives of the entire food chain, including the farmer organisations, in the framework of the High Level Forum in 2011 and partly supported by Agricultural Market Task Force report in 2016.
- Any initiative should cover the whole supply chain, as all European Institutions have acknowledged that unfair trading practices can happen at any level in the chain.

## Background:

As enthusiastic supporters of evidence based policy, AIM and FoodDrinkEurope were amongst the first in 2011 to bring data to the table to present a panorama of unfair trading practices in the EU market ([link](#)). As a result, **AIM has supported the effective implementation and enforcement of the Principles of Good Practice in the food supply chain** adopted in 2011 **and the Supply Chain Initiative** launched in September 2013. Success will be measured by a significant reduction in the number of unfair practices in the marketplace and, as importantly, a long-term improvement in the business culture.

As one of the founding members of the Supply Chain initiative represented on its Governance Group, **AIM also supported the steps foreseen in the Communication of the European Commission** of 15 July 2014 entitled '*Tackling unfair trading practices in the business-to-business food supply chain*' and welcomed the accompanying legal study to assess the situation ([link](#)). The subsequent report of the Commission issued on 29 January 2016 also provided valuable clarifications on existing frameworks for tackling unfair trading practices in the EU. It made clear that whilst there is room for improvement, measures to combat UTPs had developed significantly in recent years in many Member States. The European Commission also acknowledged the benefits of the Supply Chain Initiative, which should be strengthened, and thus did not see the need for EU action at that stage.

The report of the European Parliament published in July 2016 also contained valuable recommendations that AIM supported. It highlighted the value of the Supply Chain Initiative and the list of manifestly unfair trading practices agreed in the High Level Forum. It emphasized that UTPs could happen at any level of the chain. It

stated that structural changes in the chain such as concentration and vertical integration had led to increasingly unbalanced bargaining power at different level of the chain, which created the fertile environment for unfair trading practices. Finally, it supported the mutual recognition and effective cooperation at EU level between national authorities to ensure sharing of relevant information.

AIM also took note of the request by the AMTF, the Council of the EU and the European Parliament to evaluate the need for an EU legislative framework to tackle more effectively unfair trading practices.

Finally, AIM welcomes the attention given to a specific unfair trading practice, due to its impact on innovation throughout the EU. This UTP relates to the misuse of retailers' dual role as sellers of manufacturer brands and of their own competing retailer brands (private labels). Economic theory has assessed this dual role and suggested that powerful retailers supporting their own brands lead to a market failure in terms of reduced innovation<sup>1</sup>. In recent years, several initiatives at EU level have addressed this issue:

- The study *"The economic impact of choice and innovation in the EU food sector"* commissioned by the European Commission found that a high market share of retailers' own brands progressively reduced the rate of innovation in this sector across the EU. Under the refined analysis, the results suggest that there is a statistically and economically significant negative relationship between private label penetration and innovation. Moreover, as the relationship is non-linear, the higher the level of private label penetration, the steeper the decline in innovation.
- The European Parliament, in the Czesak report on unfair trading practices in May 2016 and in the Szanyi report on EU competition policy in January 2017, called on relevant authorities to tackle this issue.
- The Supply Chain Initiative is dealing with one manifestation of the misuse of this dual role and the associated UTP: the unfair use of commercial secrets by a retailer to favour its own competing brands. The Governance Group of the SCI is working on new guidance to clarify the implementation of the confidentiality principle.
- In April 2016, the European Institutions adopted the Directive on the protection of undisclosed know how and business information (trade secrets) against their unlawful acquisition, use and disclosure. Article 3 of the new legislation on trade secrets will provide an additional remedy to tackle unfair practices of companies in the food supply chain that have not joined the Supply Chain Initiative and other sectors not covered by the SCI. It will also help in those cases where signatories to the supply chain initiative may be in breach of this principle.
- Finally, this dual role, the associated UTP and its impact on innovation have featured prominently in two recent Communications of the Commission in the framework of the Digital Single Market strategy<sup>2</sup>. The latter states that *"preliminary results indicate that some online platforms are engaging in trading practices which are to the potential detriment of their professional users, such as the removal ('delisting') of products or services without due notice or without any effective possibility to contest the platform's decision. There is widespread concern that some platforms may favour their own products or services, otherwise discriminate between different suppliers and sellers and restrict access to, and the use of, personal and non-personal data, including that which is directly generated by a company's activities on the platforms"*. The Commission has announced its intention to conduct an Impact Assessment that could lead to EU remedies.

### **Position of AIM on the Inception Impact Assessment:**

AIM welcomes the high level of interest of the European Institutions in this crucial topic for sustainable growth and a fair and healthy competition in the food supply chain and similar supply chains. **AIM also welcomes the commitment to tackle effectively unfair trading practices in the market** and the willingness to assess the need for additional tools.

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<sup>1</sup> Roman Inderst and Zlata Jakubovic and Dragan Jovanovic, "Buyer Power and Functional Competition for Innovation", Munich Personal RePEc Archive Paper No. 61214, posted 13 January 2015.

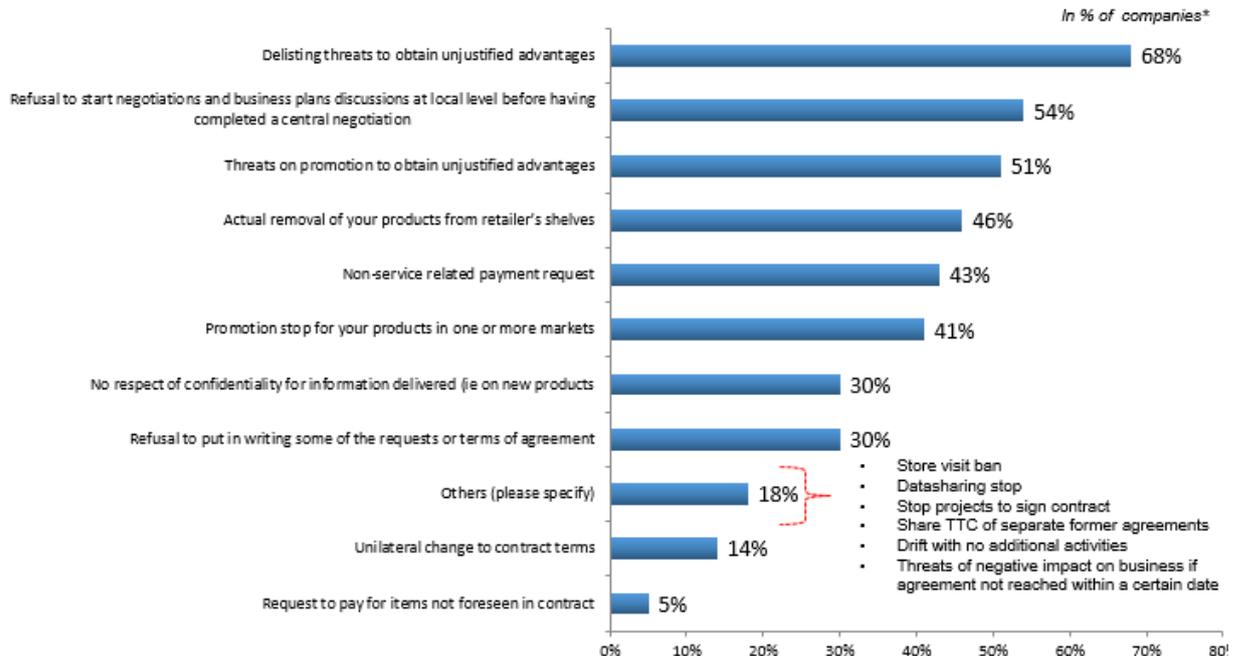
<sup>2</sup> "Online Platforms and the Digital Single Market - Opportunities and Challenges for Europe", May 2016 and "Mid-Term Review on the implementation of the Digital Single Market Strategy - A Connected Digital Single Market for All", May 2017.

## I. Any initiative should cover the whole supply chain

According to AIM's most recent survey, **unfair trading practices are still a major issue for AIM members**. Therefore, AIM considers that any initiative of the European Commission covering only farmers would not appropriately deal with the issue, as the weaker party in a contractual relationship can come from any level in the chain.

Have you been exposed in 2016 to...

**97% of companies exposed to at least one abuse**



## II. No compelling evidence supporting the need for a legislative initiative

AIM notes that the IIA mentions in its title that the likely type of initiative will be legislation but is not convinced that EU legislation is the panacea.

At national level, most Member States have adopted and/or strengthened in previous years their legislation against Unfair Trading Practices. It allowed their authorities to increase their enforcement activities and settle several important cases such as Eroski/Dia in Spain, INCA-Achat and Intermarché and INCA-Achat and Casino in France, or TESCO in the UK. **The European Commission should urgently update its legal study of 2014 ([link](#)) as it would point to improvements** in a number of EU markets in terms of both legislative tools and enforcement activities to tackle UTPs.

At EU level, following the recommendations of the European Commission in January 2016, supported by the report of the European Parliament in July 2016, the Governance Group of the Supply Chain Initiative decided to appoint an independent Chair, to be announced in September 2017. This will help address issues such as the fear factor and strengthen the Supply Chain Initiative. The European Commission should give time to this development to create the necessary trust between business partners before taking legislative action.

III. **Any initiative at EU level should take into account the principle of subsidiarity, focus on increasing enforcement and foster better coordination between all relevant authorities to achieve harmonisation**

***Subsidiarity:***

Farmers and other supply chain operators often negotiate at local or national level. As the nature of UTPs may differ from one market to another this issue can be addressed best by Member States' authorities following the principle of subsidiarity.

According to the same principle, an initiative at EU level could be useful to address unfair trading practices done by the growing web of European Retail Alliances:

- These alliances have by nature a transnational remit and impact and their membership includes many of the largest retailers in Europe;
- The size of these alliances (see annex) gives them a bargaining power that jeopardizes the contractual freedom of the other party and its ability to refuse unfair conditions;
- According to the most recent AIM survey carried out in 2016, 97% of companies were exposed to at least one UTP in 2016 and 69% of reported abuses came from European retail alliances, in particular two of them;
- None of these alliances has accepted to register to the Supply Chain Initiative, even though some of their members are registered;
- Enforcement authorities in France seem to be increasingly concerned with their impact on the French market, while they are located outside the French territory.

***Enforcement and harmonisation:***

Despite progress, AIM regrets that some Member States do not have effective tools to tackle UTPs yet. The European authorities should support more actively the efforts of Member States that are committed to addressing this issue. For example, the Swedish Competition Authority, based on a request from the Swedish Government has just decided to launch an investigation into UTPs in the Swedish Food Supply Chain and the effects of private label on competition considering the dual role of the retailers. The Swedish competition authority would benefit for its investigation from the envisaged sharing of knowledge and best practice with the European Commission and relevant national authorities.

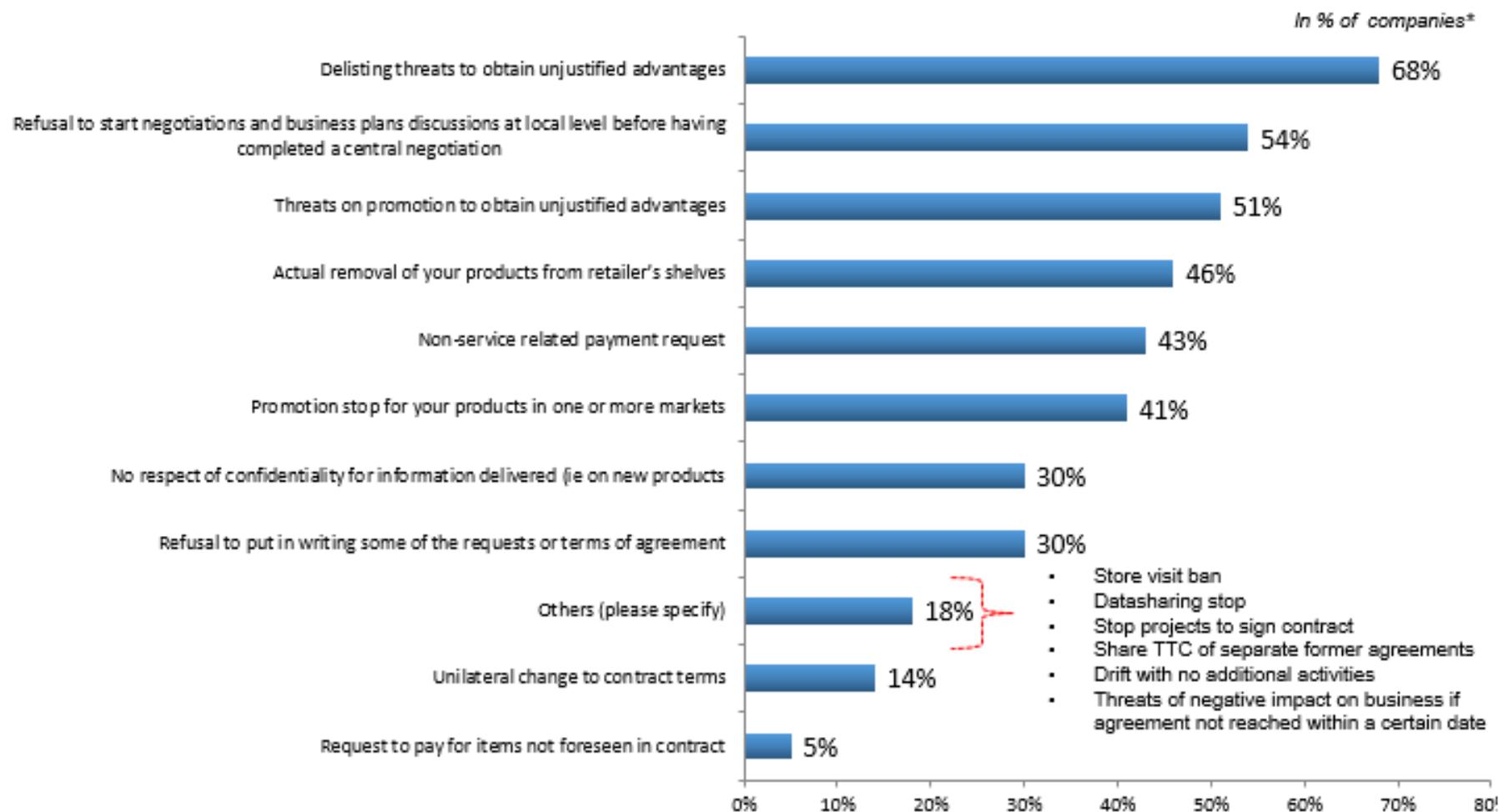
The absence of coordination led to a fragmentation of legal regimes in the EU. This makes it difficult for companies to find an EU-wide solution to a commercial issue that bears legal effects in several EU countries. The creation of a formal network of national authorities coordinated by the European Commission would certainly deliver positive results. This kind of network proved effective in other areas, be it the Consumer Protection Cooperation network for consumer rules or the European Competition Network for competition rules.

Therefore, AIM strongly **supports the idea to create a network of national authorities** to share best practices on dealing with unfair trading practices that have a transnational impact. In addition, **AIM encourages European Retail Alliances and national buying groups to register in the Supply Chain Initiative and calls on alliance members who are signatories to the SCI to press them to do so, lest they appear to condone or even outsource unfair practices conducted in the name of the alliances to which they belong.**

## Annex 1

Have you been exposed in 2016 to...

**97% of companies exposed to at least one abuse**



## ANNEX 2 European buying power (grocery only) 2016

