

Framework for the implementation and enforcement of the principles of good practice in vertical relations in the food supply chain

OUTCOME OF THE DISCUSSIONS OF THE CORE GROUP

30 June 2012¹

¹ This document has been checked by external legal counsel for EU competition law compliance

I – Introduction

In its meeting of 29 November 2011 the High Level Forum for a better functioning food supply chain, warmly welcomed the set of principles of good practice in vertical relations in the food supply chain presented by a group of stakeholder organisations covering all stages of the chain. The European Commission then mandated those organisations to present a framework for the implementation and enforcement of those principles by the end of June 2012.

The multi-stakeholder group immediately started its discussions which resulted in this document. It provides an outline of the general features of the framework for the implementation and enforcement of the principles, followed by concrete operational tools that identifies the tasks required, the responsible actors for those and a timetable for their delivery. It contains a description of the governance including monitoring and evaluation; performance indicators; a brief assessment of the relations with existing national rules and regulations and voluntary schemes as well as cross-border implications; a short overview of the funding; and finally an assessment of the fulfilment of the criteria previously set down by Commissioner Barnier in the context of the High Level Forum.

The signatories consider that it represents a compromise between different interests, which is the result of long and arduous negotiations. This framework covers operators throughout the whole food supply chain. It is expected that the framework proposed below can help achieve the objective of fair commercial relationships in the market and ultimately a better performing value chain that delivers greater value throughout the supply chain, including to consumers, in a sustainable way. Signatories therefore present this framework to the High Level Forum.

This framework is intended to offer a complement to EU and national rules and regulations and other voluntary schemes and therefore it does not replace them.

II – General features

1. Overview

The framework consists of a registration system whereby economic operators, including SMEs², voluntarily commit to implement the principles and accept different options for the resolution of disputes.

This is a voluntary framework, the success of which depends upon the willing participation of a critical mass of companies throughout the whole supply chain at all stages of the food supply chain. These companies commit to abide by the principles of good practice in vertical relationships in the food supply chain as a basis for their commercial dealings.

This framework contains mandatory features after registration and is coupled with multi-stakeholder governance, performance indicators and a level of public oversight.

² EU SME definition (insert link to EU SME definition)

A set-up phase is required before registration opens. A web-based tool, along with other information and communication tools prepared by the multi-stakeholder group, will provide the necessary information needed to register as well as the publicity to raise awareness of the framework to companies, representative organisations and the general public.

Once the tool is set-up, registrations will open. Companies wishing to register will have to comply with certain requirements before being entitled to register. Once registered, they will be required to respect the procedures outlined in this document regarding implementation and enforcement. These procedures are described in the chapter regarding the operational framework and will be complemented by implementation guidelines elaborated by the signatories of this document in due course.

2. Geographical scope

This framework covers all the EU Member States.

Registered companies are expected to implement the principles throughout their organisations independently of the geographical origin of their business counterpart provided that the obligations under the contract are to be performed in the EU. Small and medium-sized companies based outside the EU may resort to the dispute resolution options covered by this framework in their relations with counterparts that have registered, as long as the obligations under the contract are to be performed in the EU.

3. Product scope

This framework applies only to food (fresh and processed) and drink products. However, companies who are part of the food and drink chain are 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).

III – Operational framework and timetable

The operational framework is divided into four pillars for the sake of clarity. These are not necessarily sequential in time and the dates provided are indicative.

Pillar 1: Setting-up the registration system and awareness building

To ensure the smooth functioning of the registration, there are several tasks that need to be completed before registrations can actually take place. During that time it is important to start raising awareness to ensure that a large number of companies will register as soon as possible.

- Translations

The signatories consider that it is essential to translate the principles of good practice into all EU official languages.

The official reference version is the English version, as presented to the High Level Forum meeting of 29 November 2011.

To ensure a proper interpretation of the principles there must only be one officially accepted translation per language.

Other documents that require translation into all EU languages include the present framework of implementation and enforcement, website content and reporting tools.

The translation should be provided by the European Commission and be ready at the latest by the end of 2012. A verification of the content of the translation, in terms of its market adequacy, is desirable and could be performed by national federations by end of January 2013. However, before translation, time is available for the European Commission to express its views on the content of the principles and examples and communicate that these, once amended to address any concerns, and the framework of implementation and governance will not constitute an infringement of EU competition law.

- Website

Before registrations can begin it is necessary to set-up a EU-wide website that contains the requisite information as well as the technical solutions to allow those registrations.

The website should be hosted by the European Commission and be ready by the end of February 2013.

The website content will be developed by the signatories (subject to internal consultation). It will include at least the principles; the implementation and enforcement framework; the list of registered economic operators; the benefits of registering; the necessary procedures to join and effectively participate (including training and compliance) as well as a procedure for resignation; a list of frequently asked questions; and the performance indicators. This must be finished by end of March 2013.

The website's content management will be shared between the European Commission as regards updating the list of registered operators and web analytics, and the governance group (see chapter IV below) as regards the content. This task must be done regularly as a continuous process.

The development of other web pages (e.g. at national level) to mirror or link to the EU level website will be encouraged and could be the responsibility of national federations and/or public authorities.

- Awareness building

To raise awareness of the proposed framework, the signatories will develop a list of benefits for companies to register (e.g. importance for the reputation of companies, use of dispute resolution processes to efficiently find solutions) by the end of Q1 2013. This will latterly be added to the website.

Furthermore, the signatories will look into the possibility of developing other awareness-raising tools before the end of Q1 2013.

The multi-stakeholder group will look into the possibility of developing tools to assess the awareness of the principles of good practice.

National federations and public authorities will also be encouraged to develop, support and implement awareness-raising tools on the basis of the common tools developed at EU level.

To create momentum and visibility, an EU launch event will be organised once the website is ready and registrations can begin. This will be co-organised by the European Commission and the signatories of this proposal by Q2 2013.

Companies will be encouraged to prepare for registration (e.g. by ensuring the support of top management) as of July 2012 to ensure a large number of registrations as soon as the website is ready.

Sharing best practices across Member States and sectors (e.g. on the website or through events) will be encouraged by all relevant actors once the framework is in place.

Pillar 2: registration and implementation of the principles by participating companies

Voluntary registration by companies on the website will be available as of April 2013. The signatories encourage economic operators to register so as to fully benefit from the provisions of this framework.

Before registering companies must carry out a self-assessment by reviewing their internal procedures as appropriate to ensure compliance with the principles (including training, ability to participate in the dispute resolution options, communication, establishment of contact person for internal dispute resolution). At the moment of registration, companies will be required to confirm the completion of this self-assessment, that they have taken the necessary measures to comply with the principles and procedures for implementation and enforcement, including their agreement to engage in any of the dispute resolution options outlined below.

Registration (and resignation if necessary) must be by an executive or a number of executives having the power to commit the whole company in the EU including all subsidiaries in the EU, in accordance with each company's corporate structure (i.e. more than one executive may need to sign the registration if no single executive has that power or registration of companies' national subsidiaries is required). Each registered company will also designate a contact person for any follow up actions such as monitoring, etc. The names and titles of registering executives and contact persons will be published on the website.

Participating companies will be required to set-up and/or adapt training to ensure compliance with the principles of good practice. National federations will be encouraged to develop training tools (e.g. e-learning and seminars) on how to raise awareness of the framework's principles and procedures when contracting with a participating company.

Participating companies will be required to prepare for the dispute resolution procedure set-out in Pillar 3 and to designate a contact point at the moment of registration.

The designated contact point must be independent from the commercial negotiation.

Registered companies are required to inform business partners of their participation in the framework. Companies are free to choose the means by which this is done (e.g. through a mention in contracts, written notice in negotiation meeting rooms).

Registered companies will be encouraged to offer public information on the participation and on the implementation of the principles (e.g. on company website, publications, etc.).

Pillar 3: addressing disputes and finding solutions

Companies should follow a process for dispute resolution, based on the following choice of options:

- a) Internal dispute resolution procedure (companies are encouraged to set up a relevant and speedy solution);
- b) Mediation (a third party is appointed by mutual agreement to solve a dispute, the conclusions of which are not binding); the sharing of costs for this option is determined by the applicable law;
- c) Arbitration (mandate a third independent party to solve a dispute, the conclusions of which are binding); the sharing of costs for this option is determined by the applicable law.

Complaining operators may choose the option that best fits their needs and is proportionate, taking into account cost efficiency and effectiveness in relation to the nature of the dispute. This means that companies will be encouraged to resort first to the options that are less adversarial and costly.

These options do not preclude the possibility of solving a dispute through normal commercial negotiations, by any other means foreseen in the contract or by the ordinary jurisdictional methods.

By registering, companies accept to solve their disputes related to the application of the principles by any of these options. Therefore before registration companies are required to make sure that they are prepared to engage in any of these options. It is expected that the vast majority of disputes handled through these options can be resolved within a timeframe of 3 months (longer in the case of arbitration).

The internal dispute resolution procedure must be independent of the commercial negotiations and be impartial and quick. It should be elaborated in such a way that it reassures the complainant that he will not be subject to commercial retaliation. Upon registration, a company may justify that due to its small size it is not able to ensure such independence.

The remedies, sanctions, and/or penalties for non-compliance with the principles of good practice are determined by the dispute resolution options used. They are enforceable according to the applicable law.

It is considered that if the dispute resolution mechanisms at national level are available and efficient, these options for dispute resolution will address the needs of companies. The governance group will evaluate whether there is a need to develop a dispute resolution mechanism at European level in its monitoring report, taking into consideration the feedback from companies, representative organisations and public authorities.

A list of existing national mediation and arbitration mechanisms will be available on the website as reference for companies. This will be elaborated jointly by the European Commission and the signatories by the end of Q2 2013.

Pillar 4: verifying compliance, sanctioning and evaluating the success of the framework

Monitoring is the responsibility of the governance group and will be done annually starting in Q2 2014 with a mid-term review by Q4 2013. This will comprise two elements:

1- Survey

There will be a simple survey to help companies monitor progress and to serve as a basis for evaluation of compliance. The survey will not cover the substance of any disputes handled under this framework. It is based on three elements of phase 2:

- Training;
- operation of the dispute resolution options;
- communication

Elements of the survey on the functioning of the dispute resolution options (this information will be further processed for reporting purposes on an anonymous basis) will be:

- country, size of company and part of the food supply chain;
- number of complaints filed with other economic operators (see chapter V);
- number of complaints received from other economic operators (see chapter V);
- the principles that have allegedly been breached (this will allow the identification of possible weaknesses and need to review some principles and/or examples);
- number of dispute(s) resolved through Internal procedure/mediation/arbitration;
- satisfaction with the framework, including reassurance against the fear of commercial retaliation, and suggestions for improvement.

Impact as well as effectiveness of the framework will also be measured:

- impact would be measured by asking whether complaints for breach of the principles during the period surveyed had an appreciably greater, comparable, or appreciably lower impact on the company's business than in the previous period;
- effectiveness of the framework would be measured by asking whether over the same period the framework had helped address complaints appreciably better, in a comparable way, or appreciably worse than in the previous period.

The annual monitoring would be conducted in the form of a mandatory survey of all registered companies. Each company whose registration covers more than one country will ensure that all national subsidiaries covered by its registration complete the survey at national level in each of the EU's Member State in which it is present.

The survey will be conducted online with results sent to a notary or equivalent neutral recipient appointed by the governance group (see section IV below) and bound by strict rules of confidentiality

and legal privilege. The notary will pass on the anonymous replies to the governance group that will aggregate results and present them in a suitable form. The governance group will produce the annual report with the findings, conclusions and recommendations for improvements to the framework. This would include an EU level report and country sections.

The governance group will present and discuss the preliminary results of the annual report with the European Commission before elaborating the final version.

2- Ensuring compliance with process commitments

A permanent procedure will enable companies to flag anonymously issues of process commitments arising with registered companies in collaboration with the signatories and their national associations. This would happen via the governance group. If a company comes across an anomaly (e.g. the contact person for internal dispute resolution, whose name is mentioned on the website, has left the company and has not been replaced), it can either raise the matter directly with the company concerned or inform the governance group through its representative organisation or directly to the governance group as a whole through a dedicated e-mail address. The governance group will assess the best way to deal with the complaint. An unexplained refusal to remedy the problem can lead to the company's exclusion from the framework (exact process still to be determined, including publication in the annual monitoring report). The governance group only appreciates complaints related to process commitments, not substantive issues related to dispute resolution and/or application of the principles. Substantive issues must be dealt with by the dispute resolution options previously identified in this document. Finally, the governance group will examine, based on the experience gained, at the time of the annual reporting any need for interpretation of the Principles and examples for guidance in their implementation, without relation to any actual dispute. If such guidance was found necessary and agreed by the governance group it would be published on the website and communicated to all concerned. Such interpretation or guidance would have effect only for the future with no retroactive effect and no effect on any on-going disputes.

The results of the annual monitoring will be communicated publicly by the governance group. National federations, public authorities and companies will be encouraged to disseminate the results of the survey.

After the publication of the annual report, the governance group will conduct an evaluation of the framework to be concluded by September 2014.

If the framework is judged to be working, simple adjustments will be recommended as appropriate.

If not, the governance group will decide whether to reshape the framework or bring it to an end. In that case, the governance group could decide to work together to ensure that a workable EU framework legislation is introduced.

IV – Governance

Governance will be ensured by a governance group representative of the entire food supply chain. The composition of the governance group reflects the different interests in the chain by interest group. The number of representatives for each interest group will reflect its diversity. Companies' representatives may not be appointed as representatives in the governance group to avoid conflicts of interest. The interest groups and maximum number of representatives are:

- Farmers and agri-cooperatives: 4
- Agricultural traders: 1
- Food and drink industry: 4
- Brands: 1
- Retail: 4
- A cross-cutting group representing SMEs: 1

Decisions are taken by consensus and every effort will be made to reach that consensus. If there are any objections that do not prevent the decision from being taken, these will be noted in the minutes. Strict rules of procedure will be drawn up to prevent conflicts of interest.

The signatories are not in a position to commit other different interest groups but are willing to discuss within the framework of the High Level Forum, their possible inclusion if they are willing to share the responsibility of the governance.

The governance group works under strict confidentiality and anonymity and appropriate rules of procedure must be drawn-up as well as a relevant confidentiality agreement.

The governance group will report on the results and conclusions of its work to the European Commission and the European Parliament to ensure accountability and transparency. The modalities will be defined with the representatives of those institutions in due course.

V – Performance indicators

To monitor the effectiveness of the framework, performance indicators will be established. In the mid-term review, these performance indicators will be assessed to track progress and take corrective measures if deemed necessary.

These performance indicators are:

1. Critical mass of registered companies

A list of companies defined by turnover will be developed both at EU and Member States level as well as at each level of the food supply chain. Minimum percentage targets of the registered number of companies from that list after nine months of opening of registrations will be proposed for the EU and the national levels.

These targets will be ambitious and developed by the signatories and presented by September 2012.

The number of registered SMEs will be tracked and there will be an evaluation by the governance group regarding the progress in terms of uptake.

2. Number of complaints resolved within three months by type of resolution channel used

The governance group will *inter alia* analyse the number of complaints lodged, the resolution channels used as well as the number of complaints resolved within three months.

3. Impact of the framework (see chapter III, pillar 4)

4. Effect of the framework (see chapter III, pillar 4)

For performance indicators 2, 3 and 4, it is difficult to determine *a priori* objectives before having some experience with the framework.

VI – Relation with existing national rules and regulations, other voluntary schemes and cross-border implications

The signatories did not have sufficient information or time to carry out an in-depth analysis of existing rules and regulations at national level that could eventually overlap with the current framework.

However, from the information available and from a theoretical perspective, it was possible to reach some preliminary conclusions:

1. National rules and regulations take precedence over this framework and the linked principles and examples of good practice. This implementation and enforcement framework is intended to offer a complement to existing regulations and solutions where no other mechanisms exist.
2. If national rules and regulations already impose the same, different or stricter requirements on economic operators, they take precedence over this framework and the linked principles and examples of good practice.
3. Because it is a voluntary framework, companies may choose to adopt these rules whether national regulations exist or not or whether more or less stringent rules are in place.

Companies complying with a voluntary scheme (national or international) which seeks the same purposes may request the governance group to assess what would be the interactions between the two with the purpose of enabling registration to this framework, while considering local specificities. Regarding cross-border implications, as this framework provides for a harmonised set of substantive rules (the principles) and a harmonised implementation and enforcement framework it has no conflicting cross-border implications.

The existing rules used to determine the applicable law to a contract are not expected to have an impact on the dispute resolution options included in this framework. In case of a cross-border dispute, the jurisdictional aspects (e.g. venue, procedural rules, etc.) required for settling the dispute will be determined by the laws applicable to the underlying commercial relationship.

However, the governance group will review if there is the necessity to adopt any specific rules on this issue considering different factors such as the size of companies or the cultural specificities, once the framework is in place.

VII- Funding

The signatories consider that there is no need for specific funding to finance the framework. The institutions, associations and companies responsible for a specific task under this framework are expected to finance it, to the extent possible, with their own resources.

In any event, the framework will be administered in a lean way to limit the burden on all involved.

VIII – Assessment of the proposed framework

The High Level Forum at its meeting of 29 November 2011 mandated the core group of stakeholders to present a framework for the implementation and enforcement of the principles of good practice in vertical relations in the food supply chain.

At that time, Commissioner Michel Barnier enunciated the criteria that this framework should respect.

The signatories consider useful to present the reasons why they believe the current proposal satisfies these criteria. This exercise is also useful for a deeper understanding of the logical thinking behind the proposal.

1. Efficiency

This framework contains simple, practical and clear rules that can raise awareness among companies and will allow them to effectively apply the principles of good practice in their vertical relations. Because it is a voluntary framework, the proposal allows companies to adapt their internal procedures in a way that best enables them to comply with it including participation in dispute resolution options, training and information to business partners. Ultimately this should help achieve a real cultural change that sees fair practices and dispute resolution as normal business procedure.

2. Cost-effectiveness

This proposal contains cost-effective measures that economic operators should be able to cope with.

Implementation costs have been minimised. No specific funding is necessary because the framework is based on a multi-stakeholder platform with public oversight.

3. Effective control

The monitoring and evaluation of the framework is ensured by a multi-stakeholder platform representing the different interests within the food supply chain. Even though this governance group is not an “independent” organisation as such, the fact that it undertakes to work under strict rules of

confidentiality and anonymity coupled with the representation of different interests, ensures monitoring and evaluation will not be biased. As the governance group is only responsible for the monitoring of process commitments, and will work according to strict rules of procedure, the signatories consider that there is no risk of conflicts of interest.

In addition, public authorities at the EU level have a certain role of public oversight to ensure that the governance is effective and transparent. Furthermore, this proposal does not affect the prerogative of policy makers to decide, at any time, to introduce legislative measures if deemed necessary.

4. Transparency

Transparency is ensured by several communication and publication requirements set out in this proposal and by the continuous public attention by EU institutions.

In addition, the framework will be evaluated in a short period of time according to previously agreed performance indicators. This means that the evaluation is made according to objectively measurable criteria.
