

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

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Signatories:

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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.

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 SMEs¹, 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 public oversight.

¹ EU SME definition: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:124:0036:0041:EN:PDF>

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. However, during the set-up phase a transition period of registrations will allow companies to register without completing all the requirements to encourage “early movers”.

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). This framework does not apply to the provision of services that input into the food chain that are merely instrumental to it (e.g. logistics, packaging).

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 Q1 2013. A verification of the content of the translation, in terms of its market adequacy, is desirable and could be performed by national federations by Q1 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 Q3 2013.

The website content will be developed by the signatories. 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 Q2 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

The signatories commit to promote wide participation by their members and to measure take up by using ambitious performance indicators (see chapter V).

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 Q2 2013. This will be added to the website.

Furthermore, the signatories will look into the possibility of developing other awareness-raising tools before the end of Q2 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 during the set-up phase. 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 soon as this framework is agreed 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 Q3 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 and 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 according to the provisions of this framework.

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 process contact person for any follow up actions such as monitoring, etc. The names and titles of registering executives and process 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 dispute resolution contact point at the moment of registration.

The designated dispute resolution contact point must be independent from the commercial negotiation and is responsible for issues related to the resolution of disputes. The dispute resolution contact point can be different from the process contact person mentioned above.

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

I – Breaches of the principles of good practice

The following provisions apply when a dispute arises regarding an alleged breach of the principles of good practice. Registered companies must review and, if necessary, modify their contracts to make sure they are compatible with the current framework;

1. Individual disputes

Companies have the following options to solve their disputes:

- a. Commercial track: the complainant may decide to take the issue to a higher level within the commercial hierarchy of the company allegedly in breach;
- b. Contract options: the complainant may resort to any mechanisms of dispute resolution foreseen in the contract.
- c. Internal dispute resolution: the complainant may resort to the internal dispute resolution body of the company allegedly in breach. Registered companies must have an internal dispute resolution procedure in place. This internal dispute resolution procedure must be independent² of the commercial negotiations and be impartial and quick. It should be elaborated in such a way that it reassures that the complainant will not be subject to commercial retaliation.
- d. Mediation or arbitration: parties may choose to resort to an independent third party to solve their dispute either through a non-binding solution (mediation) or a binding decision (arbitration). These options require the agreement of both parties. The sharing

² Upon registration, a company may justify that due to its small size it is not able to ensure such independence.

of costs for this option is determined by the applicable law. The arbitration process should give effective guarantees of defence. The burden of proof rests with the complainant.

- e. Jurisdictional methods: the complainant may choose to resort to the ordinary jurisdictional methods according to national rules and regulations.

Commercial retaliation against any company for using those mechanisms is a serious breach of the principles of good practice and if existent may jeopardise the functioning of the whole system.

The choice of dispute resolution mechanism lies with the complaining operator unless otherwise stipulated by law. The latter may choose the option that best fits its needs and is proportionate, taking into account cost efficiency and effectiveness in relation to the nature of the dispute. This means that companies are expected to resort first to the options that are less adversarial and costly. However, mediation and arbitration require an agreement by both parties.

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 4 months with the exception of disputes solved through mediation, arbitration and traditional jurisdictional methods.

The remedies, sanctions, and/or penalties, including financial compensation for any actual and proven damages, for non-compliance with the principles of good practice, including commercial retaliation, are determined by the dispute resolution options used. They are enforceable according to the applicable law.

A list of relevant 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.

2. Aggregated disputes

A member of the governance group (see chapter IV) may request the governance group to analyse a dispute regarding a serious breach of the principles that affects several of its members.

The issue must be presented to the governance group guaranteeing anonymity and confidentiality of all the parties with respect to the identity of the companies involved and of any confidential or commercially sensitive information.

The governance group will contact and request a reply from the company allegedly in breach, through a confidential process.

The governance group will produce general guidance, which will be subject to an external legal compliance check when deemed necessary by the governance group and communicate it for the benefit of all registered companies as provided for in pillar 4 paragraph 3. The guidance itself and the process of its communication will at all times guarantee anonymity and confidentiality.

The governance group will establish written rules of procedure to ensure anonymity and confidentiality at all stages of the process, to determine the way to substantiate and aggregate the disputes and to avoid any conflicts of interest.

If, during this process the governance group considers there is a need to interpret, clarify or develop any of the principles of good practices, it may decide to do so according to the provisions in Pillar 4, point 3.

Signatories recognise that the national level is the most appropriate level to deal with disputes and therefore will encourage the establishment of similar procedures involving stakeholder associations at national level.

The governance group will only appreciate issues that have an EU cross-border dimension or issues with a national scope as long as there is no national equivalent option to deal with them in an aggregated and anonymous way (e.g. national stakeholder dialogues). In particular, disputes can only be aggregated and submitted by a member of a national multi-stakeholder governance group in strict compliance with competition rules.

II – Breaches of process commitments

The present framework contains a set of obligations (process commitments) that registered companies must comply with. Breaches of these process commitments will be solved according to the following provisions:

A permanent procedure will enable companies to flag issues with process commitments arising with registered companies. The governance group will deal with these issues.

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:

- a) Raise the matter with the company concerned;
- b) Directly address it to the governance group as a whole through a dedicated e-mail address;
- c) Address the complaint to a member of the governance group, which may bring it for discussion to the governance group, while keeping the identity of the complainant confidential.

The governance group will assess the best way to deal with the complaint in a proportionate and gradual manner. For minor breaches, the association of the company concerned would ask the company to remedy the situation. If after a reasonable time, no action is taken, the governance group may issue a warning letter. If the participant continues to breach its process commitments, the participant could be temporarily suspended pending rectification of the breach. For persistent, intentional and unexplained breaches, the governance group may ultimately decide on exclusion from the framework. Exclusion from the framework is a strong deterrent as it would bring negative publicity about the company concerned, e.g. through publication on the website and in the annual report.

Pillar 4: verifying compliance, evaluating the success and developing the framework

Monitoring is the responsibility of the governance group and will be done annually starting in Q4 2014 with a mid-term review by Q2 2014. 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 each dispute resolution option;
- 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 neutral intermediary appointed by the governance group (see section IV below) and bound by strict rules of confidentiality and legal privilege. The neutral intermediary will pass on the anonymous replies to the governance group that will aggregate results and present them in a suitable form. Members of the governance group are free to survey their own members regarding the functioning of the system, including non-registered companies, and can offer input on that basis for the annual reporting. They should inform the other

members of the governance group of this intention and preferably design the survey in a compatible way to facilitate evaluation and harmonise the results.

2. Annual reporting

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 may outsource the production of the report. The annual reporting will cover:

- The results of the survey (see point 1)
- A report of activities of the governance group, including compliance with process commitments, major sanctions and any possible interpretation of the Principles and examples for guidance in their implementation.

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

The results of the annual monitoring will be communicated publicly by the governance group and will be shared with the European Commission and European Parliament. 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 Q3 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.

3. Interpretation and development of the principles

At the time of the annual reporting, the governance group will examine, based on the experience gained, any need for interpretation or development of the Principles and examples for guidance in their implementation, without relation to any actual dispute.

At any time, Members of the Governance Group may raise issues related to the application and/or interpretation of the principles based on concrete cases for the purposes of justifying the need for guidance, keeping the identity of the companies confidential. If such guidance was found necessary and agreed by the governance group it would be published on the website and communicated to all concerned. Companies would be expected to consider this guidance in interpreting the principles. Such interpretation or guidance would not disclose the identity of any of the parties, would have effect only for the future with no retroactive effect and no effect on any on-going disputes.

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: 4³
- 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 governance group works under strict confidentiality and anonymity and appropriate rules of procedure must be drawn-up as well as a relevant confidentiality agreement.

Signatories recognise that the national level is the most appropriate to deal with disputes and to govern the system and therefore they will encourage the establishment at national level of similar structures based on the principles of equal representation between the different stages of the supply chain (Primary production / industry / retail).

The Commission plays an active monitoring role. The governance group will report on the results and conclusions of its work to the European Commission to ensure accountability and transparency. The Commission has the possibility to address recommendations to the governance group on the operation of the system. The Commission will not play any role in the arbitration of individual or aggregated disputes.

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:

³ These seats will be reserved for the associations representing farmers and agri-cooperatives if and when they join the framework.

1. Critical mass of registered companies

A list of companies defined by turnover or sales figures has been developed both at EU and Member States level. Minimum percentage targets of the registered number of companies from that list after one and two years of opening of registrations will be proposed for the EU and the national levels.

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 four 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 four 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, stakeholders reached the following 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 requirements on economic operators within the scope of this framework they take precedence to the extent they cover the same requirements.
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.

In line with the principles of subsidiarity and mutual recognition, voluntary schemes (national or international) may request the governance group to recognise their scheme as compliant with this framework. Companies complying with such a scheme (national or international) would then be considered compliant with this framework as well. They would still need to formally register and comply with any additional requirements as the case may be.

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, from their own resources. A budget will be drafted by Q1 2013.

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.

In addition, public authorities at the EU level have a 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.
