

Vertical relationships in the Food Supply Chain: Principles of Good Practice

Proposed by the following core members of the B2B platform

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Introduction¹

The European Institutions and several Member States have raised the existence of problems associated with the food supply chain and agreed that solutions to these problems should be found².

Following a request made on 10 March by the European Commission in the B2B Platform of the High Level Forum for a Better Functioning Food Supply Chain, a multi-stakeholder dialogue was created to discuss fair/unfair practices along the food supply chain. This dialogue has the objective to contribute to the High Level Forum process, on the basis of the platform's mandate. The core of the discussion has been to find a solution to the asymmetry and possible misuses of bargaining power by actors operating in the food chain.

The outcomes of the multi-stakeholder dialogue are attached in the form of a set of principles of good practice and a list of examples of unfair and fair practices in vertical trading relationships. These outcomes demonstrate i) a recognition that unfair commercial practices may occur throughout the whole food supply chain and ii) stakeholder willingness to address those practices in a consensual and effective way.

The members of the multi-stakeholder dialogue believe that these principles of good practice provide a framework for doing business that respects contractual freedom and ensures competitiveness, trust and continuity, all required for business development, innovation and the three pillars of sustainability (economic, social and environmental). Ultimately these will benefit consumers and society at large.

This approach is complementary to the development of ECR good practices designed to optimize the entire value chain to fulfill consumer wishes better, faster and at less cost.

The principles and examples that follow take into account the important role that SMEs play in the food supply chain.

The respect of the principles of good practice below would foster examples of fair practices and discourage the exercise of unfair ones, some of which are listed in the document.

¹ BEUC, the European Consumers' Organisation has followed the work as an observer. BEUC considers the general and specific principles of good practice to be sound and reflecting overall good practices in civil and commercial matters. BEUC does, however, question how their enforcement will be ensured in the EU markets

² Notably, the Final Recommendations of the High Level Group (HLG.006), the Communication on a Better Functioning Food Supply Chain in Europe (COM(2009) 591), the Retail Market Monitoring Report (COM(2010) 355), the Single Market Act (COM(2011) 206/4), the Bové Report (2009/2237(INI)), the Corazza-Bildt Report (2010/2109(INI)) and the various public and private initiatives in inter alia the UK, France, Spain, Romania, Hungary and Ireland.

Principles of Good Practice

Contracting parties shall act in strict compliance with applicable laws, including competition law.

General Principles:

- A. CONSUMERS: Contracting parties should always take into account consumer interests and the overall sustainability of the supply chain in their B2B relations. Contracting parties should ensure maximum efficiency and optimisation of resources in the distribution of goods throughout the supply chain.
- B. FREEDOM OF CONTRACT: Contracting parties are independent economic entities, respecting each other's rights to set their own strategy and management policy, including the freedom to determine independently whether to engage or not in any agreement.
- C. FAIR DEALING: Contracting parties should deal with each other responsibly, in good faith and with professional diligence.

Specific Principles:

- 1. WRITTEN AGREEMENTS: Agreements should be in writing, unless impracticable or where oral agreements are mutually acceptable and convenient. They should be clear and transparent, and cover as many relevant and foreseeable elements as possible, including rights and procedures of termination.
- 2. PREDICTABILITY: Unilateral change to contract terms shall not take place unless this possibility and its circumstances and conditions have been agreed in advance. The agreements should outline the process for each party to discuss with the other any changes necessary for the implementation of the agreement or due to unforeseeable circumstances, as provided in the agreement.
- 3. COMPLIANCE: Agreements must be complied with.
- 4. INFORMATION: Where information is exchanged, this shall be done in strict compliance with competition and other applicable laws, and the parties should take reasonable care to ensure that the information supplied is correct and not misleading.
- 5. CONFIDENTIALITY: Confidentiality of information must be respected unless the information is already public or has been independently obtained by the receiving party lawfully and in good faith. Confidential information shall be used by the recipient party only for the purpose for which it was communicated.
- 6. RESPONSIBILITY FOR RISK: All contracting parties in the supply chain should bear their own appropriate entrepreneurial risks.
- 7. JUSTIFIABLE REQUEST: A contracting party shall not apply threats in order to obtain an unjustified advantage or to transfer an unjustified cost.

Practice	Examples of <u>unfair practices</u>	Examples of <u>fair practices</u>
Agreements – written / unwritten	<ul style="list-style-type: none"> Refusing or avoiding to put essential terms in writing. This makes it more difficult to establish the intent of the parties and to identify their rights and obligations under the contract. 	<ul style="list-style-type: none"> Contracting parties ensure that the agreement is in writing, unless impracticable or where oral agreements are mutually acceptable and convenient. The agreement contains precise circumstances and detailed rules under which the parties can jointly modify the terms of the agreement, in a timely and informed way, including the process for setting the necessary compensation for any costs resulting for either party. The provisions of the written contract are clear and transparent. When contracts are not written, one of the parties sends a written confirmation afterwards.
General terms and conditions	<ul style="list-style-type: none"> Imposing general terms and conditions that contain unfair clauses. 	<ul style="list-style-type: none"> Using general terms and conditions that facilitate business activity and that contain fair clauses.
Termination	<ul style="list-style-type: none"> Unilaterally terminating a commercial relationship without notice, or subject to an unreasonably short notice period and without an objectively justified reason, for example on the grounds that unilateral sales targets are not reached. 	<ul style="list-style-type: none"> The unilateral termination of the agreement respects the agreement and due process and is in accordance with applicable law.
Contractual Sanctions	<ul style="list-style-type: none"> Contractual sanctions are applied in a non-transparent manner and are disproportionate to damages suffered. Sanctions are imposed without any justification in the agreement or the applicable law. 	<ul style="list-style-type: none"> If a party fails to meet its obligations, contractual sanctions are applied in a transparent way, in respect of the agreement and proportional to the damages. Contractual sanctions are agreed in advance, are proportionate for both sides and are applied in order to compensate damages.
Unilateral actions	<ul style="list-style-type: none"> Non-contractual retroactive unilateral changes in the cost or price of products or services. 	<ul style="list-style-type: none"> A contract contains legitimate circumstances and conditions under which subsequent unilateral action may be permitted.
Information	<ul style="list-style-type: none"> Withholding essential information relevant to the other party in contractual negotiations and which the other party could legitimately expect to receive. A contracting party uses or shares with a third party, sensitive information provided confidentially by the other contracting party, without the latter's authorization, in a way that enables it to obtain a competitive advantage. 	<ul style="list-style-type: none"> Providing relevant essential information to the other party in contractual negotiations and ensuring that information is not misused.

Entrepreneurial risk allocation	<ul style="list-style-type: none"> • Transfer of unjustified or disproportionate risk to a contracting party, for example imposing a guarantee of margin via payment for no performance. • Imposing a requirement to fund a contracting party's proprietary business activities. • Imposing a requirement to fund the cost of a promotion. • Preventing a contracting party from making legitimate marketing and promotional claims on their products. 	<ul style="list-style-type: none"> • Different operators face specific risks at each stage of the supply chain – linked to the potential rewards for conducting business in that field. All operators take responsibility for their own risks and do not unduly attempt to transfer their risks to other parties. • Transfer of risk which is negotiated and agreed by the parties to obtain a win-win situation. • Contracting parties agree the terms and conditions corresponding to their contribution to either parties' proprietary activities and/or promotional activities.
Listing Fees (upfront access payments)	<ul style="list-style-type: none"> • Imposing listing fees that are disproportionate to the risk incurred in stocking a new product. 	<ul style="list-style-type: none"> • When listing fees - used to mitigate the risk incurred in stocking a new product - are agreed between both parties, and they are proportionate to the risk incurred.
Threatening business disruption	<ul style="list-style-type: none"> • Threatening business disruption or the termination of the business relationship to obtain an advantage without objective justification, for example by punishing a contracting party for exercising its rights. • Demanding payment for services not rendered or goods not delivered, or demanding payments manifestly not corresponding to the value/cost of the service rendered. 	
Tying	<ul style="list-style-type: none"> • Imposing on a contracting party the purchase or supply of a set of products or services tied to another set of products or services -either from one of the contracting parties or from a designated third party. 	<ul style="list-style-type: none"> • The contracting parties agree to tie products or services that increase the overall efficiency and/or sustainability of the supply chain and bring benefits to consumers and both contracting parties.
Delivery and reception of goods	<ul style="list-style-type: none"> • Deliberately disrupting delivery or reception schedule to obtain unjustified advantage. 	<ul style="list-style-type: none"> • Deliveries which arrive at the agreed time allow suppliers to plan, well in advance, their production and manufacturing processes and delivery timetables, and allow buyers to plan the reception, storage and display of the goods delivered. • If a party needs to deliver or receive early / late / partially, they forewarn the other party as early as possible and in line with the written agreement.