



**British Institute of
International and
Comparative Law**

Enforcing Good Practice in Vertical Relationships in the Food Supply Chain

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I. INTRODUCTION

This paper follows an earlier study¹ drafted by the British Institute of International and Comparative Law (BIICL) which identifies and evaluates existing enforcement mechanisms applied in European Union (EU) Member States, in relation to the grocery supply chain and other relevant sectors, and examines the feasibility of developing an EU-wide mechanism to improve trading relationships within food supply chains that serve the EU market.

The aim of this paper is to consider how a code of practice can be enforced at the EU level, and whether other methods of regulation and enforcement may be more appropriate.

Within the grocery supply chain, unequal bargaining positions between some retailers and their suppliers have, arguably, resulted in imbalances in market power on the part of retailers.² Consequently, retailers have, in many cases, been able to shift costs onto suppliers, and to change contractual terms retrospectively. Because suppliers are often economically dependent on these large retailers, they are in a relatively weak bargaining position and therefore are unable to challenge these practices or recover any resultant losses, for fear of losing business. For this reason suppliers are reluctant to raise their concerns directly with a retailer or take the retailer to court, for fear of retaliatory action by the retailer. Because these problems have become so widespread, there has been significant debate surrounding how best to regulate behaviour, some arguing for competition law, others recommending contract law. It is therefore unclear who should take ownership of these issues within the European Commission. In order to examine these matters in depth, in 2008, the European Commission established a High Level Group on Competitiveness of Agri-Food Industry. In March 2009 members of the High Level Group endorsed 30 Recommendations (the Roadmap) as contained in the Final Report of the High Level Group. To oversee the implementation of the Roadmap the Commission established a new high-level stakeholder Forum to replace the 2008-2009 High Level Group. The new Forum (called EU High Level Forum for a Better Functioning Food Supply Chain) includes an expert group focused on business-to-business (B2B) contractual relationships. Within the expert group, the trade and business associations representing each stage of the supply chain formed their own working group (the Core Group) which produced, in November 2011, 'Vertical Relationships in the Food Supply Chain: Principles of Good Practice' (the Principles). The Principles, in their current form, are vague and require some sort of complementary enforcement mechanism. In that regard. the core group produced, in June 2012, a 'Framework for the implementation and enforcement of the principles of good practice in vertical relations in the food supply chain' (the proposed Framework).³

This paper builds on the recommendations of the previous BIICL report. It proposes a method of enforcement for consideration by the EU, and secondly responds, in part, to the proposed Framework's suggestions regarding enforcement of the Principles. The authors are grateful for feedback from a range of stakeholders on an earlier draft of the paper.

¹ The report is available online at <http://www.biicl.org/files/5941_biicl_b2b_report_finalversion.pdf> (accessed 30/08/12).

² This subject matter has been discussed extensively by experts in the field. See, e.g., A. Pera and V. Bonfitto, 'Buyer Power in Anti-trust Investigations: A Review' [2011] ECLR 8; P. Dobson and M. Waterson, 'Retailers power: recent developments and policy implications', *Economic Policy* (April 1999); E.A. Kaditi, 'Market Dynamics in Supply Chains: The Impact of Globalization and Consolidation on Food Companies' Mark-Ups', LICOS Discussion Paper 283/2011; G. König, 'The Impact of Investment and Concentration Among Food Suppliers and Retailers in Various OECD Countries', paper from Global Forum VIII on International Investment, 7-8 December 2009; M. Vander Stichele and B. Young (on behalf of Agribusiness Accountability Initiative, 'The Abuse of Supermarket Buyer Power in the EU Food Retail Sector' (March 2009); L. Bukeviciute, A. Dierx and F. Ilzkovitz, (European Commission DG Economic and Financial Affairs) 'The functioning of the food supply chain and its effect on food prices in the European Union' (2009) available at <http://ec.europa.eu/economy_finance/publications/publication15234_en.pdf> (accessed 5 March 2012).

³ 'The Framework' is available at <http://www.regjeringen.no/upload/LMD/Vedlegg/div/B2B_0407_Stakeholders30June12.pdf> (accessed 30/08/12).

II. REVIEW OF EUROPEAN ENFORCEMENT FOR FAIR RELATIONS IN THE FOOD SUPPLY CHAIN

The first BIICL report ('Models of Enforcement in Europe for Relations in the Food Supply Chain') examined law and practice in a number of EU and non-EU Member States in order to gain a more complete picture of how States are addressing imbalanced relations in the food supply chain. The study demonstrated that the Member States have employed several mechanisms to try and tackle the issue of unfair trading practices,⁴ which differ according to the needs and legal traditions of the Member States. Although several of the Member States have chosen to deal with these issues through competition law, it was clear that the motivation behind competition law frameworks is to protect consumers, which is not directly applicable in the context of trading relationships.⁵ Because of varied regulation of these issues, the report recommended that the EU would be best placed to bring some consistency into this area, and to introduce a mechanism that effectively addresses these unfair commercial practices.⁶ To that end, the report suggested several positive characteristics of enforcement (see box below) that an EU-level mechanism should include,⁷ and a number of options for enforcement.⁸ Overall, the report suggested that a successful mechanism would impose mandatory obligations with enforcement mechanisms that have teeth, such as the imposition of financial penalties.

Positive Characteristics of Enforcement

- Dedicated enforcing authority that can initiate its own investigations, receive complaints anonymously, impose financial penalties and build up sector-specific expertise;
- Application of a rule that does not rely on whether the retailer possesses significant market power;
- Possibility for the parties to make joint commitments to avoid an official finding of wrongdoing;
- Creation of a forum where suppliers and retailers can resolve issues in order to prevent future crises;
- A dispute resolution mechanism which makes clear in what manner parties may attempt to resolve issues;
- The possibility for stakeholders to be represented by business organisations to further ensure anonymity; and
- Imposition of obligations on retailers to comply with a code of good practice through changes to their business structures through, e.g., the appointment of an in-house compliance officer, and requirements to issue periodic reports on compliance.

III. A BUSINESS-TO-BUSINESS REGULATION

1. Learning from Existing Legal Instruments

Following on from the characteristics of good enforcement set out above, this paper looks at how EU institutions may enact legislation to oblige Member States to regulate these issues in their territories. While it is true that the legislative process is typically lengthy, the end result would be a binding legal instrument which would apply to the whole of the EU, and consequently all retailers and suppliers doing business therein.

⁴ 'Unfair trading practices' refers to B2B practices whereas 'unfair commercial practices' is understood as referring to B2C practices.

⁵ BIICL Report (n 1) p. 30.

⁶ Ibid., p. 33.

⁷ Ibid., p. 34.

⁸ Ibid., pp. 33-4.

The most obvious comparator for this suggestion is the Unfair Commercial Practices Directive (UCPD) 2005/29/EC.⁹ Although it applies in the context of business-to-consumer relations, its basic structure and several of its fundamental principles are transferrable to the context of B2B relations. Moreover, some Member States have already chosen to extend the scope of the UCPD to B2B relations. In fact, Recital 8 of the Preamble to the UCPD specifically recognises the existence of unfair commercial practices which may harm competitors and business customers rather than consumers, and instructs the Commission to examine the need for Community (legislative) action in this regard. The UCPD seeks to eliminate obstacles to the free movement of services and goods across borders and the freedom of establishment by approximating the laws of the Member States on unfair commercial practices. Chapters 3 ('Codes of Conduct') and 4 ('Final Provisions') of the UCPD discuss enforcement and its relationship to codes of conduct. Article 10 ('Codes of Conduct') provides that the UCPD does not exclude the ability of the Member States to regulate unfair commercial practices through the use of codes of conduct. Article 11 continues with specifics regarding enforcement. It requires the Member States to ensure that adequate and effective legal means exist to combat unfair commercial practices in order to comply with the Directive. Such legal means include allowing persons or organisations with a legitimate interest in combating unfair commercial practices to take legal action against such practices and/or bringing such practices before an administrative authority competent to decide on complaints or decide whether to initiate legal action. It then explicitly states that it is for each Member State to decide which of the facilities, i.e., legal remedies, should be available, and whether to enable the courts or administrative authorities to require interested parties to first seek redress through other means of dealing with complaints, such as a code of conduct. Finally, the UCPD provides that infringements of national provisions adopted to implement the UCPD must be enforced by effective, proportionate and dissuasive penalties.

In addition, two other legislative instruments are relevant. The Directive on unfair terms in consumer contracts (93/13/EC), although aimed at protecting consumers from retailers imposing un-negotiated terms (i.e., so-called 'boilerplate' language), it includes useful provisions relating to what is considered 'unfair' and how to interpret whether a retailer has acted in 'good faith' toward a consumer. As this is a law based on contractual principles, it is geared specifically for use in bilateral disputes between parties in order to determine whether a contractual term imposed on consumers is 'fair'. The UCPD may also be used in bilateral disputes, but its focus is more to do with changing behaviour with regard to unfair commercial practices generally. Because of this, the UCPD is arguably more relevant to the situation at hand, in which there is a need to create a 'cultural' change in behaviour among retailers and suppliers.

Finally, the Regulation on consumer protection cooperation (2006/2004/EC) is aimed at supporting the implementation of several EU legislative instruments on consumer protection, including the Directive on unfair terms in consumer contracts. This Regulation is intended to facilitate cooperation between national public authorities responsible for enforcement of the EU laws at issue.

2. A Business-to-Business (B2B) Instrument

The following are some key issues to consider when designing a legislative instrument.

Form

The EU will have to make the initial decision as to whether it will address these issues in the form of a directive or a regulation. A directive allows Member States a certain amount of discretion with regard to how they will implement the provisions therein. A regulation is directly applicable without the need for implementing legislation, and therefore must be directly applied by the Member States with no room for manoeuvre. There are no firm rules governing this choice; it is typically a political

⁹ The Directive is available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32005L0029:EN:NOT>> (accessed 21/09/12).

decision. However, it seems that in recent years, there has been a tendency to use regulations rather than directives. We think that this course of action is preferable in the context of B2B relations because it will result in better uniformity among the Member States' rules and equal treatment among all stakeholders in the grocery supply chain.

Scope

Once the form of the instrument is chosen, it will be necessary to consider essential issues relating to its scope. For example, the EU will have to consider whether it will apply to all retailers and suppliers doing business in the EU, or only those with a specific annual turnover in the Member State. For example, the UK Groceries Code is applicable to grocery retailers whose annual turnover in the UK exceeds £1 billion (approximately €1.25 billion), whereas in Hungary, the relevant legislation applies to retailers whose net turnover is more than HUF 100 billion (approximately €323 million).¹⁰

A broader issue is whether the instrument would be restricted to the relations of retailers and suppliers in the food supply chain, or whether it would apply more widely to all retailers and suppliers. We recommend a sector-based approach, as this would better target practices that appear to be unique to the food supply sector, and improve relations along the whole of the supply chain which delivers food to the EU.

Moreover, insofar as possible, the framework offered by the instrument should be open to all actors in the food supply chain, regardless of their geographical location. This is entirely plausible as the obligation to adhere to the legislative instrument would apply to businesses present in the Member State and therefore would apply with respect to all of their dealings with suppliers, no matter where they are located. This would avoid the creation of a two-tier system differentiating between dealings with suppliers within the EU (to which the instrument would apply) and dealings with non-EU suppliers (which would fall outside the scope of the legislation).¹¹

Principles and Offences

The instrument should contain an overarching prohibition of unfair trading practices. In the UCPD, such prohibition reads as follows: "Unfair commercial practices shall be prohibited." It then explains when a commercial practice will be considered unfair in the context of consumer relationships. Articles 3 and 4 of the Directive on unfair terms in consumer contracts discuss the concept of what is considered 'unfair' and provides that:

A contractual term that has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties rights and obligations arising under the contract to the detriment of the consumer.

In making the assessment of whether a term is unfair under that Directive, a court must take into account the nature of the goods or services which are the subject of the contract, as well as all the circumstances leading to the conclusion of the contract, and all the other terms of the contract or other related contract.¹²

In our context, we suggest that the general prohibition of unfair trading practices between retailers and suppliers be based on the principle of fair dealing. Specifically, we suggest that it could incorporate language similar to that used in the UK Groceries Code:

¹⁰ BIICL Report (n 1) pp. 8, 12.

¹¹ This is the case, e.g., in Belgium, France, Slovenia and the UK (BIICL Report, *ibid*, Annex IV.

¹² Art. 4(1) Directive 93/13/EC.

A Retailer must at all times deal with its Suppliers fairly and lawfully. Fair and lawful dealing will be understood as requiring the Retailer to conduct its trading relationships with Suppliers in good faith, without distinction between formal or informal arrangements, without duress and in recognition of the Suppliers' need for certainty as regards the risks and costs of trading, particularly in relation to production, delivery and payment issues.¹³

With regard to the delineation of unfair trading practices, the EU institutions would be required to apply the information they have been gathering on the existence of unfair trading practices in the Member States in order to ensure that the instrument is as comprehensive as possible. By way of example, such practices could include:

- Delisting or threats of delisting;
- Retroactive changes to agreements;
- Requiring payments for shelf space;
- Abuse of access to confidential information, e.g., regarding costs; or
- Subjecting suppliers to unfair penalties.

Wider categories of offences can be explored in depth within the substance of the instrument (as in the UCPD there are provisions dedicated to 'misleading commercial practices' and 'aggressive commercial practices') such as those contained in the French Commercial Code: 'submitting a trading partner to obligations which create a significant imbalance in the rights and obligations of the parties'; 'attempting to obtain grossly unfair conditions by threat of a full or partial break in commercial relations'; and 'breaking off a commercial relationship without written notice'.¹⁴ It would also be helpful to include interpretative guidelines, such as that provided in the Directive on unfair terms in consumer contracts with regard to the determination of whether a contractual term is unfair, as discussed above. Perhaps the best way to ensure comprehensiveness is to incorporate the substance of Principles of Good Practice, as well as other problematic practices into the instrument, so as to make them binding.

Codes of Conduct

The UCPD does not exclude the ability of the Member States to regulate unfair commercial practices through the use of codes of conduct. Because a regulation or directive would establish *minimum* standards, Member States could retain pre-existing schemes as long as those schemes offer at least the level of protection provided in the instrument. Member States would of course have to demonstrate that their existing frameworks are compliant when they are implementing the B2B instrument.

Enforcement

If the EU does adopt a regulation, it will have a chance to establish a definitive and harmonised method of enforcement. As stated above, the UCPD requires that the Member States provide an effective legal framework to combat unfair commercial practices in order to comply with the Directive. The UCPD suggests that Member States may either create a private right of action or set up an administrative authority that is competent to hear complaints or initiate legal proceedings.

We suggest that any instrument in the B2B context provides that a national administrative authority competent to decide on complaints or initiate legal proceedings be put in place. Such an authority would still be able to work within any pre-existing frameworks for dispute resolution, perhaps as an appellate body. In terms of EU-level enforcement of the instrument, this would be a good opportunity for the Commission to take ownership of these issues and delegate enforcement to one of the Directorates General (DGs), e.g., DG MARKT, DG COMP or DG Enterprise and

¹³ The Groceries (Supply Chain Practices) Market Investigation Order, Schedule 1 (the GSCOP), Clause 2.

¹⁴ BIICL Report (n 1) p. 7.

Industry. However, it may be more desirable that the instrument establish a wholly independent and dedicated body with adequate resources to allocate to improving fairness in the food supply chain. Such a body could build up expertise and ensure consistent enforcement across the Member States, as well as coordinate cases in which more than one Member States is involved. This would be in line with the recommendations in the first BIICL Report.

It would also be crucial to make a private right of action available, so that if parties wanted to appeal national decisions to a judicial authority, they would have the option. Of course, the European Court of Justice would be available for appeal under the legislative instrument as well. In this way, the legal instrument can remain flexible, despite being a regulation in form.

The instrument should ensure that Member States provide the administrative authority with powers to ensure the proper functioning of the instrument and the principles therein. In particular, the authority should have the power to:

- Monitor the functioning of the instrument (i.e., its national implementing legislation);
- Initiate investigations;
- Receive anonymous complaints (including from credible third parties) and maintain confidentiality;
- Order cessation of any unfair trading practices even without proof of actual loss or damage, or of intention or negligence on the part of the retailer, or a large company purchasing within the food chain;
- Require publication of any decision against a retailer, and possibly also a corrective statement;
- Enforce observance of its decisions effectively; and
- Impose financial penalties for infringements that are effective, proportionate and dissuasive.

It would also be a positive step to allow the authority to take legal action where there has been a finding by the relevant Minister that the relationship between the parties has resulted in an imbalance.¹⁵

It is also extremely important that the instrument include strict timings in order to ensure that grievances are heard as soon as possible, and that corrective or punitive measures can be imposed quickly and effectively. It would also be a good opportunity to provide the Commission with explicit power to investigate and enforce breaches of the instrument in a manner similar to DG COMP (discussed below in Part V.2).

Moreover, it is important to consider circumstances involving more than one Member State. For example, it may be the case that a supplier's relations with a retailer that is selling its products in more than one Member State could result in a dispute. In such cases, it may be preferable to give the Commission jurisdiction to handle the dispute, rather than the national authorities, assuming it has been granted explicit investigatory and enforcement powers.

Cooperation between national authorities and between national authorities and the Commission is also integral to ensuring the smooth functioning of any legislation that is adopted. It may therefore be valuable to adopt something similar to Regulation 2006/2004/EC on consumer protection cooperation (discussed above). That Regulation facilitates cooperation between the public authorities tasked with enforcing EU consumer protection legislation (or in this case, whatever is adopted to regulate unfair trading practices) and provides a clear support role for the Commission. Indeed, this would be a smart route to take if the EU adopts a legislative instrument, but does not provide the Commission with explicit enforcement powers, as suggested above. The consumer protection cooperation Regulation requires Member States to establish authorities and provide them with investigation and enforcement powers to ensure that EU legislation is being properly applied, i.e., they are empowered to act when there is a reasonable suspicion that EU law is being

¹⁵ Ibid.

infringed.¹⁶ The Regulation also imposes responsibilities concerning mutual investigatory assistance between national authorities and coordination of market surveillance and enforcement activities.¹⁷ Moreover, information with third countries is also contemplated, insofar as this is permitted by bilateral international agreements and Community legislation.¹⁸ Finally, Member States are given the option to carry out investigatory activities in coordination with the Commission.¹⁹

The European Competition Network also provides a useful model of communication, coordination and enforcement involving the Commission and the Member States.²⁰

Standing

It would be beneficial to allow credible third parties to bring cases of alleged violation before the relevant national judicial authority, or to alert national administrative authorities to any wrong-doing in the food supply sector. This would help alleviate the problem of supplier fear of retaliation and hence the reluctance of parties to complain about unfair trading practices.

Legal Basis

The UCPD was enacted based on Article 114 (ex Art 95 TEC) which empowers the institutions to adopt measures which have as their object the functioning of the internal market. This could also serve as the legal basis for any instrument on unfair trading practices in B2B relationships.²¹

In summary, the adoption of a legislative instrument such as the UCPD would result in binding, yet flexible, obligations and strong enforcement. Its flexible, multi-level approach would provide the Member States with a framework offering regulation that can include arrangements under bilateral or multilateral frameworks, such as codes of conduct and dispute resolution, but which would also offer the firm enforcement of a legislative instrument in case soft law frameworks prove to be inadequate.

IV. THE FRAMEWORK DEVELOPED BY CORE GROUP OF BUSINESS ASSOCIATIONS (July 2012)

It should be stated at the outset that the Core Group's proposed Framework is only supported by five out of eight of the Group's business associations. It rests on a four-pillar structure consisting of:

- Creating a system of registration and awareness building;
- Registration of company-signatories and implementation of the Principles;
- Addressing disputes and finding solutions; and
- Verifying compliance and evaluating the success of the proposed Framework.

¹⁶ Art. 4(6) Directive 2006/2004/EC.

¹⁷ Ibid, Art. 9-12.

¹⁸ Ibid, Art. 14.

¹⁹ Ibid, Art. 16.

²⁰ Details regarding the European Competition Network can be found at http://ec.europa.eu/competition/ecn/index_en.html (accessed 08/10/12).

²¹ Action may also be based on either Article 115 or Article 116 TFEU. However, both of these articles concern the adoption of directives, not regulations. Article 115 TFEU allows the Council of the EU to issue directives for the approximation of national laws, regulations or administrative provisions that directly affect the establishment or functioning of the internal market. In addition, the seldom-used Article 116 TFEU empowers the Commission to identify and attempt to resolve any national laws, regulations or administrative actions that are distorting the conditions of competition in the internal market. Where the distortion cannot be eliminated, the institutions can issue the necessary directives.

This report will focus on the final two pillars, which deal with enforcement. By registering as a participant, companies accept that they must resolve their disputes via a dispute resolution process, such as internal dispute resolution, mediation or arbitration, depending on what best suits their needs.²² The dispute resolution mechanism chosen must be independent of commercial negotiations, impartial and quick. Any remedies or sanctions resulting from a violation of the Principles are to be determined by the dispute resolution option chosen and enforced according to the applicable law.

In addition to the dispute resolution pillar, the proposed Framework creates a Governance Group whose 15 members will consist of representatives from the entire food supply chain. This Governance Group will not be fully constituted since the framework currently does not have the support of three business associations. The Governance Group is tasked with ensuring the functioning of the procedures (so-called 'process commitments') outlined in the proposed Framework regarding implementation and enforcement of the principles, such as self-assessment, creation of training programmes, preparation for dispute resolution and the designation of a representative contact person. The Governance Group does not have the power to govern the substance of the Principles themselves; that is only achieved through dispute resolution on a case-by-case basis.²³ The Governance Group will assess the success of the proposed Framework through an annual survey evaluating training, operation of the dispute resolution options and communication obligations.²⁴ Companies will be able to anonymously highlight any violations of the process commitments to the Governance Group, but they can also raise the issues directly with the allegedly offending company. Any unexplained refusals to remedy the conduct at issue can lead to the company's exclusion from the proposed Framework, according to a process yet to be determined. The Governance Group may also decide whether it is necessary to produce interpretation guidance for the Principles, but it is unclear how this would occur in practice.

We believe that the proposed Framework is lacking in several ways. For example, it does not provide details regarding how companies will be able to anonymously flag issues of process commitments or how chosen dispute resolution mechanisms could be implemented so as to discourage commercial retaliation. Nor does it allow the Governance Group to make any decisions relating to the substance of the Principles; in fact, it essentially permits the Governance Group to exclude registered companies for failure to abide by process commitments, but does not provide an equivalent consequence for violating the Principles. There are also potential conflict of interest issues regarding the impartiality of a Governance Group that is composed of business associations of the supply chain stakeholders. Moreover, although the proposed Framework contemplates that sanctions for violations may be imposed via the chosen dispute resolution mechanism and applicable law, it is unclear whether those sanctions would be sufficient to have a dissuasive effect on the violating company.

The proposed Framework requires company-signatories to follow a process for dispute resolution based on the three options discussed above. However, it appears that in practice, two of the three options for dispute resolution would be ineffective because it is unclear whether they would result in binding conclusions. A strict textual reading of the proposed framework indicates that only conclusions resulting from arbitration would be binding, and therefore legally enforceable. Moreover, while dispute resolution would hopefully improve bilateral relationships between the parties to the dispute, it would not result in an overall change in behaviour across the whole supply chain. Nor does it resolve the issue of supplier fear and the need to protect anonymity in the complaints process.

Perhaps the most important criticism of the proposed Framework is the fact that it is based on a system that is completely voluntary and therefore reliant upon businesses choosing to become

²² The Framework (n 3) p. 6.

²³ *Ibid.*, p. 8.

²⁴ *Ibid.*, p. 7.

bound by its obligations. This leaves a significant margin for non-participation by perhaps the biggest offenders.

An additional weakness of the proposed Framework is its failure to adequately utilise the resources of the European Commission, which are sorely needed in this area to counter the imbalances present in the supply chain and ensure adherence to the Framework. It envisions the following level of involvement from the Commission, some of which do not play to the Commission's strengths and are arguably inappropriate:

- Translator of the Principles;
- Host of EU-wide registration website and co-organiser of launch event;
- Co-drafter of list of existing national mediation and arbitration mechanisms; and
- Consultant during elaboration of annual report by Governance Group.

In addition to the four actions above, the proposed Framework considers a possible future role for the Commission should it prove to be unworkable. In particular, it refers to the possibility of a European-level dispute resolution mechanism.²⁵ In that regard, we would argue that a more valuable and useful role for the Commission would be to serve as the ultimate decision-maker in the dispute resolution process, and as an independent Guardian of the Principles. As this is not yet at issue, we focus below on how the Commission could be more meaningfully involved in the proposed Framework as it currently stands.

V. ENFORCING VOLUNTARY PRINCIPLES

1. EU Legislation

As indicated above, we believe that the creation of something akin to the Unfair Commercial Practices Directive might be an effective way to regulate relationships in the food supply chain. A regulation or directive in this area would apply to the EU Member States and all businesses operating in their territories. In theory, this is a logical and efficient way to harmonise national areas of policy at the European level.

However, in the context of the Core Group's work, using legislation to enforce voluntary principles would not be feasible. The Principles apply not to the Member States, but to individual company-signatories. Because EU directives and regulations are used as tools to harmonise and enforce *state* law and policy, they are inappropriate enforcement instruments in the context of the Principles, which are voluntary and applicable only to companies. The adoption of EU legislation would therefore be more complicated because it would require the creation of national legislation imposing private law obligations, and a corresponding national enforcement mechanism. This may be a possibility for the future, it is not an imminently a viable enforcement solution with regard to the Principles.

Given that the proposed Framework already mandates resolution of issues through dispute resolution, we argue that the most effective way of enforcing the Principles would be to give the Commission a greater role in supporting the work of the Core Group, and with regard to the functioning of the Principles themselves.

2. The Commission's Enlarged Role

The Framework proposes that company-signatories ensure that a mechanism for dispute resolution is available to the parties. It does not specify what would happen should dispute resolution fail. To be more clear, no final decision-maker is foreseen by the Framework. Nor is the Governance Group posed to make final decisions on the substance of the Principles. Given the

²⁵ Ibid., p. 6.

extensive work that the Commission has done to identify the existence of problems in the retail supply chain, and to define what it considers to be unfair trading practices,²⁶ it makes sense for the Commission to take ownership of these issues and play a key role in the Core Group's process. We therefore propose that the Commission could actively monitor compliance with the Principles, as well as the state of relationships in the food supply chain with a view toward gathering information necessary to ascertain whether any further (legislative) action needs to be taken by any relevant DGs, and as a means of support to national investigations.

Monitoring

Ideally, one of the DGs (e.g., DG MARKT or DG Enterprise and Industry) would eventually assume the same role as DG COMP and the UK Groceries Code Adjudicator and the French Minister for the Economy in relation to their powers to investigate and remedy breaches of the rules. DG COMP is permitted to open infringement cases on its own initiative, or following a leniency application or complaint. It also conducts sector inquiries in various sectors of the economy to determine whether breaches of the competition rules are causing the market to function improperly. If it concludes that there has been a violation of the competition rules, it can propose that action be taken against the violating party that may prohibit the conduct at issue and require remedial action or payment of a fine. In the context of the Principles, the DG could actively monitor their functioning, either on its own, or based on complaints (including those anonymous in nature, from credible third parties, or perhaps from the Governance Group). If, based on the information it collects, the DG determines that there has been a breach of the Principles, it could request information from the relevant parties to determine whether further action (including punitive action) is necessary. However, unfortunately this type of role is likely unrealistic in the context of the Framework as currently proposed.

Therefore, an alternative suggestion is to let one of the DGs conduct its own investigations in a manner similar to that proposed for the UK Groceries Code Adjudicator. In addition to hearing bilateral disputes triggered by named suppliers, the Groceries Code Adjudicator is empowered to actively monitor adherence to the Groceries Code by undertaking investigations. It must have reasonable grounds to suspect that a retailer has breached the Groceries Code. The Groceries Code Adjudicator may consider any information it deems appropriate to consider when deciding whether to investigate and during the investigation itself. Following its investigation, the Groceries Code Adjudicator must publish a full report (which can leave the parties unidentified) disclosing its findings and the reasons for them. Importantly, the findings of the investigation do not constitute a determination of liability. The non-violating party would still be required to make its own claim against the party allegedly in breach of the Code within the framework of the chosen dispute resolution mechanism. Following publication of its report, the Groceries Code Adjudicator can recommend remedial action, impose obligations to publicize breaches and, if the necessary power is implemented, impose financial penalties. Similarly, the French Minister for the Economy is empowered to monitor those provisions of the French Commercial Code which deal with harm caused by producers, traders or anyone registered in the trades. The Minister may engage in two methods of investigation. The first method is supplier-driven, i.e., a supplier that does not want to make a private claim before court against the retailer itself will go to the Minister to request an investigation, which can lead to a formal claim by the Minister (at which the supplier may intervene, but this rarely occurs). Alternatively, the Minister is empowered to investigate on his own initiative based on his routine market monitoring obligations, including, as discussed above in Part III.2, the possibility to bring legal proceedings where there has been a determination that there is an imbalance in the relationship between parties.²⁷

The Commission seems best-placed to carry out these tasks. It should be given the authority to monitor the functioning of the Principles in order to determine whether any company-signatory has

²⁶ A detailed overview of the Commission's work in this area is available at http://ec.europa.eu/internal_market/retail/index_en.htm (accessed 03/10/12).

²⁷ BIICL Report (n 1) p 7.

breached the substantive rules. In carrying out such an investigation, the Commission could liaise with the established contact points created under the Framework.²⁸ Such an investigation would allow it to determine whether the Principles are an overall success or whether changes are necessary, either to the Principles themselves or any relevant guidance produced. Where the Commission determines that a company-signatory has violated the Principles, it could recommend a course of remedial action for compliance. The Commission would then be responsible for monitoring whether its recommendations have been implemented correctly. The Commission could also require a retailer that is in violation of the Principles to publish information about the investigation and its outcome. Whether the Commission could impose financial penalties based on its monitoring power is a matter for future discussion, as it currently does not have the power to do so under the EU Treaty of Lisbon.

The Commission may also use its powers to conduct inquiries which examine whether it would be feasible to take any legislative action in order to remedy any sector deficiencies that cannot be addressed through the functioning of the Principles alone. This is quite common, and the information gathered by the Commission may even be used by DGs to formulate their policy.²⁹ For example, while developing its policy on roaming and mobile networks, what was then known as DG Information Society and Media³⁰ used a DG COMP sector inquiry as a basis for legislative action.³¹ An inquiry into the functioning of the Principles by, for example, DG MARKT, could be used a similar basis for legislative action either by itself or by any other relevant DG, such as DG Agriculture and Rural Development, DG Enterprise and Industry or DG Health and Consumers.

Guidance

Because one of the main goals of the Principles is to effect change within corporate culture and to deal with retailers' who apply abusive practices generally to all of their suppliers (e.g., unilaterally extending payment terms), or a group of retailers who apply the same abusive practices, one of the most important roles that the Commission could have is that of providing guidance on compliance with the Principles to the company-signatories. Within the context of the UK Groceries Code, this, along with recommending changes to the Groceries Code, is a task of the Adjudicator, which is permitted to publish guidance on any matter relating to the Groceries Code. DG COMP also publishes guidance concerning compliance with the EU competition rules. A similar practice exists within the framework of the French Commission d'Examen des Pratiques Commerciales, which produces decisions and opinions that are used as interpretive aides.³²

In that regard, it should be possible for the Commission's monitoring process to result in the publication of guidance, rather than a specific ruling or imposition of any of the penalties described above. In fact, the Framework proposal contemplates the possible need for guidance on the Principles, the necessity for which will be determined by the Governance Group.³³ However, it

²⁸ The Framework (n 1) p. 5.

²⁹ For example, DG MARKT recently completed the Retail Market Monitoring Report, which provided a factual and comprehensive analysis of the entire sector in order to identify possible market malfunctioning (http://ec.europa.eu/internal_market/retail/index_en.htm). See also the examples of: DG SANCO monitors consumer markets in two steps : (1) it identifies markets that are malfunctioning from the consumers' perspective with the Consumer Market Scoreboard; (2) it analyses in-depth selected markets to find the main consumer problems and to suggest policy solutions (see http://ec.europa.eu/consumers/consumer_research/index_en.htm); DG Enterprise and Industry has monitored the competitiveness of healthcare industries and, to complement a DG Comp sector inquiry into the pharmaceutical sector, in 2009 DG Enterprise published a study on the competitiveness of the EU market and industry for pharmaceuticals which looked at the impact of regulatory systems on the EU pharmaceutical market, with a particular focus on the implications of pricing and reimbursement regulation (see http://ec.europa.eu/enterprise/sectors/healthcare/competitiveness/monitoring/index_en.htm).

³⁰ It is now called DG Communications Networks, Content and Technology.

³¹ European Commission 'Commission Staff Working Paper Impact Assessment of Policy Options in relation to a Commission Proposal for a Regulation of the European Parliament and of the Council on Roaming on Public Mobile Networks within the Community' SEC(2006) 925 of 12 July 2006, available at http://ec.europa.eu/information_society/activities/roaming/docs/assessment_en.pdf (accessed 31/08/12) Section 1.2.

³² BIICL Report (n 1) p. 14.

³³ The Framework (n 3) p. 8.

does not elaborate details such as who is to draft the Guidance and how common understandings of the Principles would be determined. This seems like an apt role for the Commission, and a positive way of bringing consistency to practice under the Principles.

VI. COMPARING THE OPTIONS

Below we have created a table outlining the pros and cons of the enforcement solutions considered in this report. As we discussed, legislating to enforce a voluntary code that is applicable to businesses rather than Member States is inappropriate. However, because we feel that the proposed Framework itself has several failings, the most important being that it is voluntary in nature, legislating a binding EU instrument seems like a better approach in terms of access to justice for suppliers. Although Option 2 (enhancing the Commission’s role) appears easier to implement with regard to the proposed Framework, we believe that it has major limitations that would prevent it from being able to effectuate change in the way business is conducted in the food sector.

Additional pros and cons include the following:

	Pros	Cons
Option 1: An EU Business-to-Business legislative instrument	<ul style="list-style-type: none"> • Mandatory, universal coverage • Retailers less likely to drop suppliers if everyone bound • Can integrate with existing state frameworks • Applicable to all suppliers, no matter geographical origin • Could be overseen by the Commission • Scope to create independent enforcement body 	<ul style="list-style-type: none"> • Lengthy process to create and implement; • May still result in judicial proceedings; • Potential for conflicting national frameworks if directive, and not regulation, used
Option 2: The Commission enforces the Principles of Good Practice	<ul style="list-style-type: none"> • Makes use of the Commission’s current resources • Quick implementation • Applicable to all suppliers, no matter geographical origin 	<ul style="list-style-type: none"> • Unclear whether the Commission could impose penalties • Unclear whether the Commission could receive anonymous complaints • Unclear whether the Commission could itself initiate investigations • Would only apply to signatories

No matter what the outcome of the Core Group, it is clear that the Commission must take ownership of these issues. If the Commission does choose to take action, it will have to decide which DG should be responsible for supervision of these issues. At the moment, it would appear that DG MARKT and DG Enterprise and Industry have taken the lead with regard to coordination of the Core Group’s initiative, with DG COMP only peripherally involved. Should the debate about responsibility continue, it may be worth revisiting the appropriateness of regulating these issues via competition law. In that regard, we draw the reader’s attention to competition Regulation 1/2003/EC on the implementation of the rules on competition laid down in Articles 81 and 82 (now 101 and 102) of the Treaty. Recitals 8 and 9 of the Preamble specifically contemplate the possibility for national laws to include provisions prohibiting or imposing sanctions on ‘abusive behaviour toward economically dependent undertakings’ and unfair trading practices, whether unilateral or contractual in nature. With regard to the latter, Regulation 1/2003/EC expressly references a possibility for legislation prohibiting businesses from imposing or attempting to obtain unjustified and disproportionate terms and conditions. This means that the EU has explicitly

recognised that Member State action in this area is not necessarily incompatible with the existing competition law regulatory regime.

VIII. CONCLUSION

We feel that the best way to change the manner in which business is conducted across the food supply chain is through a binding legislative instrument that applies across the EU. Such an instrument would create obligations that would apply uniformly to businesses in the EU (and possibly also outside the EU), and could specifically delineate a set of principles for interpretation, a list of practices which are deemed to be unfair, and strict methods for enforcement that could adequately take into account the need to preserve anonymity. To support this recommendation, we suggest that the Unfair Commercial Practices Directive in the B2C context be considered as a model. We feel that this multi-level approach would provide the Member States with enough flexibility to retain existing soft law frameworks, but still offer strong enforcement in the event that soft law regulation proves inadequate. Although the legislative process may be lengthy, we believe that the resulting binding instrument would better protect the interests of suppliers doing business in the EU.

We do not believe the proposed Framework will change generic or widespread problems and improve relationships in the grocery supply chain, or offer a final and effective method for dispute resolution. The proposed Framework is weak, foremost, because it is voluntary in nature. Beyond that, it fails to include any aspect that would result in changes for the whole of the food supply chain, and it does not create an independent governing body that can effectively monitor and enforce the functioning of the substance of the Principles. Moreover, while the Framework includes a limited, and perhaps inappropriate, role for the European Commission, we do not feel that it provides the Commission with a role substantial enough to ensure the effective application of the Principles between company-signatories. Should this Framework be taken forward, we suggest that it be assigned a greater role. In particular, we propose that the Commission have the following powers in relation to the Principles and the proposed Framework:

- Issue binding decisions in case of dispute between company-signatories;
- Impose fines or other dissuasive measures for non-compliance with the Principles;
- Initiate and engage in investigations concerning the proper functioning of the Principles;
- Publicly disclose breaches of the Principles;
- Provide guidance and interpretation of the Principles to address generic or widespread problems; and
- Conduct inquiries and exchange information with other DGs to determine whether further legislative action is necessary.

Overall, this report seeks to reiterate the conclusion that involving the European Commission in any method chosen to regulate relationships in the food supply chain would be a good opportunity to provide consistency and clarity as to what are fair or abusive practices. It is important to allow the Commission to take on a strong role that will be practical, efficient and of use to the stakeholders involved in the process. Whilst the Framework of dispute resolution and governance with regard to the Principles of Good Practice can be improved if the Commission is involved as set out in this report, we recommend that the Commission use the legal basis provided for in Article 114 to legislate in this area to bring about improvements across the sector, and ensure uniform application of standards among businesses in the food supply chain.