

RECOMMENDATIONS TO THE EU HIGH LEVEL FORUM FOR A BETTER FUNCTIONING FOOD SUPPLY CHAIN IN RELATION TO THE BUSINESS TO BUSINESS CONTRACTUAL PRACTICES EXPERT PLATFORM'S FORTHCOMING WORK EXPLORING 'CODE' IMPLEMENTATION OPTIONS.

I) Background

- i. We welcome the High Level Forum's focus on business to business trading relationships.
- ii. As organisations concerned about the international development impacts of food sourcing on the human rights of workers and farmers in developing countries it has come to our attention that the purchasing practices of some companies in the food supply chain undermine suppliers ability to implement good working conditions, operate in an environmentally responsible manner and plan for the future.
- iii. The collaboration of the trade associations within the Business to Business Platform is commended, because it is the behaviour change of businesses within the food supply chain that is desired.
- iv. We regret that the trade associations' did not incorporate improvements proposed by the Fair Trade Advocacy Office in September 2011 to the "Vertical relationships in the Food Supply Chain: Principles of Good Practice" paper. This paper provides the basis for a code, and we would welcome the European Commission undertaking analysis to clarify how this 'code' compares to other codes and laws that apply to the food supply chain in member states.

II) Summary

- v. We propose that the High Level Forum directs the B2B expert platform to consider the following points so that a credible 'code' enforcement mechanism is developed, and swift progress can be made.

Nature of sector or current practices	Recommendations for credible 'code' enforcement
<p>WHAT is the problem? The code aims to address the behaviour of companies towards their suppliers which is a symptom of the cause which is the power imbalance in supply chains.</p>	<p>1. Enforcement powers need to be sufficiently strong to counteract a food company's rational approach to maximising the opportunities that their powerful position gives them relative to their suppliers.</p>
<p>WHO is impacted by the problem?</p> <p>The EU food sector is supplied by farms and companies based all over the world.</p> <p>These food suppliers consider their position to be weak, and want ongoing access the EU market. So many are not willing to complain publicly (or to the buying company) when faced with unfair commercial practices.</p>	<p>2. All parts of the supply chain wherever their geographic location need to be able to access the enforcement organisation.</p> <p>3. This organisation needs to proactively make itself accessible to 'weaker' companies within the food sector. Specifically it needs to:</p> <ol style="list-style-type: none"> a keep information confidential b receive anonymous complaints c gather relevant information that may indicate a breach d independently initiate an investigation if there is sufficient suspicion of a breach of the code, to avoid complainants being sought and targeted
<p>WHOSE practices need to change? Companies selling in the EU may be making the purchasing decision at their headquarters, a regional hub or in each member state.</p>	<p>4. Investigation activities and enforcement needs to involve coordination across countries.</p>

Characteristics of Enforcement in the EU Food Supply Chain to stop unfair Commercial practices

The Business to Business Contractual Practices Expert Platform of the HLF is about to look at appropriate implementation options for the 'code' which has been developed. It is not clear at first sight what the most appropriate mechanism might be to enforce the code across the EU.

We have arranged our analysis in the form of a table below. The left-hand column describes various problems exhibited by the nature of the EU food sector. The right hand column of the table below sets out recommendations to address each problem. Taken together, the points in the right-hand column form a list of characteristics that a credible enforcement mechanism would have.

To take this analysis further, learning could be gathered from enforcement activities in different sectors which meet some of the characteristics below. For example the UK ITV Contracts Rights Renewal Adjudicator meets the following characteristics listed in the right hand column: 1, 2, 6, 7, 8, 9a), 12, 13, and 14.

Nature of sector or current practices	Implying the following characteristics of how code implementation, monitoring and enforcement needs to occur
CAUSE OF PROBLEM & RESULTANT CLIMATE OF FEAR	
<p>The code aims to address the behaviour of companies towards their suppliers which is a symptom of the cause - which is the power imbalance in supply chains.</p> <p>Companies which purchase significant volumes and/or have large market share limit access to a market and have more power relative to a frequently disparate and large number of suppliers. Suppliers who want their products to reach the market either have to sell to fewer large companies, or sell to other companies who have to follow the behaviour of the larger purchasing companies (to be able to survive in the market).</p>	<ol style="list-style-type: none"> 1) Enforcement powers need to be sufficiently strong to counteract a company's rational approach to maximising the opportunities that their powerful position gives them relative to their suppliers. 2) The source of power imbalance needs to be understood to develop an effective enforcement mechanism. The imbalance of power in the supply chain is structural so competition policy solutions are likely to be an appropriate set of remedies to consider.
<p>Buyers within companies are incentivised to achieve a set of commercial objectives. The pressure to achieve these goals combined with power imbalance between buyers and sellers is what has enabled the development of unfair commercial practices to evolve unchecked.</p>	<ol style="list-style-type: none"> 3) The principles of fair contractual practices set out in the proposed code will be ignored if there is no compelling reason for a purchasing company to abide by these principles. Therefore, implementation of the 'code' will need to be monitored proactively. Analysis from this monitoring needs to be shared with public authorities and made public. 4) Claims that companies will voluntarily abide by this code will not work for the above reasons. This was verified by the failure of the 2001 UK Supplier Code of Practice (SCOP).

Nature of sector or current practices	Implying the following characteristics of how code implementation, monitoring and enforcement needs to occur
<p>The desired impact of the trade association's 'code' and its enforcement is behaviour change of purchasers. Companies in the food supply chain need to be a) aware of the code, and b) desire that their staff abide by the code, so that there are no breaches of the code and trade is undertaken in a fair manner. The latter might be evidenced according to how buyers were incentivised.</p>	<p>5) Companies need to be named signatories of the code, and the enforcement organisation needs to have direct access to senior management of the signatory food companies.</p> <p>6) The enforcement organisation needs to apply remedies/sanctions in a manner that changes the behaviour of companies. For example if a purchaser within a company breaches the code, and is found guilty – the enforcement organisation would need to act in a manner that addresses that company's specific trading practice but also sends a signal to the sector that unfair trading practices will not be tolerated. Therefore enforcement actions should not only remedy a specific situation but also act as a deterrent to further breaches.</p> <p>7) The funding mechanism of the enforcement organisation could be partially funded according to 'polluter pays principle' where those companies found to be most in breach then paid a higher amount to the enforcement organisation.</p>
<p>There is a climate of fear amongst the supplier community, because they have an on-going need to be able to access the market, and are not willing to complain publicly (or sometimes to the buying company) when faced with unfair contractual practices.</p>	<p>8) An organisation independent of purchasing companies needs to enforce the code. This organisation needs to proactively make itself available/accessible to 'weaker' companies within the food sector.</p> <p>9) This organisation needs to be able to:</p> <ul style="list-style-type: none"> a) keep information confidential; b) receive anonymous complaints; c) assess all information on whether there has been a breach of the code since it is in the interests of the EU market to stop this transfer of risks down the supply chain. Whether there is evidence of a breach of the code is the relevant information rather than the source of the information; d) independently initiate an investigation if there is sufficient suspicion of a breach of the code, to avoid the complainant being sought and targeted. This independent investigation can make recommendations to address situations it discovers.

Nature of sector or current practices	Implying the following characteristics of how code implementation, monitoring and enforcement needs to occur
WHERE FOOD IS SOURCED FROM & DECISIONS MADE	
Food Companies selling to EU consumers purchase from suppliers based both in EU member states as well as from third countries.	10) All parts of the supply chain wherever their geographic location need to be able to have access to the enforcement organisation.
Companies selling across the EU may be making the purchasing decision at their headquarters, a regional hub or within member states.	11) Investigation activities and enforcement needs to involve coordination across countries.
DYNAMICS OF SECTOR NEED TO BE UNDERSTOOD FOR ENFORCMENT TO ACT ON 'LIVE' SUPPLY CHAIN RELATIONSHIPS	
Breaches of the code will occur whilst suppliers want to have an ongoing relationship with their purchasing company. The need for quick judgement will be particularly vital on perishable products.	12) The enforcement organisation will need to develop ways of working to be able to act swiftly; when investigating and providing recommendations on a live supply chain.
An understanding of the dynamics of food supply chains will need to be developed to judge fair/unfair practices.	13) The enforcement organisation should be dedicated to this sector, so that they are able to accrue more knowledge about how the sector operates and the dynamics that occur between trading partners, so that they can form a view about fair/unfair practices, and if necessary build up relationships to be able to act swiftly.
Some parts of the code are ambiguous. (For example see current text on Predictability, Justifiable Request, 'fair clauses' within General Terms and Conditions, Information which would be expected to be shared.) The practical examples may need to be expanded upon or explained to clarify ambiguous parts.	14) The enforcement organisation needs to be able to form a judgement about whether specific practices are fair/unfair, based on a set of principles. As new unfair commercial practices occur then the code will need to be updated or clarified following on from new or ambiguous practices occurring.
DESIGN OF PAN-EU ENFORCEMENT CONSIDERING DIFFERENT MEMBER STATES	
Member States are at different stages of addressing the unfair business to business practices. Some Member States have already passed legislation, to set up enforcement organisations, some are in the process of setting up enforcement processes, whilst others are looking to the EU for a solution since they see this problem as pan-European.	15) The enforcement mechanism at pan-European level needs to be : a) compatible with the approaches already taken by member states to address this problem; b) coordinated in a similar manner across the EU, so that there is an equal base of enforcement (so that companies don't change headquarters/purchasing hubs).

Finally, we note that, if an approach is adopted in 2012 with inadequate enforcement, public authorities will then return to the subject again. This would be a waste of public money and allow further years of harm to fair and efficient functioning of EU market.