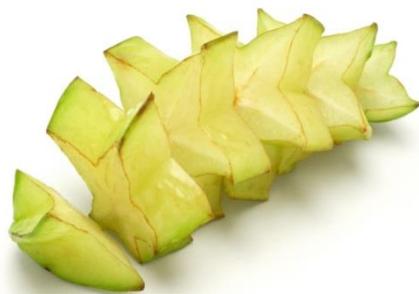


# Comparative Study on EU Member States' legislation and practices on food donation

## Executive summary

June 2014



**The full study can be dowloaded at:**

<http://www.eesc.europa.eu/?i=portal.en.events-and-activities-eu-food-donations>

*This study was carried out by Bio by Deloitte following a call for tenders launched by the European Economic and Social Committee. The information and views set out in this study are those of the author(s) and do not necessarily reflect the official opinion of the European Economic and Social Committee. The European Economic and Social Committee does not guarantee the accuracy of the data included in this study. Neither the European Economic and Social Committee nor any person acting on the Committee's behalf may be held responsible for the use which may be made of the information contained therein.*

This study responds to the [own-initiative Opinion](#) on the prevention and reduction of food loss and waste, adopted by the European Economic and Social Committee in March 2013<sup>1</sup>, which aims to give impetus at European level to the development of a coordinated strategy to improve the efficiency of food supply and consumption, and to tackle food wastage as a matter of urgency. Food donation provides a crucial support for the most deprived and is an important tool for the reduction of food waste in Europe. There is no common EU policy on food donation; policy frameworks in Member States (MS) vary, enabling donation to greater or lesser degrees.

The objective of this study is to facilitate food donation in the EU by providing a comparative overview of relevant legislation and practices in the Member States, mapping any hurdles they present to efficient food donation and identifying best practices. These elements are building blocks of policy recommendations that enable food donation to be the preferred management option for unsaleable food, in accordance with the EU waste hierarchy.

The study comprises three chapters:

- An overview of current legislation and practices concerning food donation in 12 selected MS<sup>2</sup>;
- A comparative analysis of the main legislation and practices which impact food donation in the selected MS and illustrates the hurdles identified in each legislation area;
- The development of best practices in the main legislative areas affecting food donation and recommendations for policy makers and for food donors on how to overcome the legislative hurdles identified in the analysis.

## 1.1 Overview of current legislation and practices

The study provides an overview of the key EU legislation affecting food donation and it illustrates key barriers to donation identified in these five legislative areas, at the EU level and in each of the selected countries.

- **The General Food Law:** [Regulation \(EC\) No 178/2002](#) laying down the general principles and requirements of food law, establishing the European Food Safety Authority and establishing procedures in matters of food safety.<sup>3</sup>

The aim of this Regulation is to provide a framework to ensure a coherent approach in the development of food legislation across the EU. It clarifies definitions, principles and obligations covering all stages of food/feed production and distribution. Identifying food donation as a “market operation”, and food donors as “food business operators”, this Regulation underlines that all actors taking part in food donation have to comply with the EU food legislation concerning responsibility, liability, traceability, and food health and safety.

*Key barriers:*

- Food donors may be driven to discard surplus food instead of distributing it to food banks or charity organisations in order to avoid risks associated with liability for donated food.

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<sup>1</sup> European Economic and Social Committee (2013) *Opinion on the Civil society's contribution to a strategy for prevention and reduction of food losses and food waste (own-initiative opinion)*: <http://www.eesc.europa.eu/?i=portal.en.nat-opinions.25955>

<sup>2</sup> France, United Kingdom, Germany, Belgium, Spain, Italy, Greece, Portugal, Poland, Hungary, Sweden and Denmark.

<sup>3</sup> Regulation (EC) No 178/2002 <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32002R0178>

■ **The Food Hygiene Package:** [Regulation \(EC\) No 852/2004](#)<sup>4</sup> on the hygiene of foodstuffs, [Regulation \(EC\) No 853/2004](#)<sup>5</sup> laying down specific hygiene rules for food of animal origins, [Regulation \(EC\) No 854/2004](#)<sup>6</sup> laying down specific rules for the organisation of official controls on products of animal origin intended for human consumption and [Directive 2004/41/EC](#)<sup>7</sup> repealing certain directives concerning food hygiene and health conditions for the production and placing on the market of certain products of animal origin intended for human consumption.

The abovementioned Regulations also known as the “Hygiene Package” lay down general rules for food business operators (including food banks) on hygiene conditions for foodstuffs. The primary responsibility for food safety rests with the food business operator.

*Key barriers:*

- Some Member States can interpret the EU Hygiene Package rigidly (especially rules related to food safety, storage and transport), creating more difficult conditions for food donation.
- There are no EU guidelines designed for food business operators clarifying their compliance with the EU Food Hygiene legislation when donating food. The EU could follow the example of the guides drafted by the Rhône-Alpes Region in France<sup>8</sup>.

■ **Food durability and date marking:** [Regulation \(EC\) No 1169/2011](#)<sup>9</sup> on the provision of food information to consumers.

According to Article 9 of the above Regulation, food business operators are required to determine, based on the composition of the product, whether it is appropriate to use a ‘best before’ or a ‘use by’ date. Products past their ‘use by’ date are not marketable and thus cannot be donated, whereas products past their ‘best before’ date can still be donated if the product was properly stored.

*Key barriers:*

- There is a general misunderstanding and confusion across the EU about the potential to donate food that has passed its ‘best before’ date. There is a further concern that food donated after its ‘best before’ date may be of inferior quality and that the deprived benefiting from donated food should not receive inferior products.

■ **Tax legislation:** [Council Directive 2006/112/EC](#)<sup>10</sup> of 28 November 2006 on the common system of value added tax.

The VAT Directive specifies that food donations are taxable if the donation is made by a taxable person and if the VAT on acquisition of the goods is fully or partially deductible. Tax exemptions on food donations are not allowed. The European Commission recommends, in a reply to a [Parliamentary](#)

<sup>4</sup> Regulation (EC) No 852/2004 [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2004.226.01.0003.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2004.226.01.0003.01.ENG)

<sup>5</sup> Regulation (EC) No 853/2004 [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2004.226.01.0022.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2004.226.01.0022.01.ENG)

<sup>6</sup> Regulation (EC) No 854/2004 [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2004.226.01.0083.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2004.226.01.0083.01.ENG)

<sup>7</sup> Directive 2004/41/EC [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2004.226.01.0128.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2004.226.01.0128.01.ENG)

<sup>8</sup> DRAAF Rhône-Alpes (2013) Donner aux associations d’aide alimentaire, Guide pratique et réglementaire : Produits agricoles, available at : [http://draaf.rhone-alpes.agriculture.gouv.fr/IMG/pdf/Guide\\_des\\_dons\\_de\\_produits\\_agricoles\\_cle42dd63.pdf](http://draaf.rhone-alpes.agriculture.gouv.fr/IMG/pdf/Guide_des_dons_de_produits_agricoles_cle42dd63.pdf)

DRAAF Rhône-Alpes (2013) Donner aux associations d’aide alimentaire, Guide pratique et réglementaire : Entreprises du secteur alimentaire, available at : [http://draaf.midi-pyrenees.agriculture.gouv.fr/IMG/pdf/Guide\\_don\\_alimentaire\\_entreprises\\_cle878ebd.pdf](http://draaf.midi-pyrenees.agriculture.gouv.fr/IMG/pdf/Guide_don_alimentaire_entreprises_cle878ebd.pdf)

DRAAF Rhône-Alpes (2013) Donner aux associations d’aide alimentaire, Guide pratique et réglementaire : Restauration, available at : [http://draaf.rhone-alpes.agriculture.gouv.fr/IMG/pdf/Guide\\_dons\\_restaurant\\_sept2013\\_cle091e14.pdf](http://draaf.rhone-alpes.agriculture.gouv.fr/IMG/pdf/Guide_dons_restaurant_sept2013_cle091e14.pdf)

<sup>9</sup> Regulation (EC) No 1169/2011 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:304:0018:0063:EN:PDF>

<sup>10</sup> Council Directive 2006/112/EC <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32006L0112>

[Question](#)<sup>11</sup>, setting a value of foodstuffs that are close to their ‘best before’ date, or which cannot be sold due to their external appearance, fairly low or close to zero.

*Key barriers:*

- The imposition of VAT on food donation in some MS is a difficult area. Terminology in legal texts vary such that the value of food may be considered low or zero at time of donation, VAT may be "abandoned", or "exempted". This issue is both controversial and lacks clarity.

■ **The Waste Framework Directive: [Directive 2008/98/EC](#)**<sup>12</sup>

According to the Waste Framework Directive, MS shall apply as a priority order the following waste management hierarchy: prevention, preparing for re-use, recycling, recovery and disposal. There is not specific EU guidance on a food waste or food use hierarchy, prioritising food redistribution to humans over feeding animals, energy or nutrient recovery via treatment methods such as anaerobic digestion (AD), in-vessel composting, land spreading, and landfilling.

*Key barriers:*

- A number of MS have put in place economic incentives which make lower stages of the hierarchy, including AD, more financially inviting. There is not a mechanism to enforce the proper implementation of the EU waste hierarchy in MS waste management legislation.

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<sup>11</sup> European Parliament (2013), Written questions :E-003730/13, E-002939/13  
<http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2013-002939&language=EN>

<sup>12</sup> Directive 2008/98/EC <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32008L0098>

## 1.2 Comparative analysis

The EU and MS legislation overview and the identification of barriers served as a basis for comparative analysis. The table below summarises the main findings, highlighting MS that have specific issues in the following policy areas:

Member States	Good Samaritan Law	Food hygiene	Food durability and labelling	VAT not imposed on food donation	Tax credit	Tax deduction	The Waste Hierarchy
Belgium				x			x
Denmark						x	x
France				x	x		
Germany				x		x	
Greece			x	x		x	
Hungary			x	x		x	
Italy	x			x		x	
Poland		x		x		x	
Portugal		x		x		x	
Spain			x		x		
Sweden			x				x
UK				zero rate			x

The **General Food Law** applies to all food and organisations placing food on the market, including non-profit organisations such as food banks. According to the law, food business operators are responsible for the safety of foods at all stages of the food chain and must ensure that the requirements of the General Food Law are met within their area of responsibility. This legal framework does not seem to incentivise food surplus donation in the selected Member States, as food donors are wary of jeopardising brand image and facing fines in the unfortunate case of food poisoning. As the table shows, Italy is the only EU MS which has put in place a Good Samaritan Law law which recognises food banks themselves as the final link in the food chain and prevents individuals receiving food from food banks from being able to file a lawsuit against the food donor (see Chapter 7.2.6).

The comparative table indicates those Member States that face issues regarding the lack of knowledge and misinterpretation of the **EU Hygiene Package**. Polish Food Banks argued that although the EU Hygiene Package offers flexibility in terms of its transposition in national laws, the Polish **Act on Food Safety and Nutrition**<sup>13</sup> is transposed in a more rigid way than the actual EU legislation. In Portugal, until recently, preprepared food or meals were disposed of due to the consensual misunderstanding that according to the available EU legislation, it is forbidden to recover such food. A non-profit organisation responded to a lack of knowledge around the implementation of the Hygiene Package by launching a programme to educate all actors involved in the food chain, including public institutions and health and safety authorities, about the correct interpretation of the hygiene rules and of the EU General Food Law, especially in terms of responsibility and liability (see Chapters 7.2.9 and 7.2.11).

<sup>13</sup> Dz.U. 2010 nr 136 poz. 914 Obwieszczenie Marszałka Sejmu Rzeczypospolitej Polskiej z dnia 29 czerwca 2010 r. w sprawie ogłoszenia jednolitego tekstu ustawy o bezpieczeństwie żywności i żywienia <http://isap.sejm.gov.pl/DetailsServlet?id=WDU20101360914>

In terms of **food durability and labelling**, the study shows that although the donation of products past their ‘best before’ date is allowed under EU law, Denmark, Greece, Hungary, Spain and Sweden have introduced national provisions that present barriers to donating food which has passed its ‘best before’ date. Denmark is soon to change this legislation, with an expected revision in December 2014. One of the main causes is that food donors are not willing to take the risk of liability for the donated foods, or fear a reduction in quality after this date impacting their brand image. Belgium has provided guidelines for assessing the additional lifetime of food after its date of minimum durability (‘best before’) has been reached or exceeded (see Chapter 7).

The legislation overview also clarifies that according to the [Council Directive 2006/112/EC](#)<sup>14</sup>, food donations are taxable and that “the taxable amount is the purchase price at the moment of the donation adjusted to the state of those goods at the time when the donation takes place” (Article 74). The European Commission recommends in a reply to a [Parliamentary Question](#)<sup>15</sup> setting “fairly low or even close to zero” the value of foodstuffs close to their ‘best before’ date or which cannot be sold due to their external appearance. Most of the examined Member States do not impose VAT when food is donated to food banks and charities, if certain conditions are fulfilled. One reason might be that they interpret the **VAT Directive** such that the value of the donated food nearing expiry is small or zero, as recommended by the European Commission. Four MS have recently introduced specific provisions in their own national tax legislation ‘abandoning the imposition of VAT’ on food donation: Greece, Poland, Belgium and Germany. Whether or not this is to be considered a VAT ‘exemption’ is a question of translation and interpretation of the respective legal texts. The comparative table shows that three of the studied Member States still apply VAT on food donation: Denmark, Spain and Sweden.

The study demonstrates that **fiscal incentives** through tax credits and tax deductions encourage food donations. In France 60% and in Spain 35% of the value of donated food can be claimed as a corporate tax credit, meaning that food donors are able to deduct that percentage of the value of the donated food from the corporate tax on their revenue. To be noted that there are discussions in Belgium to apply the same tax credit as in France in the near future. The table also shows that in most of the examined MS, food donation can be treated as a deductible tax expense and can reduce the taxable income (the income basis used to calculate the income corporate tax), within certain limits and thresholds depending on the MS. Portugal has in place an enhanced tax deduction, meaning that donors can deduct 140% of the value of the food at time of donation, provided that the food will be used for a social purpose (such as supplying food banks) and limited to 8/1000 of the donor’s turnover.

There is currently no EU legislation or specific guidance on how to apply the **EU waste hierarchy** to food. National approaches adapting the hierarchy to food were identified in the UK and Belgium, with the following order of preference proposed: prevention, redistribution to humans, feeding to animals, energy or nutrient recovery by methods such as Anaerobic Digestion (AD), composting, and landfilling. Although in principle such a food waste hierarchy prioritises food donation and redistribution, in practice, it is still more expensive in many MS, including the UK, to donate surplus food than to send it to AD. The recent [report](#)<sup>16</sup> published by the House of Lords, acknowledged that AD should remain an option for unavoidable food waste, and that more efforts should be made to redistribute food before being used for energy.

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<sup>14</sup> Council Directive 2006/112/EC <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:347:0001:0118:en:PDF>

<sup>15</sup> European Parliament (2013), Written questions :E-003730/13 , E-002939/13

<http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2013-002939&language=EN>

<sup>16</sup> House of Lords (2014) *Counting the cost of food waste: EU food waste prevention*: <http://www.parliament.uk/documents/lords-committees/eu-sub-com-d/food-waste-prevention/154.pdf>

## 1.3 Best practices

Based on the legislation overview and comparative analysis, six best practice factsheets were drafted in the identified legislation areas. The factsheets support the development of specific recommendations aimed at tackling existing barriers, building on current best practice.

The following best practices were identified:

### ■ **Guidance on the interpretation of foodstuff minimum durability for food banks and food charities in Belgium**

Belgium has introduced in a Circular a non-limiting list of foods that can be used by food banks and charities, to serve as a guideline in assessing the conservation of food after they reached or exceeded the date of minimum durability. It is noted that the provision of food past its 'best before' date is not a preferred option, and that the Guidance may also serve as a basis on reassessing the process for setting 'best before' dates, and exempting certain stable foods from the need for a date mark.

### ■ **The interpretation of food traceability in Belgium**

The Belgian Royal Decree contains a derogation according to which the list of retailers/manufacturers who donated foodstuffs can serve as a record of incoming products and the list of food banks and charities can serve as a record for outgoing products, simplifying the bureaucratic burden for food donation.

### ■ **The Good Samaritan Law in Italy**

This legislation identifies the food bank as the final consumer of donated products. Food donors are thus liable for food safety and hygiene conditions only to food banks, rather than to individual consumers of food bank provisions. Given that the proper safety and hygiene framework is ensured by food banks upon receipt of donations, many stakeholders consider that this legislation provides an extra level of reassurance to donors that stimulates donation, without compromising necessary safeguards.

### ■ **The interpretation of the VAT Directive in Belgium**

A Belgian Decision clarifies the European Commission's recommendations of setting fairly low or at zero the value of foodstuffs close to their 'best before' date in order to abandon VAT liability on donated products. This clear legal interpretation of the EC recommendation makes this process easier to use and more transparent in Belgium.

### ■ **Fiscal incentives in France**

Food donors qualify for a tax credit equal to 60% of the value of the food donated, to a limit of 5/1000€ of revenue of companies subject to corporate income tax.

### ■ **The application of the food waste hierarchy in France**

In France, fiscal instruments have been used such that it is more expensive for companies to send unmarketable food to anaerobic digestion than to donate it to food banks, sending appropriate financial signals in relation to the EU waste hierarchy.

## 1.4 Recommendations

The following areas for policy development have been identified based on stakeholder consultation, the comparative analysis of EU and Member State legislation and the selection of best practice.

### *Food Use Hierarchy*

It is recommended that the EU publish guidance on a food use hierarchy that clearly prioritises feeding humans, through food waste prevention and donation to charities of unsaleable foods, over waste management options such as composting, anaerobic digestion and landfilling. This hierarchy would provide further clarification on the existing EU waste hierarchy in the context of food and send a clear signal to businesses and governments that economic incentives, investment in infrastructure, and communication activities should prioritise food redistribution. Work being carried out by FUSIONS and the Food Loss and Waste Protocol can support the development of this hierarchy. This recommendation is supported by the UK House of Lords Committee, which proposes the EC publish guidance on the application of the waste hierarchy to food<sup>17</sup>.

It is recommended that Member States integrate the principles of the food use hierarchy into their National Waste Prevention Programmes, identify existing incentives and investment structures that do not reflect this prioritisation, and explain actions being taken to mitigate any conflicts, such as the case where economic instruments have made anaerobic digestion cheaper in practice than donating edible food to the hungry.<sup>18</sup> The possibility of a mechanism of review and enforcement of National Waste Prevention Programmes is raised. As the development of infrastructure and the financing of transportation/logistics are the key barriers to the expansion of food donation noted by stakeholders in the EU, it is essential that the cost signals for businesses are not distorted by political priorities for waste management options lower in the waste hierarchy.

### *Fiscal instruments*

There are a range of fiscal tools being used successfully in the EU to support food donation, including the abandonment of VAT liability and the use of corporate tax credits for donated food. VAT liability appears to have been “abandoned” in a number of Member States, although the use of the term VAT “exemption” is controversial, and the compatibility of these policies with the EU VAT Directive is unclear. Although one option is to consider the value of donated food as fairly low or *zero* for tax purposes, this may negatively impact Member States that offer a (percentage) corporate tax credit to companies on the value of food they donate, nullifying the value of that tax credit. It is thus proposed that “abandoning” VAT on donated food, rather than valuing donated food at zero, would be a more effective incentive, given its compatibility with other (potentially more significant) fiscal incentives such as tax credits.

There may be a need for a specific assessment of fiscal measures to encourage food donation in the EU and there is a clear need for transparent communication via the EC website on the application of the VAT Directive in the case of food donation.

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<sup>17</sup> House of Lords (2014) *Counting the cost of food waste: EU food waste prevention*, page 46: <http://www.parliament.uk/documents/lords-committees/eu-sub-com-d/food-waste-prevention/154.pdf>

<sup>18</sup> While the WFD requires that national waste prevention programmes be updated at least every six years, thus by 2019 for those MS who submitted their programmes on time in December 2013, these are living documents that guide MS strategy and food waste prevention is a key area for MS action.

### ***Liability legislation***

Good Samaritan legislation, as it exists in Italy and the United States, limits civil and criminal liability for good faith donation of products, known to be fit for consumption at the time of donation. In Italy, charitable organizations redistributing food are not considered food business operators, and thus the transaction between donor and charity carries the same liability conditions as retailer to consumer. In the United States, liability protection is extended to donors, persons, gleaners, and non-profit organisations distributing this food; liability being limited to acts of "gross negligence" or intentional misconduct.

In both countries, food donation follows processes developed by the parties involved, systemised via good practice guidelines. Relationships of confidence are often developed between donors and food banks regarding the proper management of donated food. While Good Samaritan legislation does not relieve donors of their legal responsibilities to deliver a good quality product, as if the product were put on the market directly to consumers, stakeholders note that the extra level of assurance that this sort of legislation provides can be critical for companies in determining whether or not to engage in donation activities. It is also considered that greater synergy between Member States, via a common position for the EU, would simplify the donation landscape for donors, avoiding a patchwork of regulations.

A common position by the EU, limiting donor liability on food that meets quality and labelling standards imposed by legislation and donated in good faith, is supported by this study, accompanied by industry-charity developed good practice guidelines along with a clear, harmonised system enabling traceability of food products that avoids excessive administrative burden.

### ***Food durability and ‘best before’ dates***

Under the rubric of food durability, two approaches are proposed. Firstly, an extension of the list of products that could be exempted from the requirement for a ‘best before’ date (extension of Annex X of EU Regulation 1169/2011) is suggested, facilitating both donation and the likelihood of final consumption, as misunderstandings around the importance and meaning of ‘best before’ dates persist among consumers. In supplement, the development of EU guidance is recommended for assessing additional lifetimes of products after their initial (producer indicated) date of minimum durability (‘best before’ date) has passed, based on the Belgian model.

Overall, the objective is to ensure that good quality, edible food is not going to waste because some ‘best before’ dates not linked to food safety and hygiene are excessively limiting.

### ***Other policy aspects for consideration***

Other policy aspects for consideration may include: MS facilitation of supply chain donor collaboration; the removal of donor requirements that food banks provide food for free (to the exclusion of social supermarkets); a review of hygiene legislation specifically relating to the food service sector as feedback and experience suggests this may be excessive and poorly understood; and the encouragement of publication of food waste data in the food supply chain, perhaps facilitated by MS-sponsored voluntary collective action programmes.