FAMI-QS Policy

Our Commitment to Competition Law

Certification schemes, by their very nature, raise important competition law questions. FAMI-QS is committed to follow the Antitrust Law. This Operational Procedure looks at how the legal framework governing certification schemes operates and sets out some of the key provisions that apply.

Background

Food/Feed Quality Certification Schemes (FQCS) provide a mechanism through which assurances can be given that a particular aspect of a product or its production method, as set out in its specification, has been observed. FQCS follow the same principles all over the world. The system adds value by allowing products to be differentiated, they also reinforce official feed/food safety and hygiene standards, thereby fulfilling liability requirements and protecting the reputation of the vendor.

Economic evidence indicates that FQCS performance can:

- facilitate access for industries/farmers to key markets;
- inform consumers effectively about feed/food quality, origin, environmental care and animal welfare;
- increase efficiency in agricultural operation;
- reduce costs within the supply chain through vertical integration;
- add value for producers; and
- maximise marketing management capabilities.

This economic evidence also identified a number of concerns regarding the ways in which some schemes have developed, in particular considering:

- heavy and duplicative administrative costs and burdens;
- competition issues and potential barriers to the functioning of the single market;
- difficulties for exporters from developing countries (especially small-scale producers in the least developed countries); and
- stakeholder concerns about the transparency of schemes.

Because certification schemes are so varied, the legal framework governing their use is complex and spread across a variety of policy areas. Certification schemes are subject to a wide range of EU legal provisions, including:

- rules of the internal market. Certification services must be freely available across EU borders, and must not result in de facto barriers to trade in goods in the internal market;
- rules on competition. Certification schemes should not lead to restrictive horizontal or vertical agreements, to an abuse of market power or to foreclosure of others from entering the market;
Competition rules

There are a number of ways in which competition law impacts upon certification schemes. EU competition law contains a number of prohibitions that restrict the way in which entities conduct their business within the internal market. In particular, the rules impose broad prohibitions on agreements, arrangements and practices whether written or otherwise, which have as their "object or effect" the "prevention, restriction or distortion of competition within the internal market". Moreover, abuse of market power (dominance) is also prohibited.

EU competition rules concern everyone who does business in the EU. The rules apply to ‘undertakings’, a broadly defined term which encompasses any entity engaged in an economic activity. Groupings of undertakings, such as trade associations and other industry collectives, while generally pursuing legitimate purposes and operating as a useful business forum, also have an obligation to comply with EU competition rules. This applies also for undertakings/associations of a not-for-profit nature. Companies whose market behaviour fails to comply with these rules run the risk of incurring significant fines (up to 10% of global turnover) and other adverse sanctions, such as their arrangements being held null and void. In certain jurisdictions, criminal liability may also be of major concern, besides the civil liability.

Objectives

Antitrust

“If competition is to be an open contest, why should there be strict competition rules? Precisely because the competitive process must be protected. If no rules existed, the uncontrolled play of the market could eventually result in the distortion or even elimination of competition. A set of laws preventing collusion between companies or excessive use of market power are therefore necessary and they need to be respected for the benefit of consumers.” Joaquin Almunia, Vice-president of the European Commission and Commissioner responsible for competition.

Competition law seeks to promote and maintain market competition by regulating and monitoring any anti-competitive conduct of companies or associations. The law seeks to ensure that each competitor is able to independently determine its commercial position on any particular matter. Anything which interferes with this independence may potentially restrict competition and, therefore, cause harm to consumers. In addition, independent determination of a commercial position in cases of market power may have its limitations.
EU competition law has the following main elements:

- prohibiting agreements or practices that restrict free trading and competition between businesses;
- prohibiting abusive behaviour by a company/association dominating a particular market;
- supervising mergers and acquisitions of large corporations, including some joint ventures in order to protect effective competition; and
- regulating certain forms of State involvement, namely State funding within the meaning of Article 107 of the Treaty on the Functioning of the EU (TFEU).

**What are the rules?**

These objectives are effected by a number of provisions set out in TFEU. Article 101 targets agreements between undertakings which restrict competition, unless they produce substantial benefits to customers and consumers. Article 102 seeks to prevent abuses by large undertakings of their dominant market positions, by prohibiting certain activities. EU level merger controls are contained in Regulation 139/2004, which puts in place a system of notification and authorisation. In addition, there are several other important documents, notices, Guidelines and Regulations issued by the European Commission that supplement and further clarify those rules.

The anti-competitive behaviours that these rules target are also addressed in legal frameworks at national level, concerning behaviour purely affecting competition within a particular Member State. The rules on State aid are targeted primarily against Member States.

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**Article 101: Anti-competitive agreements**

Article 101 TFEU involves a two-step analysis. Article 101(1) TFEU prohibits agreements that, by object or effect, materially restrict competition and have an appreciable effect on trade between Member States. Article 101(3) TFEU is a defense tool, which assesses the pro-competitive effects of the restriction and balances those against the negative effects on trade.
Article 101(1) TFEU
“The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.”

This provision seeks to prevent undertakings from colluding and operating together in a way which prejudices other competitors, in particular the competitive process on the market, and ultimately, consumers. Competition authorities may intervene if FQCS are used as a tool to facilitate such agreements or behaviour, or where they lead to a reduction of consumer welfare by, for example, foreclosing others and the market from effective competition.

Companies participating in trade associations and those involved in standard setting or certification activities or any other forms of horizontal cooperation between competitors need to consider their arrangements carefully in light of these provisions. In particular, they should consider their position in view also of the updated European Commission Horizontal Guidelines.

Certification schemes represent an area of potential concern as they may lead to anti-competitive, cartel-like behaviour (horizontal coordination), including:

- horizontal or vertical agreements restricting competition;
- foreclosure of competing undertakings by one or more undertakings with significant market power (such as preventing access of competing buyers to supplies and/or access of competing suppliers to distribution channels);
- preventing access to the certification scheme by market operators that do not comply with the applicable pre-requisites; and
- preventing the parties to the scheme or other third parties from developing, producing and marketing alternative products which do not comply with the specifications laid down in the scheme.

Examples of illegal contacts and agreements between companies
DON’T fix purchase or selling prices or other trading conditions;
DON’T limit production, markets, technical development or investment;
DON’T share markets, customers or sources of supply;
DON’T exchange individualised information on intended future prices or quantities or other strategic information;
DON’T boycott or foreclose access to competitors.

Information sharing, in particular, can often be pro-competitive and bring about efficiencies, but may entail restrictions “if liable to enable awareness of market strategies of competitors”. The key is whether information sharing “reduces strategic uncertainty”, “reduces independence” of competitors and “diminishes their incentives to compete”. Assessment is not always straightforward and may take place on a case-by-case basis. Restrictive effects would also depend on the overall: a) conditions of the market concerned and b) the types and characteristics of the information exchanged.
Limiting market access: technical standards

- Associations may develop and promote industry standards or standard terms and conditions, provided that they do not restrict competition;
- Association standards must not favour some and discriminate against others;
- Standards must not be used to raise barriers to entry to the market or to exclude competitors;
- Standards should be free and open to all;
- Standards should not restrict freedom to adopt/develop alternative standards and should not go beyond their basic aims;
- The award of certificates or seals of approval is permitted, provided criteria are objective and legitimate and applied on a non-discriminatory basis;
- Standards must remain voluntary. Members should be free not to adopt and not comply with the standard;
- Participation should be unrestricted.

Allocating markets or customers and pricing

- Members of trade associations must not allocate, divide or assign customers, territories, products or services;
- Members must not exchange sensitive information, particularly relating to customers or territories;
- Members must not exchange sensitive information on future strategies, business, production and marketing plans, output or selling restrictions, etc;
- Members must not agree, or even discuss, amongst other things, their company prices, pricing policies, terms and conditions of sale, discounts, allowances, credit terms, individual company costs related data, market shares, strategies, customers;
- Members must not engage in price-fixing.

Article 102: Abuse of dominance

Article 102 TFEU

"Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States."

- Dominant position on a specific market (product and geographic)
- Abusive conduct
- Distortion of competition and effect on trade between Member States
- Absence of any objective justification
- Imposing unfair purchase or selling prices
- Limiting production, markets or technical development
- Using discriminatory trading conditions in a way that places other parties at a competitive disadvantage
- Making the conclusion of contracts subject to acceptance by the other parties of unconnected supplementary obligations.
If companies/associations have a large proportion of the business in a particular market, they are likely to hold a dominant position in that market. What amounts to a "dominant market position" will be determined by the nature and characteristics of the market, the percentage share held by that undertaking - this is often established from around 40% - and other factors. Such companies have a special responsibility not to engage in behaviour which is considered abusive. They should not act in a way that prevents their competitors from competing effectively or that drives them out of the market. If the behaviour produces anti-competitive effects this may result in fines and civil liability. Actual effects are not necessary and mere intention is often sufficient.

Examples of abusive conduct on the part of dominant companies include, but are not limited to: charging unreasonably high prices which may exploit customers; charging unrealistically low prices which may be used to drive competitors out of the market; unjustified discrimination between customers; refusal to supply competitors or customers; and forcing unjustified trading conditions on trading partners.

**Trade Association membership**

Trade associations can breach competition rules by excluding competition from non-members and by failing to have membership criteria which are:

- Clear
- Precise
- Objective
- Legitimate
- Necessary
- Non-discriminatory
- Transparent
- Proportionate

**Association membership: restricting competition**

- The Association membership criteria must be transparent, proportionate, non-discriminatory and objective. The criteria are designed to eliminate any subjectivity in the decision of whether to accept or refuse membership;
- Membership must be open to any interested party within the sector;
- Any proposed expulsion or rejection of a membership application should be based on objective criteria. Any such decision should be properly documented, including the reasoning behind the decision. Ideally an independent review panel should be established;
- Competition concerns can still be raised if the expulsion of members is due to failure to comply with codes or ethics requirements;
- No rules should exist which affect the freedom of others to adopt policies or to choose those with whom they want to deal or not.

**Trade Association meetings**

EU and national competition authorities have extensive powers to collect both electronic and written information in relation to any investigation they conduct. It is therefore essential that Associations and their members ensure the proper procedures are followed. Compliance is key.
Some indications of proper general rules of conduct may help you to avoid conduct that could potentially violate EU competition rules and increase awareness regarding the competition law implications.

**Rules of Conduct**

- **DO** set a clear agenda which limits the possibility of sharing commercially sensitive information. Stick to the agenda;
- **DO** consult with counsel in advance if there are any topics which may involve the disclosure of potentially commercially sensitive information or be restrictive of competition;
- **DO** conduct meetings in the presence of a counsel;
- **DO** ensure that discussions stay within the permissible scope;
- **DO** remind all members about competition compliance requirements at the outset;
- **DO** closely follow the agenda and keep clear minutes;
- **DO** advertise meetings, which should be open to all stakeholders;
- **DO** immediately, visibly and clearly protest as soon as any prohibited antitrust topics arise. Order the discussion to stop immediately;
- **DO** adjourn the meeting to explain the rules, if necessary;
- **DO** repeat your concern and if necessary, end the meeting. Ensure that your objection and the ending of the meeting are recorded in the minutes;
- **DO NOT** continue to discuss a topic if you are unsure, adjourn the issue to a subsequent meeting in order to take specific legal advice;
- **DO NOT** allow discussion of any prohibited antitrust topic;
- **DO NOT** share information that relates to: prices, production, customers, strategy, individual or current data, projections, or non-genuinely public information.