

EUCOLAIT

EU Competition Law Compliance Guidelines

Contents

1. Introduction	2
2. EU competition law principles	3
3. Membership.....	4
4. Conduct at meetings	4
5. DOs and DON'Ts.....	5
“DOs”	6
6. Information exchange.....	6
7. Communications and informal contacts/events.....	7
8. Sanctions	7
Annex 1	9
Guidance for meeting Chairs	9
Annex 2	11
“DOs and DON'Ts” for members attending EUCOLAIT meetings	11

1. Introduction

While trade associations often perform legitimate and valuable functions, like any other form of cooperation between competitors, the activities of trade associations are capable of breaching competition law. As they bring together members that are actual or potential competitors, trade associations are often investigated by competition authorities as they might act as a conduit for anti-competitive behavior between members.

EUCOLAIT, the European Association of Dairy Trade, is committed to strictly complying with EU competition rules.

The breach of EU competition law rules may bring severe consequences. A trade association may be fined up to 10% of the sum of the total turnover of each of the members, may have to pay damages to third parties affected and may suffer the financial costs of dealing with an investigation, as well as the detrimental impact on its reputation.

Ignorance of the law will not shield EUCOLAIT and its members from the consequences of infringing it. It is therefore essential to be aware of the main areas of EU competition law risk and to be able to identify situations where such a risk may arise.

These EU Competition Law Compliance Guidelines (“Guidelines”) provide general guidance to minimise the risk of EU competition law breaches occurring. They set forth the basic competition law principles that the members and staff of EUCOLAIT will comply with when preparing, organizing and attending meetings as well as in the day to day conduct of EUCOLAIT activities.

These Guidelines have been endorsed and adopted by the Board on 29 September 2014. They shall be explicitly and unconditionally accepted by every member and staff of EUCOLAIT. It is essential that the activities of EUCOLAIT comply with competition law and these Guidelines not only in form but also in substance.

These Guidelines are intended for the members and staff of EUCOLAIT insofar as they are engaged in EUCOLAIT activities. It is the responsibility of each EUCOLAIT member to comply with competition law relying on their own legal advice; it is not the responsibility of EUCOLAIT or its staff to ensure that members comply with competition law in their own activities.

Failure to comply with competition law or with these Guidelines is a serious matter and any member’s conduct contributing to non-compliance which comes to EUCOLAIT’s attention may result in a member's expulsion.

These Guidelines cover EU competition law. Being national competition laws not identical, members shall seek local competition law advice for any specific issue. These Guidelines do not constitute and are not a substitute for legal advice on the specific facts of any concrete situation.

2. EU competition law principles

The purpose of EU competition law is to maintain and encourage effective competition in the EU. It contains two principal provisions that constrain the activities of trade associations and their members: Article 101 TFEU prohibits anticompetitive coordinated conduct,¹ while Article 102 TFEU prohibits anticompetitive unilateral conduct by an undertaking which holds a dominant market position.²

These Guidelines focus on the prohibition of anticompetitive coordination.

Anti-competitive contacts between companies which, irrespective of their form, may distort the normal play of competitive forces and reduce strategic uncertainty in the market are prohibited. Also agreements between companies at different levels of the supply chain are illegal. Such contacts can take many forms and do not require the formal acceptance by the companies involved through an agreement. Tacit understandings among business representatives, including responding to pressure, exerting pressure, or doing "what is expected", can be sufficient.

Examples of anti-competitive contacts between companies include:

¹ Article 101 TFEU provides:

"1. 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, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,

- any decision or category of decisions by associations of undertakings,

- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question".

² Article 102 TFEU provides as follows: *"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. Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts".*

- price fixing;
- markets sharing s (by territories or by product) or customer allocation;
- production or output limitation, whether through bid rigging (i.e., exchange of prices before or during the tendering procedure or the submission of an artificially high bid, so that a competitor can win a contract), group boycott or otherwise.

EU competition law concerns may even arise when there is no actual effect on competition: a potential effect is sufficient for a competition authority to intervene, even if that potential effect is not intended.

Any action on the part of a trade association that reflects an intention to coordinate its members' conduct and prevents, restricts or distorts competition is prohibited. Some of the association activities, if undertaken with an anticompetitive intention, may give rise to competition law liability. For competition law purposes, decisions or recommendations of a trade association are treated as agreements between its members. Competition law may be breached even when the decisions or recommendations of trade associations are not binding on the members or have not been fully complied with. All aspects and conducts of a trade association must comply with EU competition law rules:

- Membership issues
- Conducts in meetings
- Information Exchange
- Communications and informal contacts / events.

Activities outside the territory of the EU may also violate EU competition law if the conduct has an appreciable effect on trade between the EU Member States. Absent such an effect on inter-state trade, national competition laws may still apply.

3. Membership

Membership criteria may give rise to competition law concerns if, as a result of the exclusion from membership, a national delegation or an individual trading company may be put at a competitive disadvantage (such as being prevented from accessing information or expertise on dairy trade issues). For the above reasons, EUCOLAIT shall make sure that its rules for admission, resignation and exclusion of members are transparent, proportionate, based on objective criteria, enforced in a non-discriminatory way and subject to an appeal mechanism.

- Membership of EUCOLAIT is voluntary. No one should be forced to join it or penalised for not doing so;
- Membership of EUCOLAIT shall be open to all national delegations and undertakings within the industry on a non-discriminatory basis as set forth in the Association's Statutes;
- Members of EUCOLAIT shall remain free at all times to join other associations and initiatives;
- Members of EUCOLAIT shall not be restricted in any way in how they decide to run their businesses. All actions of members remain voluntary. Each member remains free to take independent, competitive business decisions.

4. Conduct at meetings

Trade association meetings are opportunities for competitors to meet face-to-face. It is important that all EUCOLAIT meetings (including product committee meetings, workshops and *ad hoc* working groups,

conferences, etc.) are conducted so as to ensure that the risks of inappropriate discussion taking place are minimised.

- The Secretary General shall act as a contact point, when concrete situations or doubts arise.
- Written agendas for each EUCOLAIT meeting shall be drafted and circulated prior to the meeting and after having been approved and cleared by the Secretary General. The agenda shall be closely followed during the meeting.
- Once the agenda has been circulated, members shall feel free to consult their legal department or outside legal counsel if they consider that any topic may involve disclosure of information in breach of competition rules.
- Every agenda shall contain, as its first item, a competition law caution in the terms set in Annex 1 (Guidance for Meeting Chairs). The Chair of the meeting shall read the competition law caution at the beginning of each meeting and that will be recorded in the minutes of the meeting.
- Every meeting shall be recorded by minutes. These shall be circulated to all members promptly after each meeting. Minutes of each meeting shall be reviewed by the Secretary General prior to circulation.
- A list of participants shall be circulated during the meeting and signed by all participants. The list shall be annexed to the meeting minutes.
- The agendas, minutes and participants' list of all meetings shall be kept by EUCOLAIT and organised chronologically by group. Members shall be given access to those upon request, if they are no longer available on the website.
- Topics that are not on the agenda agreed in advance shall be discussed only if - according to the Chair – they do not raise competition concerns.
- If a meeting participant is uncertain whether a discussion or conduct raises competition law concerns, he/she shall object immediately and that objection shall be recorded in the minutes. The Chair shall report to the General Secretary and decide whether to continue the discussion. The motivation of the decision shall be recorded in the minutes.
- A competition lawyer should be invited to attend a meeting if there are topics that may involve sensitive areas for the members of EUCOLAIT.
- The above is the joint responsibility of the Chair and of EUCOLAIT's staff. If a meeting is held without the participation of EUCOLAIT's staff, it is the responsibility of the Chair to ensure compliance with these Guidelines.

5. DOs and DON'Ts

EUCOLAIT members do not engage in any discussion or practice that might infringe EU competition law. It is essential that members comply with these rules because infringements of competition rules can lead to serious fines. A trade association acting as a forum for anti-competitive conduct can also be fined. The following rules apply both to formal meetings of EUCOLAIT and to social events incidental to EUCOLAIT meetings.

“DOs”	“DON'Ts”
<ul style="list-style-type: none"> ▪ DO remember that you are responsible for your compliance with competition law rules. ▪ DO ensure that EUCOLAIT Competition Compliance Guidelines are respected. ▪ DO read the competition law caution at the beginning of every meeting. ▪ DO object to any discussion, activity or conduct that may infringe competition law rules. ▪ Do interrupt any meeting at which you feel matters discussed raise competition law concerns and request that your interruption be recorded in the minutes; ▪ DO feel free to discuss policy and market issues listed in Annex I: <i>“Permitted for Discussion at Meetings”</i>. 	<ul style="list-style-type: none"> ▪ DON'T use EUCOLAIT as a venue to engage in conduct that could be construed as intended to exclude competitors from the market or create a barrier to market entry. ▪ DON'T enter in agreements that restrict any party in its freedom to set prices, choose trading partners, decide product ranges or otherwise manage terms of sales. ▪ DON'T, in either fact or appearance reach understandings or agreements, or even hold discussions on: <ul style="list-style-type: none"> – Company-specific prices and any other element of pricing and trading terms (e.g. costs, profit margins, purchase and resale prices); – Company-specific production, capacity and inventories; – Elements that might lead to the boycott of a supplier or customer or exclude competitors; ▪ DON'T exchange any commercially sensitive information that would enable members to make forecasts of your future market behavior; ▪ DON'T remain silent when issues that raise competition law concerns are discussed. ▪ DON'T discuss or exchange information regarding the above matters during social gatherings incidental to EUCOLAIT meetings.

6. Information exchange

A trade association should not be used as a forum for the exchange of confidential or otherwise competitively sensitive business information between competitors. The exchange of information may have an appreciable effect on competition where it serves to remove any uncertainties in the market and therefore eliminate any competition between undertakings.

Members must under no circumstances share confidential or commercially sensitive information from or about other members, such as strategic data on:

- their intended future prices (including maximum or minimum price levels, price increases and their timing, price ranges, discounts and other related pricing actions);
- their intended future quantities (production volumes, sales or capacity);
- their intended future terms and conditions upon which products are supplied or obtained;
- their customers' list, current orders and backlog, contract tenders and internal procedures for responding to tenders.

EUCOLAIT should never allow its members to disclose information that could be considered confidential or commercially sensitive.

The regular and systematic exchange of specific information on prices between competitors is likely to reduce the uncertainties inherent in the competitive process and to facilitate the co-ordination of market conduct. While the compilation of general information may not be a restriction on competition, it must not cover (or enable undertakings to deduce) confidential information relating to individual undertakings.

EUCOLAIT provides for arrangements that allow the regulated exchange of business information about the marketplace. In those strictly defined cases, information may be collected and aggregated and then shared anonymously. Only aggregate results are returned, without enabling the extraction of individual data (e.g., where interactive voting is applied). Indirect extraction of data is not possible, considering that, where less than 5 contributions are provided to a question, aggregate results are not presented. Moreover, EUCOLAIT cannot identify the source of the data provided (i.e. it is not possible to determine who has participated in an electronic vote or an online survey).

The exchange of information which is already in the public domain, that is available to market participants or that does not relate to the parameters of competition, such as regulatory developments, is unlikely to cause competition law problems.

Should company specific data be circulated in exceptional cases, such data shall always be historical.

No recommendations should be made on the basis of the statistical data/information exchanged.

7. Communications and informal contacts/events

Inappropriate discussions about commercially sensitive information may be more likely to occur in informal settings (coffee breaks, over lunch, social events, etc.) than at formal meetings. Conduct at social events in conjunction with EUCOLAIT meetings or else shall follow the same standards as regular meetings.

Communications between EUCOLAIT's staff and members, and information exchanged via EUCOLAIT website are also subject to these Guidelines.

8. Sanctions

Any member who does not conform with competition law and, in particular, with any of the principles set forth in these Guidelines may be asked by any other member(s) to leave the meeting where the infringement occurs. Any such member may be temporarily or definitively excluded from participating in the meetings.

Any member of EUCOLAIT staff who does not conform with competition law and, in particular, with any of the principles set forth in these Guidelines may be liable to be dismissed in accordance with EUCOLAIT employment contracts and procedures.

Annex 1

Guidance for meeting Chairs

- All meetings organized and attended by EUCOLAIT must relate to the activities of the Association.
- Written agendas for each EUCOLAIT meeting must be drafted and circulated prior to the meeting and after having been approved and cleared by the Secretary General).
- Every agenda must contain, as its first item, a competition law caution:

“This is to remind the participants to this meeting that the EU Competition Law Compliance Guidelines adopted by EUCOLAIT Board and communicated to all members continues to serve as guideline for EUCOLAIT in the field of EU competition law. Sensitive information relating to prices, markets, output, commercial activities and other confidential information should not be discussed before, during or after the meeting”.

MESSAGE TO NEW MEMBERS OR PARTICIPANTS TAKING PART FOR THE FIRST TIME: *“Please take note that taking part in EUCOLAIT is subject to having read and understood EU Competition Law Compliance Guidelines. If you have not yet done so, please do so now”.*

- The Chair of the meeting shall read the competition law caution at the beginning of each meeting, and that will be recorded in the minutes of the meeting.
- A competition lawyer should be invited to attend a meeting if there are any concerns that the topics may involve sensitive areas for the members of EUCOLAIT.
- Any member who considers that information or conduct being discussed at the meeting raises competition law issues shall object and request that a record of the objection be made in the minutes. The Chair shall report to the General Secretary and decide whether to continue the discussion. The motivation of the decision shall be recorded in the minutes.

Permitted for Discussion at Meetings:

- Exchange of statistical information is allowed when the data is public, historical, non-confidential or aggregated for more than 5 independent undertakings.
- Key economic trends and publicly available information about the market in general that is not commercially sensitive or company-specific.
- Non-confidential issues of common concern to the industry, such as regulatory policy developments and EU trade agreements.
- Industry communication, public affairs, advocacy activities on legislative issues and promotion initiatives.

NOT Permitted for Discussion at Meetings:

It is strictly prohibited for members to discuss or agree on the following:

- **Prices:** intended individual prices.
- **Production:** changes in individual production, capacity or inventories.
- **Market Sharing:** geographical areas or product sectors where members will not compete with each other.
- **Customer/suppliers allocation:** allocation of customers, suppliers, contracts, sites, regional areas and/or types of products.
- **Foreclosure:** discussions that could lead to a boycott of a supplier or customer or create a barrier to market entry to competitors.
- **Output restrictions:** restricting output, technical development or investment, or establishing quota systems allocating a specific part of the total industry output amongst members.
- **Bids:** bids for contracts or procedures for responding to bid invitations and allocation of bids to individual members.
- **Strategic information:** exchanging commercially sensitive information (future and individual strategy or investment plans, costs, know-how etc.).

Annex 2

“DOs and DON’Ts” for members attending EUCOLAIT meetings

EUCOLAIT members do not engage in any discussion or practice that might infringe EU competition law. It is essential that members comply with these rules because infringements of competition rules can lead to serious fines. A trade association acting as a forum for anti-competitive conduct can also be fined.

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