IFFO COMPLIANCE WITH ANTI-TRUST AND COMPETITION REGULATIONS

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Introduction

Compliance with competition/anti-trust laws ("competition law(s)") in the various jurisdictions in which IFFO and its members operate is a matter of key importance for both IFFO and for the fishmeal/fish oil industry in general. The reputation of IFFO and its members is one of the most important assets we have as an industry in our dealings with governments, customers and other third parties. As a result, it is vital we comply fully with key trading laws in the jurisdictions in which we do business, not least relevant competition laws. In addition to significant reputational harm, a breach of competition law may also result in the serious penalties being imposed by the authorities.

The application of competition law in specific situations can be complex, and the relevant rules can differ somewhat across different jurisdictions. If members have any doubt as to whether the activities their company is engaged in are in compliance with relevant competition laws, they are strongly advised to seek specific advice from their company's usual legal advisors.

Requirements

There are two appendices to this Code of Practice prepared by our legal advisers, Travers Smith LLP. The first, for the IFFO Management Board, the second for IFFO and all IFFO members.

These appendices have been approved by the IFFO Management Board, will be updated by IFFO secretariat and must be adhered to by the IFFO Management Board and all IFFO members (in line with the IFFO Code of Conduct). The Revision number in the footer should be used to ensure this is the latest version.

This document replaces earlier guidance issued in February 2008. If you have any questions on the content of this note, or if you have any concerns as to the compatibility with competition law of any of your activities as an IFFO board member or the activities of IFFO more generally, please speak in the first instance to the IFFO Secretariat.

Appendix 1 – requirements for IFFO management board

This note has been prepared by IFFO's external lawyers, Travers Smith LLP, to provide an introduction to competition law compliance for new IFFO board members and to serve as an update/reminder for continuing board members. The note is based on the relevant EU and UK competition law provisions. However, the note is also likely to assist in compliance with the other main competition law regimes that may be relevant to the activities of IFFO and its members.

Compliance with competition/antitrust laws in the various jurisdictions in which IFFO and its members operate is a matter of key importance for both IFFO and the fishmeal/fish oil industry in general. Given in particular that competition authorities have historically been suspicious of the activities of trade associations, IFFO needs to ensure

that not only are its activities compliant with competition law, but also that they are *clearly seen to be compliant* so as not to attract the interest of the competition authorities.

Potential consequences of a breach of competition law

Entering into an arrangement or engaging in conduct in breach of competition law can lead to serious consequences for IFFO and its directors/employees as well as for IFFO member companies and their directors/employees. The potential consequences include:

- reputational harm to IFFO and its member companies;
- significant monetary fines on IFFO member companies and potentially IFFO;
- for certain "hard core" competition offences, individual directors/employees may face criminal sanctions, including imprisonment;
- disqualification as a director for the individuals involved;
- third party damages claims and invalidity of infringing agreements; and
- utilisation of IFFO and IFFO member company resources (e.g. the significant legal costs, as well as management and back-office time, required to facilitate an antitrust/competition law investigation).

Note that many competition law regimes (including the EU, UK and US) apply on an extra territorial basis. As a result companies and individuals should not consider that they are safe from the application of particular competition law regimes simply because an arrangement is concluded outside a particular jurisdiction.

Key practices to avoid

The area of competition law most relevant to IFFO and its members is that relating to horizontal arrangements between competitors. Note that such arrangements need not be written or formal in order to result in a breach, and competition law can also apply to "nod and wink" agreements between competitors.

Also note that EU and UK competition law can apply to "decisions of associations" (i.e. decisions, rules and in certain circumstances recommendations) as well as direct arrangements between association members.

Particular types of so called "*hard core*" practices are considered so serious that they will almost always be considered to amount to a breach of competition law, regardless of the particular factual circumstances. If IFFO member companies (and potentially IFFO itself) were found to have engaged in such activities then they are likely to face heavy fines and the individuals involved may potentially face criminal sanctions. As a result it is particularly important that both in the context of the IFFO board and as regards the activities of IFFO more widely the following are *always* avoided:

- market or customer sharing;
- price fixing, bid rigging or agreements on important non-price terms;
- capacity and output limitations;
- collective boycotts of customers or suppliers.

In addition to these so called hard core breaches certain other "*grey area*" practices can also result in a breach of competition law if, in the particular circumstances of the relevant fishmeal and fish oil markets, the relevant practice appreciably affects competition (or has that purpose) and is not able to be otherwise justified.

The grey area breaches particularly relevant to a trade association such as IFFO are:

- that an association should not be used as a forum for an information exchange which amounts to a breach of competition law, either;

  - because it underpins a related price fixing, market sharing or other hard core practice; or
  - because, as a separate matter, the amount and/or detail of the information exchanged leads to tacit coordination of competitors' behaviour by removing usual market uncertainties or enabling the prediction of the behaviour of a specific competitor.
- that membership restrictions or agreed technical standards of an association should not operate as a barrier to entering into/expanding in the relevant markets, and should be set on a fair and objective basis.

Practical steps

The following are some of the practical steps IFFO board members should adhere to in order to ensure compliance with competition law:

- The IFFO board should not make recommendations to members on matters such as prices, production levels, or standard terms and conditions, and board members should take care to ensure that any public comments (e.g. in the trade press) cannot be construed as conveying an IFFO "view" on price, desired production levels or standard terms.
- All IFFO board meetings should be conducted according to a clear agenda circulated in advance and members should avoid deviating from this agenda. Discussion of prices, sales matters, individual firm's anticipated or recent production levels/stocks, and individual customers or specific groups of customers should be strictly avoided. Minutes should be kept of each meeting in order to be able to demonstrate that the discussion did not go beyond the agenda.
- Generally contact between competing IFFO member companies outside of formal IFFO meetings should be kept to a minimum and limited to instances where there is a legitimate commercial reason for such contact. Any such meetings should be conducted in accordance with the same recommendations above as regards IFFO board meetings (as applicable).
- The various regular information exchanges under the auspices of IFFO (e.g. the weekly/monthly/stock reports) should be conducted according to separate guidance provided by Travers Smith LLP. This guidance has recommended certain restrictions on the way in which relevant information is collected from members and the level of detail that is reported back to members.
- The bi-annual supply/demand forum meetings should be conducted according to separate guidance provided by Travers Smith LLP. In particular, these meetings should be open to associate members and there should be certain limitations on the information presented and matters discussed.
- The information collected for and reported back at the bi-annual IFFO conferences, and the procedures for collecting and reporting back this information, should be in accordance with separate guidance provided by Travers Smith LLP (see also Appendix 2).

Appendix 2 – General Rules for IFFO and IFFO members

Competition laws generally govern each of: horizontal agreements between competitors (e.g. price fixing and market sharing); certain arrangements between suppliers and customers (e.g. resale price maintenance); and the conduct of dominant firms.

This guidance note focuses only on the first category, horizontal agreements between competitors, which can in turn be broken into two broad categories: "hard core" practices and "grey area" practices.

Note that the concept of "agreement" in the context of competition law is very broad. An agreement can be implied from conduct and does not need to be written or indeed binding; so called "gentlemen's agreements" will be caught.

Further, the relevant provisions of EU and UK competition law can also extend to encompass decisions of associations. As a result, even where a particular anti-competitive practice does not involve direct agreement between competitors, it might nonetheless be caught by competition law on the basis that it results from the constitution, rules or a recommendation of a trade association.

Contacts with competitors – hard core practices

Particular types of practices (so called "hard core" practices) are considered so serious that they will almost always be considered to amount to a breach of competition law, regardless of the particular factual circumstances. Information that these practices maybe occurring are also most likely to result in investigations by competition authorities and, if their initial suspicions are confirmed, lead to the heaviest fines against the companies involved and, potentially, criminal sanctions against the individuals involved. For these reasons the following activities should always be avoided:

- **Market or customer sharing:** a company agreeing with a competitor that each of them will only supply (or will not supply) a certain group of customers or a certain territory.
- **Price-fixing with competitors**: any agreement between competitors on prices should be avoided. This prohibition extends to all price related aspects including: an agreed range; the timing of price increases; limiting discounts or rebates; and agreeing margins.
- **Bid-rigging**: an agreement between competitors as to how to respond to an invitation to tender from a customer (e.g. one company agrees to submit an uncompetitive bid in return for a reciprocal arrangement on a subsequent tender).
- **Further hardcore restrictions**: the following practices should also be avoided: agreements on important non-price terms (e.g. credit facilities); capacity and output limitations (e.g. agreements on production levels); and collective boycotts (e.g. an agreement not to deal with a certain customer).

Contact with competitors – grey areas

Other activities will only result in a breach of competition law if in the particular instance they do in practice appreciably effect competition (or have that purpose) and cannot be otherwise justified on efficiency/consumer benefit grounds. Two examples relevant to IFFO are the exchange of confidential information between competitors and the activities of trade associations generally.

An information exchange between competitors will certainly be problematic where it operates to underpin a related price-fixing, market sharing or other "hard core" practice. However an information exchange can also be problematic in its own right where it leads to the tacit coordination of competitors' behaviour by removing a degree of normal uncertainty in the market and/or enabling a company to predict competitors' behaviour. Whether an information

exchange does give rise to a competition law breach is a question of fact and degree in the individual case, but in particular concerns can arise where:

- **price information** is exchanged;
- the information is **confidential** rather than public;
- the information is **current/future** rather than historic;
- the information is **detailed** rather than aggregated/overview (e.g. relating to a specific competitor or customer);
- **the exchange is systematic** rather than ad hoc; or
- the information is **exchanged directly** between competitors rather than via an independent third party.

As regards trade associations, particular concerns are likely to arise where:

- membership restrictions or agreed technical standards operate as a barrier to entering the market;
- the association is used as a forum for the coordination of price fixing, market sharing or another hard core breach; and/or
- the association serves as a forum for an information exchange which amounts to a breach of competition law.

Practical Guidance

Trade associations

- IFFO's membership criteria should be set on a fair and objective basis and any technical standards set by IFFO must be able to be objectively justified.
- IFFO should not make recommendations to its members on matters such as prices or standard terms and conditions.
- IFFO should not place restrictions on, or recommend the restriction of, members' activities (e.g. restricting them from dealing with particular customers).

IFFO organised meetings & information exchanges

- Any IFFO meetings should be conducted according to a clear agenda circulated in advance and members should avoid deviating from this agenda. Discussion of prices or sales matters should be avoided, in particular discussions in relation to specific customers or groups of customers.
- Detailed minutes should be kept of each such meeting in order to be able to demonstrate the discussion did not go beyond the agenda items. Depending on the subject matter and context of the meeting IFFO may require that a competition lawyer attends the meeting.
- As regards information exchanges under the auspices of IFFO, any sharing of information should be subject to separate legal advice or supervision and at a level of aggregation such that individual competitors or customers cannot in practice be identified (e.g. by aggregation into sufficiently broad geographic categories). So far as possible any such information shared should be made available to any member who is prepared to pay for the service.
- IFFO and its members, before presenting at or appearing on/chairing a panel discussion during IFFO meetings, should consult the IFFO aide-memoire (separately provided by Travers Smith LLP) regarding their antitrust/competition law obligations, which provides further practical guidance regarding the content and how to conduct such presentations/discussions.
- IFFO, before opening any meetings/conferences (e.g. IFFO's Annual Conference and Members Meeting) should remind IFFO members about the importance of competition law/antitrust compliance via the

announcement of an antitrust/competition law compliance warning (along the lines as that separately provided by Travers Smith LLP).

Re general contact with competitors outside of IFFO organised meetings

- Generally contact between competitors outside of formal IFFO meetings should be kept to a minimum and limited to instances where there is a legitimate commercial reason for such contact, for example lobbying of a government to increase fishing quotas.
- Any such meetings should be conducted in accordance with the same recommendations above as regards formal IFFO meetings (i.e. conducting the meeting according to a pre-circulated agenda; avoiding discussion of prices or sales/demand matters; keeping detailed minutes; and considering whether a competition lawyer should attend).

Re document creation

Given the wide ranging investigatory powers of many competition authorities it is difficult to ensure that any document that is created will remain confidential. Documents containing careless and inappropriate language may make perfectly legitimate conduct appear suspicious or collusive and it may be difficult to subsequently convince a lay reader of the true meaning and context of a suspicious statement.

As such it is important to take care in the language used in preparing all documents whether internal or external. The following are useful guidelines:

- Follow the "Financial Times Rule": do not write anything that you would be embarrassed to read on the front page of the FT;
- Avoid all language that could be interpreted as indicating an understanding with a competitor (e.g. "XY's price cut came as expected by us");
- Avoid the use of words implying that there is something to hide (e.g. "Do not copy", "Destroy after having read", "off-the-record"); and
- When you report market information always record the source of the information.