

SQAS & COMPETITION COMPLIANCE - GUIDANCE DOCUMENT

European and National Competition Authorities have a clear commitment to fight infringements of competition law. They can act either on their own, or as a result of a complaint, or in application of leniency policy which encourages companies that are part of a cartel to bring evidences to their attention.

Respect of law, in particular competition law, is part of Cefic's Governance Policy to be applied by staff and members regarding all activities, with no exception.

Cefic expects that partners and users of its systems such as SQAS act in compliance and check their respective actions to ensure adherence to competition law.

Competition law may possibly apply to any type of activities such as SQAS, it being either national law or EU law (TFEU Treaty - Article 101 –prohibiting cartels/antitrust, Article 102 – abuse of dominant position). The present document focuses on Article 101.

Art. 101 (1) provides that all agreements between companies, decisions by associations of companies and concerted practices ["agreement"] which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, shall be prohibited, 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.

Under Art. 101 (3) the provisions of paragraph 1 may, however, be declared inapplicable in the case an "agreement" contributes to improving the production or distribution of goods or promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and does not :

- (a) impose on the companies concerned restrictions which are not indispensable to the attainment of these objectives, and
- (b) afford such companies the possibility of eliminating competition in respect of a substantial part of the products in question.

Three basic points should be borne in mind : First, regardless of the good intentions of companies and associations, if the effect of activities is found to affect competition and markets unduly, this activity will be declared illegal; Second, to violate Art. 101 it is not necessary to make a real agreement as under the concept of concerted practices agreement may be implied by certain type of actions of companies – participants (eg decisions of a trade organisation, exchanges of e-mails....); Third, to violate Art. 101 it is not required that there is actual effect; potential effect may also be caught by law. Furthermore, Art. 101 applies to vertical activities (eg distribution agreements and networks) and horizontal activities (eg co-operation agreements between producers).

Not all agreements which restrict competition are necessarily illegal. On the contrary. Under Art. 101 (3) agreements which have more positive effects than negative ones are allowed. Justifications for this may be technical progress, new innovative processes, safety and quality enhancement, and HSE efficiencies, provided the positive effects can be objectively justified for example by scientific studies and that the conditions set in Art. 101 (3) are fulfilled.

This document is intended to guide companies using one of the SQAS modules (Road, Tank Cleaning, Packaged Warehouse, Rail Carrier and Distributors). The fact that a potential problem is addressed in this document does not necessarily mean it is illegal.

- **DO NOT** presume that because you are working within Responsible Care, Product Stewardship and HSE issues competition law does not apply.
- **DO NOT** presume that you know all about competition law just by reading this document. It is neither exhaustive nor a substitute for legal counsel.
- **THEREFORE**, competition compliance must be checked by companies before entering into agreements on a case by case basis, at all levels of the logistics/ supply chain.

SQAS Principles: Objectivity, Neutrality, Transparency, Quality and Open Access

What is SQAS?

- An objective third party assessment of service providers and distributors involved in the logistics chain (eg transporters, distributors, warehouses....).
- A means to evaluate the safety, quality, environmental, health, security and corporate social responsibility performance of the service providers and distributors and to seek way for improving performance based on voluntary participation.
- A uniform assessment carried out by third party (independent) assessors using a standard questionnaire.
- One of the tools that chemical companies may use when deciding to make a contract with a service provider. It is operated in a non-discriminatory and non-exclusionary manner.
- A tool with which every individual chemical company could make its own decision with respect of using the services of a service provider.

What it is NOT

- It is **NOT** a certification system to be compared to ISO, and it is **NOT** a standardization system.
- It is **NOT** a “pass” or “fail” system and it does **NOT** result for the service provider being assessed to be white or black listed. It does **NOT** confer a kind of certificate or label of quality to those having been assessed.
- It is **NOT** an exclusive system that replaces existing ones or future systems that may be applied or developed for assessing the HSE performance of a service provider in the logistics chain.
- It is **NOT** a system adopted by the chemical industry to exclude collectively service providers that have elected not to be assessed under SQAS.
- It is **NOT** a collective decision-making process.

As a consequence, the choice of a service provider is based entirely on the individual decision-making of each chemical company. This is based on their own criteria that may or may not include an SQAS assessment.

Any system such as SQAS must comply with Art. 101 and the EU Commission Guidelines on Horizontal Agreements, the main points of which are the following:

- ✓ **no exclusion of actual or potential competitors**
- ✓ **freedom to develop alternative systems**
- ✓ **transparency**
- ✓ **means should be proportionate to aims**
- ✓ **exchange of information limited to the minimum**
- ✓ **open, non-discriminatory system**

All SQAS modules are set up in compliance with the above rules. It has to be ensure that the rules are applied in all daily operations, by all those involved and that all communications in relation herewith are clear and cannot be interpreted in an equivocal way.

