

**Date** 31 August 2011  
**To** Jérôme Rupied, UTIPULP  
**CC**  
**From** Quentin Azau / Fiona Carlin  
**Re** Guidance on compliance with EU competition law

**CONFIDENTIAL  
ATTORNEY/CLIENT PRIVILEGED**

Baker & McKenzie prepared a competition compliance audit for UTIPULP in June 2003. In 2011 UTIPULP asked us to review:

- minutes of recent UTIPULP General Meetings;
- recent statistics prepared by UTIPULP; and
- the Articles of Association ("AoA") and related Rules of Application ("RoA").

This memo contains our observations on potential competition issues we identified based on these documents and recommendations on how to address them. UTIPULP also asked us to prepare some concise guidelines on information exchange for representatives attending these meetings.

**1. MINUTES OF RECENT UTIPULP MEETINGS AND GUIDELINES  
ON INFORMATION EXCHANGE**

We did not find in the minutes of recent General Meetings any evidence of unlawful discussions. We see that reference is made in the minutes to reminders given by the chairman to participants of the importance of compliance with competition rules (see minutes of meeting of 18 September 2009, point 6, minutes of meeting of 17 September 2010, point 5). The members are invited to "apply the conclusions" of the Baker & McKenzie 2003 audit report.

The 2003 audit report contained our analysis under the applicable competition rules of UTIPULP's activities. The conclusion of the audit report contains a list of 7 practical actions that we recommended UTIPULP to take at the time but do not contain general guidance on information exchange which could be followed by participants to UTIPULP meetings.

Accordingly, we suggest that for future meetings reference be made instead to the attached general guidelines on information exchange which should be distributed to all

participants. We prepared these guidelines based on the current case law and Commission guidance. These guidelines provide an overview on the nature of discussions which can lawfully take place between UTIPULP members.

## **2. STATISTICS**

The statistics prepared by UTIPULP must not allow its members to identify or assess with sufficient precision the commercial data relating to individual producers, taking into account their knowledge of the industry. We understand that UTIPULP always uses the same template to present the statistics distributed to its members. On this basis we have reviewed the statistics published in June 2011: "June 2011 World & European Chemical Market Pulp" and we understand that all previous and future statistics were / will be presented on the same basis.

We see that information for certain countries has been grouped (Austria and Switzerland, Portugal and Spain and Belgium, Denmark and The Netherlands). Providing that under their current format, individual values for each country (or group of countries) and group of product comprise aggregated data of at least three independent producers in such a form that does not enable the identification of individual businesses, the exchange of the statistics as they are presented in the sample of June 2011 would not raise any competition concerns.

Providing that this point is confirmed we consider that the statistics as they are currently presented do not give rise to competition concerns. We recommend seeking legal advice prior to any modification of the presentation of UTIPULP statistics.

During a previous telephone conversation you explained that the statistics are first circulated to UTIPULP members before being sent a couple of days later to non-European associations and the specialised press. You asked us whether this could amount to illegal discrimination.

Delaying the communication of statistics by a few days allows members to absorb the data and respond to press queries if any. This methodology is therefore justifiable. In any event, the delay has no impact on competition since it is not treating like customers differently.

We consider that the fact that UTIPULP makes the statistics available in priority to its members before communicating it to third parties does not amount to illegal discrimination.

### 3. ARTICLES OF ASSOCIATION

#### 3.1 Art. 2 RoA (Statistics)

Article 2 of the RoA currently reads as follow:

***Article 2 - Statistics***

- *no statistics carried out by the Association shall be of such a nature as to allow one member to ascertain the source of the data or to induce a concerted behaviour of the members,*
- *members may only send out statistics concerning the countries as a whole,*
- *members may only send out the information necessary for the elaboration of the statistics of the Association,*
- *the statistics are to be sent to the Association at least on a quarterly basis,*
- *the Association shall take all necessary measures to protect the confidentiality of the information received from its members.*

*Members (National Associations) are required :*

- (a) to keep the company data confidential, secure and protected against unauthorised access and not to use the data for any other purpose*
- (b) to abstain from exchanging aggregated data if at any given moment there are less than three companies participating (zero or negligible inputs must also be excluded when they might cause the disclosure of individual companies' data) or take immediate steps with UTIPULP's secretariat to aggregate country reports to avoid this happening.*

The wording of Article 2 (b) is taken directly from the 2003 audit report and does not read consistently in the RoA. In addition, the article states that the data must be communicated by the members at least on a quarterly basis. This wording can create uncertainty regarding the actual frequency of exchange. We understand that in practice UTIPULP members communicate their respective data on a monthly basis.

For sake of clarity we suggest amending the Art. 2 of RoA as follow:

***Article 2 - Statistics***

- *The statistics prepared by the Association must not allow any member to ascertain the source of the data or to induce a concerted behaviour of the members,*
- *members shall not provide information other than what is strictly necessary for the elaboration of the statistics by the Association,*
- *members should aim at submitting their data to the Association on a monthly basis,*
- *the Association shall take all necessary measures to protect the confidentiality of the information received from its members,*

*- members are required to keep company data gathered from their members for the purpose of submitting national statistics to UTIPULP confidential, secure and protected against unauthorised access and not to use the data for any other purpose,*

*- members shall abstain from circulating to their members aggregated data if at any given time there are product categories and/or geographic regions in which fewer than three participating companies (zero or negligible inputs must also be excluded when they might cause the disclosure of individual companies' data) and will take immediate action to aggregate country reports to avoid this happening.*

### **3.2 Art. 3 AoA and Art. 3 RoA (Membership)**

UTIPULP Membership rules must not be discriminatory. Under Article 3.1 AoA, potential members are defined as "the National Associations of European Paper and Board Industries through their Group or Committees of market pulp users". This definition may exclude national paper pulp associations with no specific market pulp user "Group" or "Committee". If UTIPULP wants to rely on this provision to reject a national association's application to become a member it must be sure that there is an objective reason why a restriction of membership to Group or Committees of National association is reasonably necessary for the purposes and/or efficient governance of UTIPULP.

Article 3.2 RoA seems to indicate that national associations (or groups or committees) representing pulp users which are also pulp producers or pulp sellers can become members of UTIPULP. This may give rise to competition concerns if information is exchanged between users and producers.

We suggest clarifying that:

- individuals representing UTIPULP members (i.e. national associations through the relevant group or committee) which together with pulp users also represent (or have as their members) paper pulp producers or paper pulp sellers, or
- individuals employed by paper pulp users which are also a paper pulp producer and/or a paper pulp seller,

should not be communicating data or information obtained through their participation in UTIPULP's activities to other departments within their association or company.

The term "user companies" referred to at Art. 3.2 does not appear anywhere else in the AoA or the RoA. Art 3.2 RoA should be amended to make it clear to which provision it is aiming at clarifying.

Finally, Article 3(1) RoA states that "It has been agreed that, for the time being, membership shall be confined to Associations predominantly of users of market chemical wood pulp (whether bleached or unbleached, long or short fibre)". Any

restriction in membership criteria should be based on objective criteria. If UTIPULP is approached by a mechanical pulp producer advice should be obtained before rejecting any membership application.

Kind regards

**Quentin Azau / Fiona Carlin**