

## Legal Briefing

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Brussels 24 July 2017

To: CEPI National Associations' Director General (ADG)  
Cc: CEPI Directors

### European antitrust law conduct and compliance in international conferences

CEPI has been informed by some of its members that on several occasions, a non-European pulp producer has made presentations at international conferences sharing commercially sensitive information which may be in violation of antitrust competition law.

The materials of these conferences have been reviewed by CEPI's competition law attorney who underlined that the **European producers who attend(ed) such presentations could be inadvertently exposed to significant legal risks** and therefore recommend some legal actions to avoid any issue.

The below 2 page briefing aims to highlight these risks and provide practical guidelines to be shared by National Associations with their member companies in the most appropriate manner.

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## Background

CEPI's competition law attorney carried out a preliminary competition law assessment of two presentations on market pulp developments given at conferences in Shanghai (March 2017) and Shenzhen (May 2017) and has provided advice on the conduct of European producers in such conferences.

The presentations in question dive into market and pricing dynamics for the pulp market and essentially argue that *"...there is a strong case to be made for a focus on healthy, profit-driven growth that looks at all factors rather than only capacity coming unto the market"*. They present a number of scenarios, including providing a market price target, and further stating that *"[...] companies will have a great deal of room to create value if they simply focus on profit-driven growth"*. In effect, the presentations develop a market leader view of market developments, the correlation between volume and prices and recommended margin strategy.

Based on a review of the attendance list for the first conference, up to approximately  $\frac{3}{4}$  of the wood pulp industry were represented at the first conference and may have attended the second conference, including all major producers and a number of European companies.

It is not known exactly who physically attended the presentations but the presentations were later disseminated to the participants and further discussed in industry publications, such as PulpWatch.

## Legal Assessment

Even though the presentations were made in a non-European context and arguably could be said to focus mostly on the Asian markets<sup>1</sup>, there is a **significant risk** that they could be claimed by European competition authorities to infringe the prohibition under EU law against anticompetitive agreements and concerted practices.

In particular, the problem **for the European companies** is that **European competition law applies a presumption rule** that, when a company receives strategic information from a competitor, it is presumed to have accepted the information and adapted its market conduct accordingly unless it responds with a clear statement that it does not wish to receive such data. *In other words, companies who attend such presentations can be inadvertently exposed to significant legal risk.*

Preliminary assessment of the materials that were reviewed indeed stressed that

- Some of the statements can be construed as invitations to competitors to collude on reducing output and increasing prices;
- The statements were not genuinely public, i.e. they were made at a specialized industry conference where the audience consisted almost exclusively of industry market players
- The statements did not seem to have been based on a legitimate commercial need as they appear to have been provided with the intention of convincing other producers to focus on value and not volume (i.e. output restrictions in order to keep up margins)
- The presentation contained information of commercially sensitive, strategic importance in terms of how a market player intends to act on the market in the future

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<sup>1</sup> The analysis was made on the assumptions that the wood pulp market is global and that it could be argued that there are possible effects on EU trade.



- Whilst output limitation is considered a serious (“by object” or “hardcore”) restriction not requiring actual effects on the market to be proven, it can be seen from later publications that announcements on capacity may have actually impacted prices in the market
- The legally important fact that a market is fragmented may, in practice, be less relevant for a risk assessment as current enforcement practices by competition authorities tend to focus on obtaining legally binding “commitments” from the investigated companies without having to meet higher legal burden of proof set out in case law.

## Recommendations

Companies who attend such presentations could **be inadvertently exposed to significant legal risks** and subject to investigations that can be very time-consuming and costly.

**1. Post event and presentations** - We recommend that the European companies that attended such presentations (or other industry meetings where similar views were shared) to be informed of the risks and take active steps to distance themselves from any contentious statement and related documentation.

In particular a record should be kept of the active steps, which could, for example:

- Identify the employee(s) participating at the conferences and questioning them on the subjects raised by the presentations and participants;
- Identify whether/how the conference materials were circulated within the company, and having such materials quarantined and/or destroyed;
- Run a dedicated competition law educational session with any such participants and other employee(s) that may have received a copy of the materials;
- If justified by the findings of the internal investigation, shift the relevant employee(s) to other positions where the information cannot be utilized;
- Write a formal letter of protest to the organizers of the conferences advising them to avoid such presentations in the future and making it clear that the company does not intend to use or act on the information provided.

**2. At an event itself** - Should such presentations be given again in the future in any conference or industry forum, European companies representatives are strongly advised to:

- **Immediately interrupt the presentation and object** to the statements being made;
- If the presentation persists, immediately **leave the meeting**, and where possible ensure that your objection and departure have been minuted (otherwise sending a formal email to the organisers as soon as possible);
- **Do not disseminate any commercially sensitive information internally**;
- Immediately **inform their supervisor and legal department** of the incident and detail actions taken in writing; and
- Follow up with their legal department on any additional steps that may be needed, if any.

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