MEMORANDUM

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Date 28 October 2016

To Raquel Ponte Costa, VIPA

cc Frédéric Louis

From Cormac O'Daly

Re **PRIVILEGED AND CONFIDENTIAL: Potential VIPA statistics**

1. We understand that the Vacuum Insulation Panel Association ("VIPA") is considering assembling statistics based on input from its members. You have requested that we summarise the general legal principles that should be taken into account when collecting statistics and provide an overview of the correct procedure to follow when doing this. Below we set out the main concerns associated with statistics, the factors that determine whether or not distribution of statistics is lawful and the best practices for collecting statistics.

Competitively sensitive information ("CSI")

2. Under competition (also known as "antitrust") laws, it is illegal for competitors to share or discuss competitively sensitive or strategic data. CSI includes information on prices (actual prices, discounts, price increases, price reductions, margins etc.); quantities; costs; demand; specific customers; sales; capacities; R&D; marketing plans; investments etc.

Aggregated information

3. We understand that VIPA is considering sharing aggregated statistics among its members. In principle, sharing aggregated information will not infringe competition laws provided the aggregated information does not enable any company to identify/infer CSI about any other company from the aggregated data.

4. In practice, this means that behind each data point that is distributed, there must be at least three material contributors.[1] We prefer not to set a precise threshold in advance for what constitutes a "material" contributor. Instead, we determine this on a case-to-case basis taking account of the type of data in question and the relevant market conditions.

Type of information

[1] We note that VIPA has eight members. Unless most of these are small companies, it should be possible to publish some industry statistics (there may of course be niches where one or two companies are much bigger than others, which could mean that it is not possible to produce sufficiently aggregated information on those niches).

5. We understand that VIPA is considering assembling information on volume/units sold or sales' revenues. In principle, provided the other conditions for legality are fulfilled, information on either volume/units or revenues can be assembled legally. Normally, however, we recommend not assembling and distributing information on both volume/units and revenues. Depending on the circumstances, it can be possible to assemble and distribute aggregate information on capacity, production etc.

6. We would recommend that VIPA not assemble/distribute information on costs or prices. Competition enforcement agencies (such as the European Commission) often consider that even aggregated information on price or cost can be used as a benchmark or focal point for setting prices, which means that such information has a greater risk of being deemed illegal.

7. We understand that VIPA might be interested in assembling data on different applications (e.g. buildings, appliances, transport and packaging etc.) and in various geographic areas. In principle, there is no objection to any of this but we would need to review the draft data before it could be distributed.

8. We also understand that VIPA might prefer to distribute statistics based on estimates from its members rather than statistics based its members' actual sales. While this sounds feasible in principle, we think it may prove problematic in practice. For example, how can VIPA and its members know if the estimates are accurate? We have also found that if companies are asked to provide estimates, this leads to a significant risk of the estimates – and the market more generally – being discussed among competitors, which should be avoided. For these reasons, we would recommend that VIPA base statistics on the aggregated actual data of the members rather than on estimates.

Age of the data/frequency of exchange

9. The age of the data that is being distributed also influences the legality of statistics. Distributing older more historic aggregate data is less problematic and more likely to be legal. However, what is historic depends on the relevant industry. For example, in an industry in which contracts are typically of short duration and prices are adjusted frequently, relatively recent information can go out of date quite quickly and be considered historic. We would need to learn more about the markets for vacuum insulation panels before indicating what would be considered sufficiently historic.

10. Similarly, the statistics' frequency can affect their legality. When statistics are published more frequently, competition enforcement agencies sometimes consider that they can be used to monitor illegal agreements or understandings. Normally, however, it is fine to

distribute statistics once a year and, in some cases, every six months or even quarterly but this depends on the data being distributed and the market characteristics.

Market characteristics

11. In addition to the type of information that is being distributed, its age and the frequency of distribution, more general market or industry characteristics influence statistics' legality.

12. In general, greater care must be exercised when distributing statistics in markets that are transparent (e.g. there are not many transactions and transactions are generally public), concentrated (namely there are few competitors on the market) and stable. The relative weight of any of these market characteristics in the overall assessment of statistics' legality varies from case-to-case.

Who will receive the statistics?

13. Competition enforcement agencies sometimes prefer if statistics are published and made available also to entities that are not members of the relevant association (in theory, it is argued that if the entire market, including customers, has access to statistics, this may promote competition). Yet, it can also often be entirely legitimate for the statistics to be distributed only to members of an association – access to statistics in such cases is a legitimate advantage of membership.[2] Some associations sell their statistics; if VIPA wanted to do this, we would need to discuss the applicable pricing as this should not be so high as to be "unreasonable".

Best practices on how to assemble statistics

14. It is essential that members only have access to aggregated statistics and never access others' CSI. The best way to ensure this is for members to send data individually to an independent third party who then compiles the data. The VIPA secretariat (or another Kellen employee) would be a suitable candidate for this role. The third-party should be obliged not to share any members' individual data with another member – this obligation can be imposed in an NDA.

15. At least at the outset, it is essential that the draft statistics – and the underlying data from the members – be reviewed by a competition lawyer before they are distributed.

16. Members often are tempted to discuss statistics and their implications. We recommend that distributed statistics should "speak for themselves" and strongly advise against

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[2] In this situation, it is essential that the association's membership rules and rules on who can participate in statistics are transparent, objective and non-discriminatory and that these rules are applied in a consistent and non-discriminatory manner.

discussion of statistics since this can easily spill-over into discussions of market conditions, which can be problematic. This does not mean that VIPA's secretariat cannot prepare high level presentations on trends but the reasons for trends etc. should not be discussed.

17. In so far as possible, the pool of contributors to statistics should remain constant. This makes statistics more meaningful since they can be compared from period to period. Moreover, this avoids the risk that CSI relating to a new (or former) contributor can be identified. In some instances, where there are relatively few contributors to statistics and a company refuses to contribute to the statistics or leaves an association, we have had to recommend that distribution of statistics be paused for a period to prevent data relating to that company from being revealed.

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