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Brexit: trade associations and competition law

How to discuss your industry's reaction to Brexit without falling foul of competition law

Given the economic, political and legal uncertainty following the "Leave" vote, businesses will understandably want to discuss with each other how Brexit will affect their industry and explore how they can help shape the future of the legal and regulatory landscape affecting it.

Such discussions will be valuable and necessary. However, communications between competitors attract suspicion from competition authorities, who will be concerned to ensure that those discussions do not breach competition law rules.

These guidelines, which apply to all formal and informal discussions, are intended to help businesses keep on the right side of competition law when entering into such discussions.

Legal framework

It is important to remember that agreements and other practices that prevent, restrict or distort competition are prohibited under both UK and EU competition law.

Although the UK's legal and trading landscape may be changing, businesses must remain compliant with competition law. Breaches can have serious consequences for companies, trade associations and the individuals involved, including large corporate fines, disqualification as a director, imprisonment and personal fines, reputational damage and damages claims.

Permitted discussions

Businesses can discuss the following issues, including in the context of Brexit discussions, but only to the extent that those discussions do not involve pricing or other competitively sensitive information:

- General market trends and publicly available information;
- Government or regulatory policy;
- Joint industry lobbying and promotion initiatives; and/or
- Other purely technical/non-commercial issues.

It is also possible to collect, share and disseminate certain information, provided that this relates to historical data and is appropriately aggregated and anonymized (discussed further in this note).

If meetings are specifically intended to discuss Brexit and develop a joint lobbying effort, the discussion should be limited to this topic. Only information which is necessary to develop a strategy and a related lobbying position should be disclosed.

Prohibited discussions

Some general guidelines on what topics must be avoided are set out in this note. However, the golden rule is that businesses should not share information which would reduce competitive uncertainty in the market, or could help inform a competitor's future commercial strategy.

No discussion of pricing information

Businesses should never discuss pricing practices or intentions. Competition authorities will be particularly concerned that discussions on Brexit should not, for example, provide businesses with the opportunity to insulate themselves from the current economic uncertainty by fixing prices. Businesses should not discuss or agree:

- Current prices (including information relating to discounts) or financial terms and conditions;
- Future pricing plans, including the timing of proposed price changes; and/or
- Past pricing levels, if that information allows inferences to be drawn about current or future pricing.

No discussion of other types of competitively sensitive information

Businesses should also not agree or discuss their own approach to any other matters that could be regarded as competitively sensitive. For example, businesses should never agree or discuss:

- Current or future marketing strategies, business, marketing or operational plans or strategies;
- Current or future profit margins or profitability targets;
- Customer lists or any other customer-specific information (including negotiating strategies and proposed contract terms);
- Cost information;
- Capacity or production, export, purchase and sales volumes; and/or
- Any other matter on which businesses compete.

Businesses should also not use Brexit related discussions to agree to take steps, for example, to protect the UK markets from competition from the rest of Europe.

Before, during and after meetings – procedural safeguards

In relation to any meetings or discussions, an agenda should be prepared in advance. At the beginning of each meeting, it should be made clear what discussions are permitted and what are prohibited. Official minutes should be prepared following each meeting, summarizing the discussions that took place.

If a discussion strays into prohibited matters, participants should leave the meeting immediately, and their departure (and the reason for their departure) should be noted in the official minutes. If the discussion is informal and/or no minutes were taken, legal advice should be sought immediately.

Industry publications and reports

As part of an industry lobbying effort, trade bodies may wish to prepare economic reports to support their position. This may require members to provide specific, potentially sensitive, information. If that is the case, a single, independent employee of the relevant trade body should be designated to collect the relevant information. That company-specific information should never be disseminated to members.

Instead, the information disseminated to members must be sufficiently historic to be no longer useful for taking business decisions (at least 12 months old – or longer depending on the business cycle in the industry concerned), and aggregated to prevent identification of information about individual members.

In addition, information should be disseminated to certain named individuals only, who are not sales or marketing staff or other "front-line" employees.

To find out more about how we can help you prepare for Brexit, either in the UK, the EU or globally, please contact our Brexit team via Brexit@hoganlovells.com or using the details below. For the latest thinking on Brexit, and further resources to help you develop your practical response strategy to Brexit, visit our Brexit Hub: www.hoganlovells.com/brexit

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