HERBERT SMITH FREEHILLS

SURVIVING BREXIT WITHOUT BREAKING THE LAW

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Legal Briefings – By **James Quinney** and **Craig Pouncey**

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As the UK faces potentially significant legal and regulatory change resulting from the Brexit vote, there is a real opportunity for businesses to engage in joint lobbying on the shape of the UK exit. But in doing so, they need to keep an eye on competition law risks.

On 23 June 2016, the UK voted to leave the European Union, triggering a period of uncertainty for businesses and the prospect of significant legal and regulatory changes. The coming months and years will pose unique challenges for businesses. Although some sectors will be more directly affected than others, none will be unaffected. At present, the only certainty is the likelihood of potentially significant changes to the legal and regulatory framework in which business is done in the UK.

In light of this uncertainty, it is only natural that businesses will want to engage with their competitors, customers and suppliers to understand the potential changes affecting their industries, and to lobby politicians in the UK and Brussels to ensure that the shape of the UK's future relationship with the EU is as business-friendly as possible.

Lobbying on industry-wide issues (such as tax or environmental regulations or a sector-specific regulatory regime) is not and has never been contrary to competition law. Joint lobbying in favour of a position reflecting the collective interests and views of an industry is likely to be more effective than potentially more diffuse individual lobbying. Joint lobbying may improve legislative and regulatory outcomes. This seems particularly likely in the current environment where there is a high degree of uncertainty and the prospect of significant changes across a very wide range of areas.

However, competition law does impose constraints on what information can be shared between competitors (including in situations where a third party may act as a conduit for the flow of such information), even where that information is shared for the legitimate reason of formulating a joint lobbying position. The restrictions on anti-competitive information sharing flow from both EU and UK domestic competition laws and reflect international best practice. These laws and their application are unaffected by the referendum result and it is clear that whatever the eventual consequences of the Brexit vote, the prohibition on anti-competitive information sharing will remain in one form or another.

Businesses should therefore make sure that they protect themselves against potential breaches of competition law by making sure that any individuals likely to be involved in discussions with competitors and attending meetings/forums where competitors are present are aware of what is and is not acceptable from a competition law perspective.

Businesses should be able to advocate for a particular form of regulation to be introduced as a replacement for a particular EU provision that is being repealed. However they will need to ensure that in discussing the likely commercial impact of any measure on their business, they restrict themselves to high level or aggregated information, and do not go so far as to divulge competitively sensitive information such as sales forecasts.

Here are ten do's and don'ts to help you to ensure that your business stays on the right side of competition law.

DO

1. Make sure that any industry discussions are limited to formal meetings/calls set up for that purpose.

2. Circulate a written agenda in advance of any meeting, limit discussions to items on that agenda, and keep a record of all matters discussed and agreed.

3. Immediately leave any meeting/call at which prices or other competitively sensitive information (see definition below) is discussed and ask that your objection to the discussions and decision to leave the meeting is minuted. Report any such incidents to your legal counsel.

4. If competitively sensitive information is required in order to model the likely industry-wide impact of any new proposals or regulations, ensure that this is provided directly to an independent third party who understands the restrictions imposed by competition law on information exchange and will take appropriate steps to mitigate the risks.

5. When sharing competitively sensitive information in a legitimate context with third parties (including customers and suppliers), make clear that such information should not be shared with your competitors.

6. Seek legal advice if in doubt.

DO NOT

1. Do not disclose to a competitor or discuss with a competitor any competitively sensitive information, and in particular information which could give an insight into your current or future competitive conduct. Competitively sensitive information includes:

    a. current or future commercial strategy or business plan (including, but not limited to, information about particular business opportunities);

    b. pricing information, including current or future prices (and aspects of pricing such as minimum fees, discounts or rebates) or other terms of engagement with clients;

    c. the specific impact of particular proposals/outcomes for your business;

    d. revenues or profit margins;

    e. distribution practices and customer and supplier details;

    f. output, production volumes and capacity; or

    g. key items of cost.

2. Do not discuss specific commercial strategies your business might adopt if particular proposals or regulations are adopted. For example, disclosing to competitors that your business may consider relocating to another EU jurisdiction may be sufficiently general to be unproblematic, but disclosure of details such as the jurisdiction, the particular commercial impacts that necessitate the move, the expected benefits from the move, timing and costs implications for your business would likely be considered competitively sensitive.

3. Do not discuss details of the costs for your business in implementing particular proposals or regulations.

4. Do not solicit or accept competitively sensitive information about your competitors from third parties. Report any situation where you think you have received competitively

sensitive information in breach of competition law to legal counsel.

ADDITIONAL STEPS

For those businesses with sufficient legal resources, additional steps to reduce risk of inadvertent breach of competition law include ensuring that any agendas are reviewed from a competition law perspective prior to circulation, and asking legal counsel to attend any meetings/calls where competitors are present.

BEYOND COMPETITION LAW

It is worth remembering that competition law is not the only compliance issue to be aware of when lobbying. Anti-bribery and corruption rules are relevant and there are specific EU and UK requirements for lobbyists.

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LEGAL NOTICE
