ALLEN & OVERY

Brexit Law – your business, the EU and the way ahead

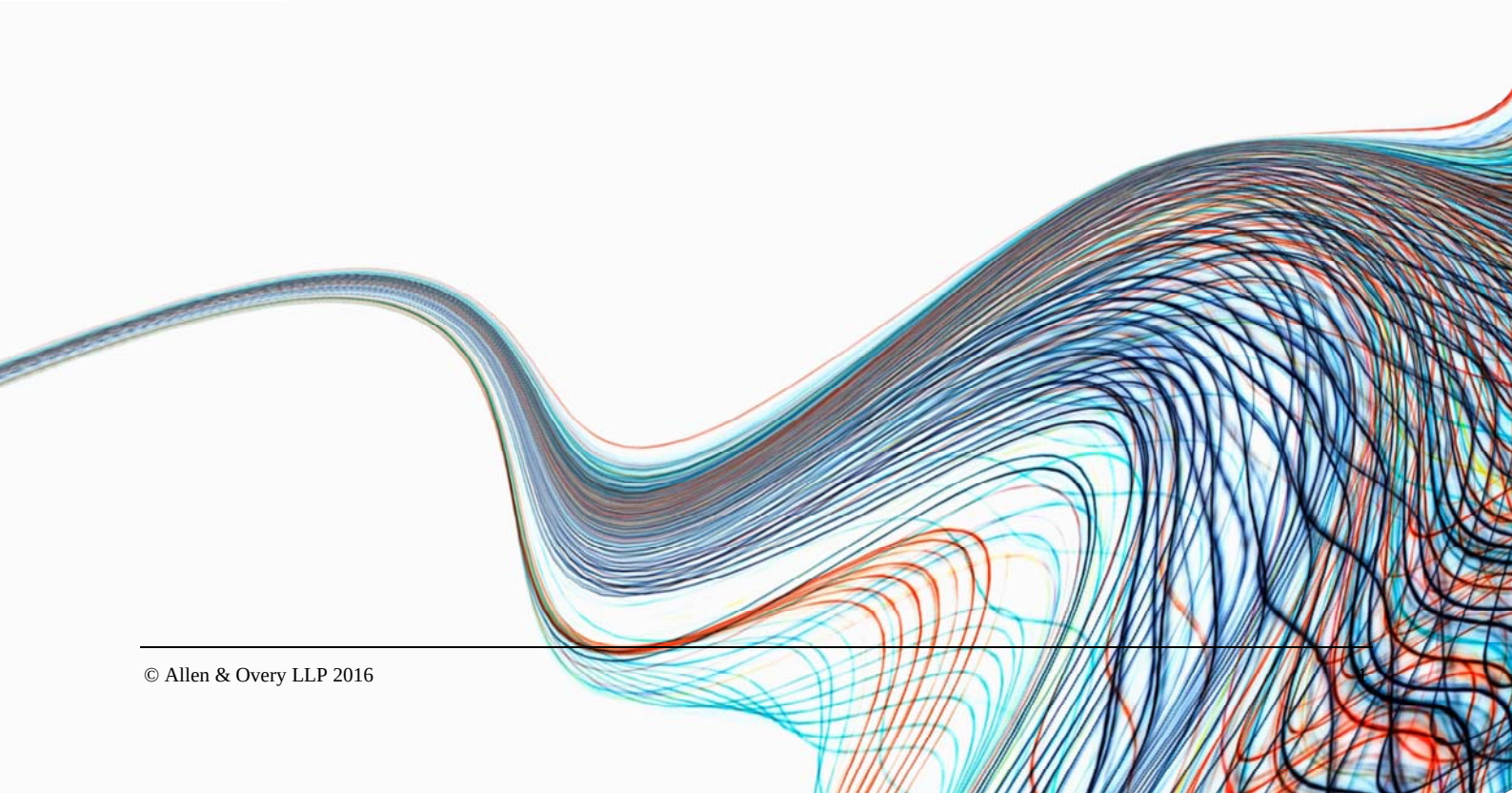
Competition law guidance for Brexit-related consultations and discussions

August 2016

Overview

Competition law prohibits certain agreements between competitors and other forms of conduct (including the exchange of commercially sensitive information) which may prevent, restrict or distort competition. Price-fixing, agreements to limit output and market or customer allocation generally constitute the more serious forms of anti-competitive agreement.

Meetings such as those that might take place between industry practitioners on the implications of Brexit will perform useful and important functions. However, from a competition law perspective, because such meetings bring together representatives from competing businesses, they are also open to increased scrutiny from competition enforcement authorities who may be concerned, for example, that information exchanged between competitors could facilitate or even amount to illegal anti-competitive arrangements.



Potential liabilities for breaching competition law

Sanctions for breaching competition law are severe and, in addition to the huge amount of resources in terms of management time required during an investigation, include significant fines, damage to the reputation of the organisations involved, contracts being void and unenforceable and third party claims for damages.

Where anti-competitive arrangements arise in the context of contact between competitors at events held by organisations of which they are members, competition authorities may impose fines on the organisation itself, even though the organisation is unlikely to be active on the affected market.

The consequences of competition law infringements might not be limited to companies. Under the laws of a growing number of jurisdictions (including the UK) individual employees may be found guilty of a criminal offence, and may face personal fines and/or prison sentences. It is also possible for directors to be disqualified from office for a set period of time.

Competition law checklist for attendance at Brexit-related discussions

The following checklist provides a very brief guide to the type of behaviour which is generally acceptable under competition law to help avoid any inadvertent breaches of competition rules. It should be applied at both formal Brexit-related discussions and other meetings and informal discussions and contacts that take place around formal activities. Please note that this checklist should not be treated as a complete guide to those rules. If in doubt about the legality of any behaviour, including in relation to a specific jurisdiction, seek appropriate legal advice. Immediately contact your legal advisor if you have reason to believe that you have been involved in a violation of competition law.

At the beginning of all Brexit-related discussions/meetings, a chairperson(s) should remind participants of their responsibilities to comply with competition law and ask if any participants would like to raise any issues or concerns in relation to their obligations under competition law. The chairperson(s) should also be prepared to interrupt and intercede during the course of the discussion if he/she considers that the discussion is potentially at risk of breaching these obligations. He/she should bring any discussion to a halt if he/she considers that commercially-sensitive information has been exchanged. If there is any doubt, the discussion should not continue. An experienced competition lawyer should be present during any meeting where there is a risk of coordinating commercial strategies.

Do:

- Use the meetings to discuss generic issues which are clearly removed from the competition "danger areas" listed below, for example, matters: (i) in the public domain of general interest to the industry, such as the impact of any new post-Brexit legal or regulatory regime (ii) representing the industry's views to government or other regulatory bodies on the impact of Brexit, (iii) collecting, collating and disseminating statistical information (provided this is on an aggregated and anonymised basis, and relates to historic data), (iv) promoting education and training
- Use publicly available aggregated data to comment on general market trends including those following the UK vote to leave the EU
- Remember that informal arrangements or activities (e.g. those made orally in a social or other informal context such as a dinner) will be caught by the competition rules
- Ensure meetings follow a written agenda, prepared in advance, and that a written record of topics discussed at meetings is produced. If in doubt about the legality of any topics listed in an agenda, seek legal advice prior to the relevant discussion. If discussion turns to a prohibited topic, make sure that you object and if the discussion continues, leave immediately, ensure your departure is minuted and report the matter to your in-house counsel or compliance officer or legal adviser. If a competitor approaches you and starts discussing any of the items listed under "Do Not", state that you cannot discuss such matters, keep an accurate file note and inform your legal adviser

Do Not:

- Discuss individual price-related data including prices paid to vendors or received from customers, price changes, pricing trends, pricing policies, mark-ups, discounts, allowances, promotions, credit terms or any other information relating to bids for or deals with particular customers, including how these have changed following the UK vote to leave the EU
- Discuss information relating to your firm's individual costs, profit margins, output, capacity, utilisation, inventory or other sales data including in relation to any re-structuring or re-location required as a result of Brexit
- Discuss information relating to your firm's strategy (including in respect of preparations for Brexit, e.g. relating to company re-structuring or changes to the location of subsidiaries/personnel), investment, technical development/R&D, product design or distribution, marketing or potential new markets
- Discuss industry pricing policies, price levels, price changes, pricing procedures, profit margins, capacity, output or other data relating to price
- Enter into any agreements or informal arrangements/understandings with competitors in respect of any of the information set out in this section before seeking legal advice
- Discuss or agree to divide up the market/territories in which you compete or potentially compete (e.g. by agreeing that you will only target certain types of customers, or those based in a certain region or country or by agreeing where you will be located, registered or licensed post-Brexit), the sources of supply (e.g. by agreeing only to approach named suppliers or suppliers in a stated location), the types of product in which you and your competitor(s) will be dealing, your respective production schedules or not dealing with a competitor, supplier or customers
- Discuss or agree the black-listing or boycotting of named competitors or suppliers or Brexit strategies that could result in the market foreclosure of competitors or suppliers
- Discuss, share or seek access to confidential or other unpublished information with competitors
- Dispose of or delete your agendas – store them carefully and inform your legal adviser of any ambiguities

There are other issues you may need to consider in relation to lobbying in addition to those listed above. If you would like to discuss this further, please be in touch with your usual A&O contact.

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If you would like to discuss the issues raised in this paper in more detail, please contact any of the experts above or your usual Allen & Overy contact.