



GCA statutory review – A response from branded companies

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Response from British Brands Group

Part 1: Questions for all relevant parties

1. Have you engaged with the GCA?

Yes

2. If yes, how often?

Regularly

3. How satisfied were you with how the GCA handled your issue?

Very satisfied

4. If you are a representative group (e.g. a trade association), would you consider raising an issue with the GCA on behalf of your members?

Yes

Comments:

The Group represents branded suppliers, with over half of members being SMEs (a membership list is provided in [Annex C](#)). Around a half of all packaged product sales in UK grocery comprise branded products, representing a significant proportion of overall shopper product choice. Branded products are distinctive and widely available across many retailers and channels. They compete directly with retailers' private label products, without the latter's inherent advantages. Retailers control the consumer price of all products in store (including the price differential between their own and branded products), as well as controlling key in-store / on-screen dynamics of competition such as prominence, promotions and associated product communications, all of which can be and are used to favour the retailer's private label. The GSCOP and GCA combined are crucial to ensure competition is fair, lawful and in the overall interests of shoppers and consumers.

The Group liaises with the GCA on a regular basis, to provide information on supplier experiences, discuss practices that may have GSCOP-compliance implications, explore areas where guidance may be helpful and seek input on GSCOP interpretation when new practices or situations arise. The Group and its members also meet regularly with the GCA. This contact delivers strong value, both to our members and to our training courses, keeping them current (the Group was the first to launch supplier training on the GSCOP remedy in 2013 and has run 174 courses for 2,780 delegates).

The ability for trade associations to raise issues direct with the GCA is crucial, particularly in a fast-moving commercial climate where suppliers are reluctant to raise issues themselves for fear of harming key commercial relationships (what the Competition Commission referred to as the 'climate of fear'). A retailer has many tools for disadvantaging a supplier should it wish, including reducing store or online product visibility, not taking new products or promotions, favouring a supplier's competitors and/or delisting, either in selected stores or entirely. Threats are real and powerful. As an association we raise concerns when practices affect several members and can do so in a way that protects anonymity. This gives suppliers different and additional choices for raising GSCOP compliance concerns. It also enables the GCA to understand issues which are widespread, as opposed to waiting for a number of individual complaints to be

made on the same matter. This approach has proved successful on several occasions, with issues raised with the GCA then being raised promptly with the retailer, leading to stronger compliance. This fast action allows normal trading to continue and the focus to remain on delivering for the shopper. Longer resolution would lead to uncertainty, frustration, inefficiency and higher costs.

5. What do you believe has been the impact of the GCA on the groceries market?

The impact has been wholly positive since 2013 and has been consistently sustained during the period of this review. This is evidenced by....

The practices that caused concern to the Competition Commission as harming shoppers and consumers are now monitored annually by retailer via the GCA's supplier survey. This, along with retailers' published compliance reports brings transparency and the ability to scrutinise a significant market that would otherwise be opaque. This can be done by compliance issue and by retailer (Chart 5, [GCA Annual Survey 2022](#)), illustrating the high level of regulatory focus that is achievable that is both efficient and effective.

The combined dynamics of the Code and the monitoring and enforcement powers of the GCA provide an incentive for retailers to come to the negotiating table to resolve issues that would otherwise harm shoppers. In most cases this occurs during the course of trading, with no need to involve the GCA, yet it is the presence of the GCA, its powers and its granular scrutiny of practices that provide the jeopardy and therefore the incentive to resolve problems. This is efficient and pragmatic, allowing both parties to focus more on meeting the needs of shoppers.

The GCA's investigations are also an indicator of impact and success. The fact that there have only been two indicates that the GCA's collaborative approach is working well to address most alleged breaches. The fact that the investigation reports, though several years old now, are published in detail is helpful as the GCA has made it clear that the findings and recommendations apply to all retailers, not just the two investigated. They give good insight to how retailers should approach compliance.

The GCA has been consistent in seeking a "whole-house approach to Code Compliance" (page 9, [Annual Report and Accounts, 2021/22](#)). This approach supports compliance behaviour, culturally and practically on a day-to-day basis.

The latest GCA survey shows the consistent decline of suppliers experiencing code compliance issues up to 2021 (Chart 7, [GCA Annual Survey 2022](#)). The rise in issues in 2021/22 is deemed to stem from sharp cost inflation and related negotiations around cost and price, not the performance of the GCA. We believe the increase would be significantly greater were the GCA to be ineffective or worse, not present.

Some of the key improvements introduced by Amazon since March 2022 can be attributed to the work of the GCA. These include contact points available to all Vendor suppliers, revisions to payment terms and a revised approach to supply agreements. Without the attention of an influential GCA, there would have been significantly less incentive to make these changes so quickly, or indeed make them at all.

The publication by the GCA of 7 Golden Rules on how retailers should approach supplier requests for trade price increases demonstrates the GCA's willingness to promote collaborative trading between retailers and suppliers without harming the

consumer benefits arising from buyer power. The Rules extend beyond the scope of GSCOP and the need for them illustrates the limitations of the Code and the GCA's willingness to overcome these as best he can.

While the GCA is transparent, publishing meeting notes, newsletters and supplier surveys, the full and significant influence on compliant trading relationships is discreet. The most important role of the GCA is providing the motivation and incentive for designated retailers to comply and, if necessary, resolve GSCOP-related concerns with suppliers at the point of negotiation, without recourse to regulatory intervention. Fast resolution means a speedier return to collaborative trading in the interests of shoppers. If powerful retailers do not have such incentives, suppliers can face obfuscation, inefficient processes and refusals to engage (see the GCA [Investigation into Tesco](#), 2016, Findings of fact on delay in payments). Such behaviour is currently being experienced as suppliers are forced to increase prices. As the Code contains no specific provision in this area, retailers can – and some do – ignore suppliers, passing uncertainty and excessive costs up the supply chain. This inhibits supplier investment from which shoppers and consumers benefit and is exactly what the Code was designed to prevent.

6. How effective do you consider the GCA has been in exercising its powers:

a) in providing arbitration?

We do not know as arbitrations are confidential. It is however encouraging that there was only one arbitration in 2020/21 and two in 2021/22, indicating that most disputes were resolved via quicker, cheaper means. This is how the Code, with the oversight of the GCA, should work.

b) in conducting investigations and undertaking enforcement activity?

There have been no investigations in the review period, something we consider to be evidence of the GCA's effectiveness.

As already stated, enforcement activity can be discreet, handled in the first instance under the GCA's collaborative approach with Code Compliance Officers. All the issues we have raised have been handled this way and all have resulted in positive changes in approach. As such, we consider the GCA's enforcement activity to be effective.

c) in providing advice, guidance and recommendations?

Best practice statement on forensic auditing – the aims of reducing invalid claims and providing clarity over the nature of valid claims, as well as speeding up settlement, are being achieved, based on feedback from our training courses. It is an indication of the GCA's effectiveness that all designated retailers designated before 2022 have now signed up to the voluntary agreement on such audits.

7 golden rules – cost inflation continues to present significant challenges along the full length of the supply chain. Publishing the 'rules' in [Edition 28](#) of the newsletter, outlining the relevant provisions of GSCOP, good practice and the broader requirements of competition law was timely and directly relevant to prevailing market conditions. With one exception (Rule 6 on delisting), the Rules fall outside the monitoring and enforcement powers of the GCA. This is in contrast to the provisions of the Australian [Food and Grocery Code](#) which has already been amended in relation to negotiating price rises.

The jury is out on whether the publication of the golden rules will be sufficient to prevent retailers passing upstream to suppliers the costs and risks arising from the current

extraordinary economic climate. Certainly, we continue to hear of practices that are unaligned with the Rules, notably an unwillingness to engage in and resolve negotiations on supplier price rises, with the GCA not empowered to act. This is not surprising as retailers have very strong incentives to refuse supplier price rises in order to protect their price competitiveness relative to other retailers, incentives that are stronger than the incentive to sustain the viability of products and of suppliers. This presents a significant threat to shopper product choice and the ability of suppliers to invest in quality, range and innovation.

The Groceries Code Adjudicator Act 2013 includes a provision for the GCA to recommend changes to GSCOP (paragraph 13) though this has never been used. There is now a strong case for the Code to be amended, with the aim to regulate behaviour rather than outcomes. We suggest the following additional provisions are considered:

- retailers to engage with suppliers on cost increases and in a timely manner
- retailers not to request commercially confidential information
- retailers not to manipulate market prices, directly or indirectly, via their suppliers
- retailers to report annually on their processes for negotiating supplier prices.

7. Do you think the GCA has been effective in enforcing the Code?

Yes

Our answers to the preceding questions provide evidence that the GCA has been effective in enforcing the Code. We have also indicated that the number of arbitrations, investigations and fines are not appropriate measures of the GCA's effectiveness. What is key is the extent to which the Code + GCA combined create a climate in which retailers have strong incentives to comply and address supplier concerns when they arise. The number of arbitrations, investigations and fines are therefore potential indicators of failure of the remedy rather than of its success. The effectiveness of the Code + GCA rests in the ability to resolve issues at point of trading.

Overall, the structure and operation of the Competition Commission's remedy is very effective and certainly world class. The EU's [Unfair Trading Practices Directive](#), for example, provides a contrast. The UK approach is founded on specific consumer and competition concerns identified and analysed by the Competition Commission. It is, for instance, more focused (only on retailers), broader in scope (food and non-food), simpler in terms of who is regulated, provides more supplier options for addressing issues and stronger monitoring and enforcement via a dedicated body (the GCA). While it is early days for the UTP Directive, we consider the UK approach to be more practical and useable, more effective in changing behaviour and more efficient, all at virtually no cost to the taxpayer.

The GCA's effectiveness goes beyond enforcement of the Code and reducing the incidents of unexpected costs and excessive risks being passed from designated retailers to suppliers. There have been marked improvements in productivity due to the presence of the GCA. Two illustrative areas involve the resolution of financial queries and the ability to communicate and negotiate solutions with retailers when issues arise.

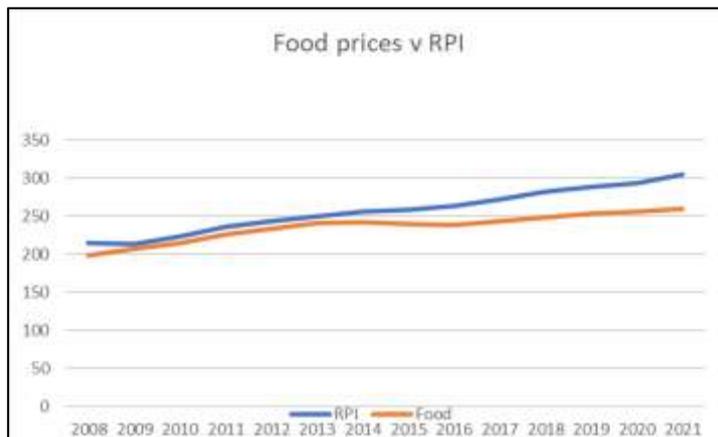
Today, all designated retailers have financial supplier helplines and, except for Amazon which we understand to be work in progress, are signatories to the voluntary agreement on forensic auditing.

Similarly, the GCA's agreement with all Code Compliance Officers to treat supplier issues confidentially provides a valuable means for suppliers to highlight potential

breaches when buying teams do not engage. The publication of contact points for Amazon is considered a particular milestone in Vendors' ability to speak to the retailer and resolve issues (smaller suppliers in particular had had no means of practical contact previously).

The Code + GCA is cost efficient and does not impact on consumer prices. The total cost of the GCA's Office in 2021/22 was £649,021, with costs funded by retailers, not the taxpayer. This cost is low overall and represents a cost of £46,360 per designated retailer, if spread equally. This represents strong value when considering the scale of the 14 designated retailers (annual sales >£1 billion each) and the c.10,000 suppliers that benefit from fairer and more lawful trading.

During Parliamentary debates of The GCA Bill 2010, it was argued that appointing a GCA would be price inflationary. Such fears have proved groundless, with the Code + GCA having no discernible impact on consumer prices, either when the Code came into force (2010), the GCA was appointed (2013) or the fining regime introduced (2015). In fact, grocery prices have risen slower than the Retail Price Index for many years. While there may be many reasons for this, greater certainty of trading for suppliers will play a part. The corollary of this is that, were the GCA to be disbanded or its duties transferred to another less effective organisation, consumer prices would either remain unchanged or prices may rise as suppliers' costs and risks of trading rise. One member refers to the positive impact on consumer prices in its comments, illustrating how the Code + GCA avoids costs that would otherwise be passed down to shoppers.



Part of the credibility of the Code + GCA remedy arises from the visibility of the GCA. In the last reporting period, the GCA held 68 meetings with retailers, 14 meetings with suppliers and 41 meetings with trade associations and other stakeholders (GCA Annual Report and Accounts, 2021/22). This is a strong and unique benefit of a dedicated regulator.

Any shortcomings in the Code + GCA remedy lie predominantly with the Code and the GSCOP Order, not the GCA. There are two to highlight over and above comments already made on the negotiation of cost increases, the transparency of retailer designation and the definition of 'groceries'.

- Designation of retailers: The process has improved significantly since the GSCOP Order was introduced, with the CMA reviewing annually those retailers reaching the threshold. This has led to the designation of Amazon, B&M, Home Bargains and Ocado. However, the process lacks transparency, relying on the confidential disclosure of groceries turnover by a retailer to the CMA. This can lead to unpredictable outcomes. Appropriate designation is crucial not only for suppliers but also for designated retailers who compete with large retailers that are not regulated,

are able to transfer excessive risks and unexpected costs onto their suppliers and do not incur the costs of compliance. Greater transparency of the data used to determine the designation outcome of those retailers exceeding or close to the threshold would add confidence to the designation process.

Case study

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- **Definition of groceries:** The definition in the GSCOP Order includes toiletries but not **cosmetics**. This presents difficulties as the legal definition in the UK Cosmetics Regulation ([Article 2](#)) is broad, covering products used to perfume or alter the body's appearance and to clean it¹. This means the top level category (cosmetics) is excluded from the GSCOP definition while a sub-category (toiletries) is included. This presents an unhelpful lack of clarity to suppliers over what is and is not covered and where lines are to be drawn between protection and lack of protection.

This confusion also affects the designation of retailers, and therefore competition between retailers. Should a candidate retailer for designation exclude cosmetics and toiletries sales from its declared turnover to the CMA, on the basis that cosmetics (and therefore by implication toiletries) are explicitly excluded from the definition of groceries, it could exploit this lack of clarity to evade designation.

We take this opportunity to highlight that designated retailers have a high market share of **over-the-counter pharmaceuticals**, yet these are excluded from the definition of groceries. Designated retailers collectively have a significant share of this category that is central to the nation's health, 72% by volume and 59% by value (52 w/e 4 September, Kantar), yet suppliers in this category do not have the Code's protection against unfair and unlawful trading.

An area to be considered in the statutory review is whether the information that the GCA may consider when deciding whether to investigate should be limited. At present, sources of information are unrestricted and we believe strongly that this is correct, giving the GCA access to all available information and evidence to inform his approach. To restrict this would be inappropriate and reduce efficiency. In a trading environment in which suppliers are unwilling to come forward with information themselves, it is particularly important for all avenues of information to be available to the GCA if the remedy is to remain effective and credible.

A further area for review is the fining regime. This is an integral feature of the Code + GCA remedy that motivates retailers to engage suppliers on GSCOP issues and incentivises them to reach mutual, compliant solutions. The Groceries Code Adjudicator (Permitted Maximum Financial Penalty) Order 2015 should remain in place and we consider the level of fines to be appropriate. It provides both a deterrent to breaching the Code and an incentive to address alleged breaches when these occur.

¹ 'cosmetic product' means any substance or mixture intended to be placed in contact with the external parts of the human body (epidermis, hair system, nails, lips and external genital organs) or with the teeth and the mucous membranes of the oral cavity with a view exclusively or mainly to cleaning them, perfuming them, changing their appearance, protecting them, keeping them in good condition or correcting body odours; UK Cosmetics Regulation

8. Do you think there are advantages of transferring the GCA functions to the Competition and Markets Authority (“CMA”) to increase efficiency, effectiveness and economy in exercise of public functions?

We see no advantages of transferring any of the GCA’s functions to the CMA and foresee some significant disadvantages.

Comments:

There are already efficiencies in the form of the GCA’s Office sharing the location and office functions with the CMA.

While we see no advantages arising from a transfer of functions to the CMA, we do see advantages in changing and freeing up the pool of talent on which the GCA may draw to staff his Office. It would increase the flexibility, skills and experience of the Office were the GCA able to draw skills from both the wider civil service and public sector and for the term of any secondment to be longer than two years where required.

9. Do you think there are disadvantages of transferring the GCA functions to the CMA and do you have thoughts on how these might be addressed?

Yes, there would be significant disadvantages in transferring functions to the CMA.

Comments

An active, dedicated monitor and enforcer of the Code is a central element of the Code and key to its effectiveness. It creates the jeopardy that both motivates retailers’ compliance and incentivises the resolution of GSCOP-related issues at point of negotiation. Weaken that dynamic and the effectiveness of the remedy will weaken and reduce to the extent that it is likely to cease being effective.

As evidence, we point to the weakness of the Supermarkets Code of Practice (SCOP) monitored and enforced by the Office of Fair Trading which was found by the Competition Commission to be ineffective and which led to GSCOP and the appointment of an independent, dedicated monitor and enforcer in the form of the GCA. The SCOP and GSCOP are not significantly different in wording. The significant difference lies in the monitoring and enforcement provisions. To transfer any functions back to the competition regulator would be a retrograde step.

It is not, in our view, practical to monitor and enforce the Code with any smaller team than the GCA’s. The same number of people will therefore need to be allocated within the CMA, thereby not delivering any efficiencies.

The GCA’s Office is funded by retailers, not the taxpayer. Any transfer of functions to the CMA will need to be funded by the taxpayer at a time when the stated aim of Government is to reduce public spending.

While we respect the CMA as a market enforcer, its core strengths do not lie in the day-to-day oversight of trading involving the multitude of transactions of thousands of suppliers with 14 retailers. We would be concerned that trading disputes, where the Code may be in breach, would not meet the CMA’s prioritisation principles for investigation. We are not aware of the CMA having such hands-on oversight and practical enforcement day-to-day of any of its other remedies. We also doubt whether the CMA will have the same visibility as the GCA, not having the resources to attend the number of meetings indicated in the GCA’s latest annual report, for example.

The CMA already has duties under the GSCOP Order, such as in designating retailers, ensuring Supply Agreements are in place and that retailers report on their compliance annually. There is no transparency of CMA monitoring of Supply Agreements, for example, despite 53% of suppliers claiming they don't have one (GCA supplier survey 2022). We also understand that duties on public reporting of compliance have now, by agreement, been taken on by the GCA. Since this development, retailers' published compliance reports have been, in most cases, more detailed and helpful than previously, underlining the positive impact of an independent body with more granular involvement.

The CMA has responsibilities for enforcing competition law though it has been silent on two ongoing retailer practices that have competition law implications but fall outside the Code. These are:

- the requirement by some retailers for their branded suppliers to provide detailed cost breakdowns to substantiate cost increases. Where the retailer has competing private label products, competition law should prevent a requirement to share confidential, commercially sensitive information with a direct competitor;
- retailers motivating suppliers to manipulate market prices. Where a retailer states that it will not accept a price increase unless other retailers increase their prices, they are not acting independently but motivating suppliers to influence the consumer prices of other retailers, contrary to competition law.

In both instances the CMA has been silent, suggesting it might also be silent when Code-related issues arise.

We have already commented on the lack of transparency surrounding the CMA's designation, and non-designation, of retailers. In contrast, the GCA is transparent in its dealings, publishing summaries of meetings with retailers and a detailed annual report. These provide valuable information and insight, contributing to supplier confidence in the role and work of the GCA. It would be concerning were this transparency to cease.

There are some important elements in the current regime that contribute to the significant effectiveness of the GCA which may not be possible to replicate, or may not work so well, under the auspices of the CMA. In particular, we point to the GCA's whole-house approach to compliance with retailers, with the work that that involves, and the collaborative approach which has been so successful in the speedy resolution of many issues and the avoidance of costly, disruptive arbitrations and investigations.

Case study

[X]

10. Do you think there would be advantages of transferring to another public body. If so, could you explain which one and why and whether there are any disadvantages?

We see no advantages in transferring the GCA's functions to another body.

Comments:

The strength of the GSCOP + GCA remedy lies in the dedicated nature of the monitor and enforcer. This presents those regulated with a credible threat.

Any transfer to a public body would transfer costs of the function from retailers to the taxpayer. We see no case for doing so. There would be no positive impact on consumer prices for example, as we have shown.

Any weakening of the CC's remedy will undo the significant progress of the last 9 years and subject suppliers to the very practices that the CC identified as harmful to consumers and competition.

11. Do you think it is still necessary to have an Adjudicator to enforce the Code?

Yes, the GCA plays a crucial role in addressing identified competition concerns in a large and important market. It is essential.

Comments:

There is strong evidence of the success and effectiveness of the role.

The cost of the GCA's Office is low and paid for by those regulated, not the taxpayer.

Recent supplier experiences of negotiating price rises due to cost inflation, an area not covered directly by the Code, illustrate what can be expected if the GSCOP + GCA remedy is weakened. Retailers have the buyer power to impose terms, to ignore suppliers and to refuse to negotiate, whatever the wider supply-chain implications of doing so.

The dynamics of the retailer / supplier relationship are summarised by one member:

Every year in our experience one or more major retailer seeks to extract additional funds from the supply base. Invariably these demands are presented in terms of collaboration and growth, however they are in reality simply a means of forcing additional investment from suppliers. Often these processes are led by external consultants with little understanding of the industries whose advice they affect and with no long term view of the essential relationships that underpin a sustainable market.

[...] medium sized or smaller businesses are forced either to lose their profits by handing over the cash, or their sales through being delisted or defocused. Unchecked this can lead to the sort of excesses that have been seen in recent times where some retailer behaviour ultimately escalated out of control, resulting in fraudulent behaviour. The mechanism by which this excess is prevented is the GCA / GSCOP. It is valued by the supply base and the best retailers benefit by the investment that is generated from genuine relationships between suppliers and retailers in the service of consumers.

Comparing the practices of designated and non-designated retailers helps to indicate the value of GSCOP + GCA. In September, Wilko, a non-designated retailer, announced it would unilaterally delay payments to suppliers due between 11 September and 8 October by a month. It also changed its supplier payment terms to a minimum of 60 days (source: The Sunday Times, 11 September 2022). Such actions are likely to breach supplier agreements, a red line of the Code, and be potentially unlawful. Wilko's buyer power would however allow it to impose the changes on many of its suppliers.

To provide further evidence, the Group surveyed its members to compare the practices of designated and non-designated retailers. On a number of key measures, designated retailers markedly out-performed specific non-designated retailers, notably in relation to fair and lawful dealing, the imposition of unagreed charges / fines, the quality of forecasts, delists without notice, the quality of buying teams, the charging of listing fees and the charging for better positioning. The results indicate....

- the positive influence of the Code + GCA. Remove the GCA and retailers will be less constrained in exploiting their suppliers;

- the undue competitive advantage that non-designated retailers enjoy over designated retailers.

An overview of the survey and the results can be found in [Annex A](#).

The GSCOP + GCA remedy as currently structured is pro-innovation and pro-growth:

Branded suppliers invest in consumer insights and innovation to meet consumer needs better than competitors. They drive innovation in grocery, bringing to market 80% of innovative products in the top five grocery retailers across 75 product categories between 2012-14 (see chart 27, [Access to Brands](#), Kantar Worldpanel | GfK | Europanel, 2017).

Examples of brand-led innovation can be found in the #WhatBrandsDo case studies on [our website](#). Innovations cover product, packaging, health and wellness, sustainability, supply chain and marketing.

The innovation creates consumer value, awareness of which is spread via marketing and advertising to reach shoppers at scale. This creates a virtuous cycle, generating greater returns on investment that provide the resources for further innovation, powering the next turn of the cycle (source: A virtuous cycle: innovation, consumer value and communication, IMD | PIMS, 2000).

[An article](#) from Kantar in May 2022 finds that strong brands deliver better shareholder returns than the S&P 500 and that brands that continue to innovate grow seven times faster than competitors. Fair and lawful dealing supports the healthy turning of this innovation and growth cycle. On the other hand, the transfer of undue costs and risks from retailers upstream to their suppliers through abuses of buyer power, if unchecked by GSCOP + GCA, disrupts the cycle, starving it of the necessary returns to function.

The GCA therefore plays an essential role in the proper functioning of the market.

Annex A

Member survey on retailers' performance

[X]

Annex B

Experiences of using the Code + GCA

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Annex C

Members

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