



The retained Horizontal Block Exemption Regulations – Call for Input

A response

John Noble
11 January 2022

Response

General questions

- IA1 The British Brands Group is a not-for-profit member organisation of companies of all sizes producing branded consumer goods. A confidential list of members accompanies this response. Most members supply fast-moving consumer goods (FMCG). The industries of most relevance to our members in relation to this Call for Input is manufacturing and the retail trade. The retail trade is of most relevance in the context of those retailers that hold significant market power and function as gatekeepers to the shopper for our members' products and/or retailers that stock both branded and their own private label products.
- IA2 Our response is made as a representative organisation of member companies. Members have been notified of the CMA's Request for Input, their views have been invited and this response has been circulated in draft form for their further input and comment. The particular issues we wish to draw to the attention of the CMA are:
- (1) the sharing of confidential commercial product information with retailers in a vertical relationship which may then be used unilaterally in a horizontal context; and
 - (2) agreements between retailers with significant market share that are used to further leverage the buyer power of those retailers.

In relation to (1), the risk of information supplied in a vertical context but then applied in a horizontal context is faced by all branded companies that supply large grocery retailers that have private label ranges.

In relation to (2), such agreements are a feature in European mainland markets and occur from time-to-time in the UK, most recently involving Tesco and Carrefour. This agreement, while involving only two retailers, affected many suppliers.

- IA3 The British Brands Group is an SME.
- IA4 We do not have information on our members' use of horizontal agreements, whether in relation to R&D or specialisations. The primary focus of our response is the impact of agreements of others in the supply chain, notably retailers, that have a direct impact on the competitive climate in which our members operate and which impact directly on innovation and consumer welfare. Such agreements, outlined above and explored further below, fall within the Horizontal Guidelines, specifically provisions relating to information sharing (HGL2) and joint purchasing (HGL5).

Specialisation BER

We have no input to make on this Block Exemption Regulation.

Research and Development BER

We have no input to make on this Block Exemption Regulation.

Horizontal Guidelines

- HGL1 Additional guidance in the Horizontal Guidelines would be of particular help in the following areas:
- (a)
 - exchange of information in circumstances where the purpose of the exchange is vertical but the relationship between the parties is, in part, horizontal – for example between a branded supplier and a retailer that also supplies private

label products. In such circumstances, the misuse by the recipient of information originally supplied for pro-competitive purposes may raise horizontal concerns.

Branded suppliers provide large retailers with significant amounts of commercially-sensitive information to secure listings, obtain retailer support and strengthen their competitive position. This is vertical in nature. Such information may comprise market trends, consumer research, product and competitor analysis, product formulations, marketing plans and new product plans. When such information however is then used to develop private label strategies, private label promotional plans and new private label products, it is no longer being applied in a vertical, but in a horizontal context. Current Guidelines are silent on this and there is no restraint on retailers using supplier information in this way. This damages the climate for innovation, allowing retailers to free ride on innovations developed by branded suppliers, and distorts competition in favour of retailers and their private label products.

Guidance would be helpful on how retailers may avoid competition concerns when using information exchanged where they have a dual role, be they bricks-and-mortar retailers or platforms.

Note that this situation differs from the exchange of information between a supplier and a retailer in the context of dual distribution (where the supplier acts as its own distributor in addition to supplying its products to retailers). First, because the information flow is from the party with the dual role (the supplier) to the party with the pure vertical function (the retailer), the opportunity to misuse information supplied for a legitimate purpose should not arise. Second, since in dual distribution both the supplier and retailer have the incentive to work together to maximise the sale of the same products (those of the supplier) there is – in contrast to the position of a retailer who receives information while also acting as a provider of private label products – no conflict of interest;

- the operation of retail buying alliances that involve large retailers, including those that are national and those that operate across borders. Such alliances may or may not involve joint purchasing and / or information exchange. Further guidance is required on when such alliances are, and are not, pro-competitive.

Factors to be assessed in determining whether an agreement restricts competition include whether: the coordination integrates purchase functions, retailers coordinate on coercive measures and retailers hold power over suppliers.

The exchange of information is a further factor relevant to further guidance in relation to retail buying alliances, members of which can be mobile, moving between alliances. An EU Competition Policy Report of July 2021 referred to "an EU-wide systemic risk of collusion through alliances both at national and international level. The risk of excessive transparency has been made more acute since retailers have often changed partners in these alliances, and specialised managers have been moving between retailers and alliances as a result, thus providing more opportunities for retailers to collude" to the detriment of suppliers.

HGL1 Further guidance in relation to digital issues would be helpful, notably in relation to data
(c) pools, data sharing and dual distribution.

Data pools

Data pools are an important feature of modern consumer goods markets, ensuring fast, efficient supply chains nationally and internationally which at the same time reduce environmental impact. We are not aware of competition concerns arising in relation to these pools. Rather, we wish to underline their importance in the sectors in which our

members operate and that clarity in the Guidelines that they enjoy safe harbour would be helpful.

Dual distribution

Information exchanges between suppliers and distributors in a dual distribution context are common and pro-competitive, although the precise content may vary according to the needs of the parties, the type of products in question and the circumstances (e.g. promotion). However, as set out above, since the information should flow from the party with the dual role (the supplier) to the party with the purely vertical role, no conflict of interest and no opportunity for the misuse of information should arise. Given the frequency with which such circumstances arise, specific guidance to the effect that, to the extent information flows only from the supplier to the retailer, such exchanges do not raise concerns, would have substantial value to industry generally and branded goods suppliers in particular.

- HGL1 Improving the sustainability both of products and their packaging is a key priority for all our members and so specific guidance on co-operation agreements that pursue sustainability goals would be both relevant and helpful. A dedicated chapter in the Guidelines would underline the importance of the topic.
- (d)

Despite the importance of the subject and members' commitment to improve, they often face the issue of 'first mover disadvantage' – that companies which invest in increased sustainability may suffer costs that render them less competitive. While action on a company basis can help move the dial towards sustainability, it may not lead to the extent or speed of action necessary. Industry co-operation may therefore be required to achieve certain goals. Such co-operation should not be inhibited through uncertainty over the competition law implications. For example, it would be helpful to have clarity that agreements that achieve environmental goals or otherwise improve sustainability can also improve the production or distribution of goods or promote technical and economic products and may therefore be eligible for exemption on that basis.

In short, companies may be dissuaded from investing in co-operative improvements in sustainability unless they are clear on what is, and is not, allowed.

Information exchange

- HGL2 We believe the Guidelines can be clearer and more forceful in highlighting where information exchange may and may not be problematic where a retailer is both a supplier's (vertical) retail customer and direct (horizontal) competitor via the provision of private label products. In particular, safe harbour guidance as to the circumstances in relation to which such exchanges can take place can occur without raising competition concerns would be of great value.
- (b)

Suppliers and retailers must have confidence that the sharing information in relation to the vertical relationship can be achieved in a compliant fashion, as this is essential to the listing, marketing and promotion of products, including new products. Meanwhile, retailers need to be alert that using such information to inform the development and strategies of their competing private label ranges is likely to give rise to competition concerns, unless such information is in the public domain.

Retailers with private label ranges do not warrant any special treatment in relation to competition law. Private label has a high market share in UK grocery (52% in 2021: Statista) and enjoys significant competitive advantages, with retailers controlling, both in-store and online: the consumer price of both branded and private label products; the presentation of products, including facings and rankings; promotions; and all communication at point of sale.

Purchasing agreements

HGL5 A combined market share of 15% is a level for safe harbour that we support, while noting (a) that it is an unreliable measure of market power. The Competition Commission in its 2000 Supermarkets market investigation found that:

any main party with more than an 8 per cent share of grocery purchases for resale from its stores, and accordingly all the major buyers (Asda, Sainsbury, Somerfield and Tesco), are, for the most part, able to control their relationships with suppliers to their own advantage, whilst the smaller multiples are not able to do so to anywhere near the same extent (para. 2.458).

Similarly, the existing EU Horizontal Guidelines state that:

Joint purchasing arrangements usually aim at the creation of buying power (para. 194).

Where increased buyer power is offset by increased efficiencies, no concerns should arise. However, many joint buying arrangements involve no physical integration of the parties ordering, purchasing or delivery functions. Such arrangements cannot generate material efficiencies and are therefore likely to be inherently problematic.

Two key factors contribute to retailer's (and retail alliances') buying power:

- (1) consumers stick to their preferred retailer as consumers purchase a basket of grocery products when grocery shopping and do not tend to switch retailers if products are missing in their store. This stickiness confers a retailer with power over its suppliers;
- (2) relative market shares between retailers and suppliers matter more than absolute market shares. In grocery, suppliers obtain a much greater share of sales from large retailers compared to the share of sales that large retailers derive from any given supplier. The balance of market power therefore rests with retailers.

As in the case of market power generally, the critical factor in terms of buying power is whether the retailers in an alliance are unavoidable trading partners because they function as important gateways to shoppers, either at a national or at a regional/local level. Both online and bricks and mortar retailers may meet this criterion.

While we support a safe harbour combined market share of 15%, this should be considered a maximum.

The same analysis applies to retail alliances that comprise large retailers operating in different national markets. Indeed, the physical separation of the members' activities make the integration of those activities, and therefore the achievement of material efficiencies, particularly unlikely in such cases. It is therefore imperative that such arrangements exist only within the 15% safe harbour. The fact that such buying alliances will inevitably operate in relation to suppliers that are 'multinational', this does not alleviate the potential concern. Many suppliers will inevitably seek to expand their markets by operating internationally. It does not follow that they will be large or sophisticated companies able to protect themselves from the abuse of buyer power.

HGL5 While market power is one influence on the competitiveness of retail buying alliances, it (b) would also be relevant and helpful were the Guidelines to consider and expand on other competition considerations, specifically whether the co-ordination includes a purchase function and whether retailers co-ordinate on coercive measures against suppliers.

The purchase function

As set out above, buyer coordination that is dissociated from physical integration of purchasing functions cannot generate material pro-competitive efficiencies.

Buyer co-ordination dissociated from purchasing arises notably in international grocery retail alliances which erect access barriers to local retailers and extract access fees from suppliers through the accumulation and exercise of the collective market power of the participating large retailers. They replace independent decision making in the market with co-ordinated conduct to bring about market outcomes that deviate from the competitive process and therefore do not warrant safe harbour.

Coercion

In assessing the competition effects of co-ordination where joint purchasing does not occur, it is relevant to consider the content and nature of the agreement. International grocery buying alliances for example may comprise a series of coercive measures that may give rise to anti-competitive effects:

- (1) participating retailers agree to force suppliers to enter into supplementary agreements with distinct retail entities as a precondition for accessing all participating retailers;
- (2) retailers agree to fix and impose access fees on suppliers that provide little or no genuine value;
- (3) retailers agree to threaten and execute collective boycotts of suppliers that resist the supplementary agreements and access fees.

These measures replace independent retail decision making to extract rents from suppliers that retailers could not obtain through the normal competitive process.

Such international buying alliances are a strong feature in some (particularly EEA) markets and there is no feature of the UK market that precludes their appearance and growth in the UK market. It is therefore important for the Guidelines to be clear on the pro-competitive elements that purchasing agreements, whether national or international, must include to be eligible for safe harbour.

Impact assessment

The following is our assessment of our proposal on the competitive process, innovation, consumer welfare and our members:

Information exchange where retailers have a dual role – constraints on the use of such information for horizontal purposes while leaving vertical purposes unrestricted and unaffected – **Significant**

Information exchange where suppliers operate dual distribution – clarity in the Guidelines that such exchange does not give rise to competition concerns would be reassuring to all business that operate such approaches – **Significant**

Joint purchasing – limiting buying alliances (whether national or international) to those with a combined market share of 15% with active purchasing and no coercion – **Significant**

Sustainability – greater clarity and certainty over what horizontal co-operation will be allowed in pursuit of sustainability goals and how fines may be mitigated – **Significant.**