# Response

**CMA consultation on draft guidance on the application of the Chapter I prohibition in the Competition Act 1998 to horizontal agreements**




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## Response from the British Brands Group

# 1. Introduction

The British Brands Group (the 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. The industries of most relevance in relation to our response to this consultation are manufacturing and the retail trade.

The parts of the retail trade of particular focus are supermarket retailers that have significant market power, that act as strong gatekeepers to consumers for our members' products and/or that stock both branded and their own private label products and are therefore at the same time important retail customers and direct horizontal product competitors with their own private label ranges.

Our response to the CMA's consultation on draft guidance on the application of the Chapter I prohibition in the Competition Act 1998 to horizontal agreements (the Guidance) is made as a representative organisation of member companies. Members have been notified of the CMA's consultation, their views have been invited and this response has been circulated in draft form for their further input and comment.

The Group's comments focus on Chapter 6 (Purchasing Agreements) and Chapter 8 (Information Exchange) and a number of additional comments are made.

# 2. Purchasing Agreements

### 2.1 Retail alliances

While the Guidance on purchasing agreements and on buyer cartels is helpful, it does not cover supermarket retail alliances that jointly sell services to branded goods suppliers (as the Carrefour / Tesco alliance did and alliances such as Agecore, Coopernic and Epic do in continental Europe and that could re-emerge in the UK).

Retail alliances are identified at para. 6.2 of the draft but they appear to be equated with joint purchasing arrangements. Many supermarket retail alliances jointly negotiate and sell commercial marketing services to branded goods suppliers, rather than or in addition to undertaking a joint purchasing function. Services sold to branded goods suppliers by continental supermarket retail alliances may include facilitation of top-to-top meetings, promotions and new product launches by alliance members and sale of alliance members' sales data. The purchase of these services by branded goods suppliers is not optional. These alliances effectively act as gatekeepers, requiring payment for these services in order to get access to the supermarket shelf space.

As such, the negotiations that international supermarket alliances typically conduct are not joint purchasing negotiations on behalf of retailers, but distinct arrangements that fall outside the concept of joint purchasing and must be assessed separately. We propose the CMA excludes from the scope of the definition of joint purchasing those cases where buyers cooperate through collective tying arrangements to force suppliers to sign separate service agreements that are unnecessary and artificial. Well-functioning markets that allocate resources on the basis of competition on the merits are key to increasing consumer welfare in the long term.

It would be helpful were the Guidance to cover this scenario separately. In particular, it would be helpful to have further guidance on the boundaries of these supermarket retail alliances. This would include guidance on:

> the risks associated with the exchange of competitively sensitive information between retail alliance members within the same retail alliance as well as between alliances, the members of which are often mobile; and
>
> the need for confidentiality, notably the obligation not to disclose to other members the terms negotiated with particular members.

**2.2 Coercion**

In our view, where supermarket retail alliances resort to coercion by ceasing to purchase products from branded goods suppliers or threatening to do so, this should be considered anti-competitive by object. It is not clear why such conduct is considered as a collective boycott when implemented by a buying cartel, but merely a "bargaining threat" when implemented by a retail alliance (paras. 6.38 and 6.39). In both cases, the agreement leads to an outcome that is not achieved through the normal competitive process. In the case of supermarket retail alliances, they orchestrate product delisting (threats) to enforce a tying mechanism that serves to impose unnecessary service agreements on suppliers.

Example 2 in Chapter 6 does not accurately reflect the variances in supermarket retail alliances and the differing negotiation processes between suppliers and such retail alliances that exist. It is therefore potentially misleading in its focus and underplays the outcomes and potential harms to consumers.

First, the negotiations with the alliances such as the one described in Example 2 do ***not*** typically "*cover an additional rebate (…) in return for certain promotional services*". As the market access fees that they charge are lump sums paid to the alliance and then distributed as lump sums to its members, they are unlikely to be passed on to consumers in the form of lower retail prices or to be used to fund activities that increase sales, such as promotions.

Second, they typically do ***not*** negotiate "*certain terms and conditions* (…) *based on which the*(ir members) *individually purchase their required quantities*." Instead, they negotiate to impose unnecessary service agreements on branded goods suppliers in exchange for the right to negotiate supply agreements with their members. Although the services offered by these alliances are usually notional, they are sold at a high price. Since branded goods suppliers cannot afford to lose access to the must-have shelves of several retailers at the same time, they have no choice but to pay these market access fees, which these alliances are almost free to increase, leading to an inflationary effect on the cost to supply.

Third, there is no way of knowing ex ante whether a purchase stop will be temporary or permanent. Rather, any purchase stop is potentially permanent as long as the parties fail to reach an agreement.

Fourth, the fact that "*each member of the alliance decides individually which products from the manufacturer to stop ordering during the temporary stop*" is in fact an aggravating circumstance of the collective boycott orchestrated by the alliance, since leaving it to its members to decide (according to the local competitive environment and private label ranges) which products to delist will maximise the impact on the branded goods suppliers and minimise the collateral damage to the member retailers.

Enforcing an "empty shelf policy" to put pressure on branded goods suppliers is not appropriate for joint negotiations that do not relate to the products to be delisted. Such delistings are damaging to consumers who are forced to settle for less attractive alternatives or to switch

retailers to find their preferred products. They are also very damaging to branded goods suppliers, as market access fees reduce their incentives and ability to invest in branding, marketing, production improvements, or efficient sourcing of raw materials. There is a very real risk of harm to consumers due to the longer term impact on branded goods suppliers' investment and innovation resulting from the costs of such arrangements.

Such conduct should not qualify for an exemption as it is neither strictly necessary nor proportionate to the object of the agreement. We would recommend adjustments to Example 2 to better reflect the reality of the bargaining process.

### 2.3 Bargaining power

The Group believes that the 15% purchasing and selling markets market share safe harbour for joint purchasing arrangements is reasonable (para. 6.24). However, we do not believe that the Guidance adequately identifies market power in relationships between branded goods suppliers and supermarket retailers.

The critical factor in relation to buying power is whether the supermarket retailers (whether or not in an alliance) are unavoidable trading partners because they act as important gateways to consumers, either at a national or at a regional/local level. Both online and bricks-and-mortar retailers may meet this criterion. Bargaining power depends on the share of sales that each of the negotiating parties generates via the other party in the relevant market. If a branded goods supplier generates a large share of its sales via the retail purchasers in the relevant market while the retail purchasers generate a comparatively smaller share of their sales via the branded goods suppliers, the supermarket retailer purchasers will have bargaining power over the supplier. Further, the risk of adverse effects from purchaser cooperation will be higher.

We recommend that the Guidance be adjusted to reflect this specificity of the branded goods supplier/supermarket retailer market.

## 3. Information Exchange

### 3.1 Retailer dual role as customer and competitor

Branded goods suppliers and supermarket retailers would benefit from clearer guidance on information exchanges in the context of supermarket retailers’ often dual role as customers (in the resale of branded goods to consumers) and as competitors (in the sale of own label products competing with those supplied by branded goods suppliers). There are circumstances peculiar to this relationship which give rise to potential competition concerns, namely the need to share information in the customer role that would not normally be shared in the competitor role. The group urges the CMA to include specific reference to this situation in the Guidance.

There are several common scenarios giving rise to particular concern, including the provision of information by branded goods suppliers to supermarket retailers that is necessary to i) obtain a product listing; ii) obtain retailer support for promotions; and iii) justify a price increase. Such information may comprise market trends, consumer research, product and competitor analysis, product formulations, go-to-market costs, marketing plans and new product plans. This is part of the normal process and raises no competition law compliance concern when used in the vertical supplier/customer context. When such information is used by supermarket retailers to develop private label strategies, including product launches, price positioning and promotion plans, the information is being used in a horizontal competitor context, distorting competition in favour of retailers and damaging the climate for innovation.

Para. 8.29 provides examples of competitively sensitive information, the exchange of which is qualified as a by object restriction. Para. 8.29 (h) specifically identifies “The exchange with competitors of elements of a potential entrant’s launch plans”. Branded goods suppliers are required by supermarket retailers to provide just such information, often quite some time in advance in order to obtain new product listings. Similarly, supermarket retail customers may require detailed cost information supporting branded goods suppliers’ requests to implement product cost price increases. When a retailer requires a supplier to provide this information, there should be no risk of the supplier infringing competition law because it provides this information unilaterally and we would ask that this be made explicit in the Guidance.

Para. 8.53 specifies that “When an undertaking receives competitively sensitive information from a competitor …, it will be presumed to take account of such information and adapt its market conduct accordingly …”. Clarification in the Guidance, perhaps by way of example, would provide assurance to branded goods suppliers and supermarket retailers that providing this information to customers in their capacity as retailers will not give rise to a risk of restriction by object. Guidance would be beneficial on the risks associated with the misuse of this information by supermarket retailers for their own label strategies and what measures supermarket retailers might consider putting in place to minimise the risk of misuse, such as the use of confidentiality agreements or firewalls between customer teams and own label teams.

### 3.2 Competitively sensitive information

The list of information that is considered competitively sensitive, the exchange of which has been qualified as by object restrictions, is helpful. However, the list focuses predominantly on output information such as prices and volumes, while input and operational information is under-represented. It would be clearer to expand the list to include such areas as market research results, innovation plans, quality changes, process and logistics practices and developments and cost breakdowns. This type of information is often required to be provided by branded goods suppliers to supermarket retailers in their capacity as customers, a context that should be considered appropriate under competition law. However, such information is competitively sensitive if used by supermarket retailers for their competing own label businesses unless explicit measures are in place to prevent the information transfer.

### 3.3 Public domain information

The Group would value expanded guidance on the concept of “public domain information” that is not “genuinely public information” (para. 8.33 (b)). The type of scenario that branded goods suppliers face is requests from a supermarket retailer to supply it with current market consumer pricing data from across the market, requiring data collection through on-line research and in person store visits, for example. Such requests may involve analysis of one or two, or more retail competitors and may be ad hoc or more frequent. It could be inferred from the draft Guidance that such data collection and collation would not constitute genuinely public information and that the exchange of this data, irrespective of the number of competitors assessed or the frequency, would constitute an exchange of competitively sensitive information with potential liability for infringement of the Chapter I prohibition. Clarification on this point would be appreciated.

In addition, guidance on which party should bear the costs involved in collecting the information would be welcomed, to cover situations where the costs of information gathering are passed upstream via the application of buyer power. It is currently unclear in the draft Guidance whether the relevant costs are those incurred by the provider of the information (e.g. a branded goods supplier) that may have access to crawlers or similar that would enable the information to be collated with potentially lower costs, or those potentially higher costs that would need to be

incurred by the recipient (e.g. a supermarket retailer), in order to conduct on-line research, conduct in person store visits or invest in an on-line crawler.

Furthermore, the Group considers that the example of the petrol station pricing information provided at para. 8.34 – 8.35 is outdated. It is clear that there would be substantial time and transport costs involved in collating the prices advertised on the board of petrol stations spread all over the country. However, such fuel pricing information is now readily available on a range of price comparison websites. The Group suggests that a different example would be preferable – one where there would indeed be substantial time and costs involved in collating information that is not readily available in this manner.

### 3.4 Historic data

We are surprised that the Guidance indicates that consumer preference data over the last year is not considered historic (para. 8.50). In our view, such data should not be considered problematic, at least in the context of relationships between branded goods suppliers and supermarket retailers. By its very nature, the data does not reveal anything about competitors' intended behaviour. If anything, it should be considered pro-competitive, enabling suppliers to adjust their go-to-market strategy, product innovations and positioning more quickly. There is a considerable time lag between the collection of data and the adjustment of product offerings on supermarket shelves. Therefore, the quicker the adjustments can be made, the quicker the consumer benefits.

We would also welcome some clarity over any competition concerns between the position stated in para. 8.50 and that in para. 8.62. The latter paragraph, in our view, correctly recognises the growing importance of real-time data to the ability of businesses to compete effectively and that "… the highest competitive advantage may be obtained by the automated real-time information exchange."

An adjustment to the Guidance to expand on these points and provide clarity on the permissibility of real-time information exchange would be of benefit to everyone.

## 4. Other Comments

**Para. 3.8-3.10**: The Group welcomes the recognition that agreements between parents and their joint venture generally fall outside the Chapter I prohibition where the parents exercise decisive influence over the joint venture. It also welcomes the clarifications about the circumstances in which the Chapter I prohibition can apply to the relationship between the parties to a joint venture.

**Para. 3.47**: in the context of assessment under the section 9 exemption, the Guidance states in the last sentence of para. 3.49: "However, fixed cost savings are, in general, less likely to result in benefits to consumers than savings in, for instance, variable or marginal costs."

It would be helpful to have support for this assertion and an explanation. Could these savings not meet the requirements for exemption?

**Para. 4.159**: again, in the context of assessment under the section 9 exemption, the Guidance states in para. 4.159: "Moreover, the higher the market power of the parties, the less likely they are to pass on the efficiencies to consumers to an extent that would outweigh the restrictive effects on competition". Para. 5.129 contains a similar statement.

It would again be helpful to have support for these assertions and an explanation.

## 5. Conclusion

The Group would be grateful were the CMA to adapt the Guidance to take account of the specificities of the relationship between branded goods suppliers and supermarket retailers, in particular the dual role of supermarket retailers as both customers and competitors and the realities of market power in this market. We stand ready to assist in the further development of the Guidance on these issues, for example by developing modified or additional examples.

## Annex – Membership list

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