



A response

to the Digital Markets Taskforce's Call for Information

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The Brands Group Limited
100 Victoria Embankment London EC4Y 0DH
Telephone 01730 821212
Registered in England and Wales No 5660494
Registered Office as above

www.britishbrandsgroup.org.uk

The voice for brands

OVERVIEW

The British Brands Group, a not-for-profit organisation of branded suppliers of all sizes, welcomes the opportunity to present its views on competition and consumer matters in digital markets, notably where large companies are intermediaries between producer and consumer.

Brand suppliers provide quality, trusted products and choice to shoppers and are a dynamic force for competition, competing on quality and reputation as well as price. They also drive innovation (for example in grocery branded suppliers account for 80% of new products).

A range of factors are expected to contribute to the definition of Strategic Market Status (SMS), with the most important common denominator being scale. Nevertheless, a single measure of scale (such as turnover or market share) may not be the most appropriate basis on which to designate firms with SMS, with a range of criteria being potentially a more adaptable approach.

Digital markets shift and evolve rapidly, requiring any *ex ante* approach to be flexible and subject to review on a regular basis.

The practices of greatest concern to members fall mostly under the principle of fair trading and include those that arise from significant market power, harm the reputation of others and mislead consumers and/or affect their ability to make accurate, informed choices.

In particular we highlight: [X<]. These issues are compounded by ineffective means and processes to address concerns and resolve disputes.

When considering enforcement, we draw on our experience in the UK grocery market and the Groceries Supply Code of Practice which promotes fair and lawful dealing by large retailers. This has proved transformational, incentivising firms to resolve issues and disputes at the trading level, often at point of negotiation, with little need to raise complaints or prompt regulatory action.

According to the Groceries Code Adjudicator, the sector has become more competitive, more efficient and more innovative since the Code has been in place and there have been no identified unintended consequences.

Some practices that cause concern online may contravene existing laws, such as the Consumer Protection Regulations and intellectual property law. We urge a holistic, inclusive rather than a silo approach to digital regulation, with the necessary enforcement powers being available to the regulator.

A response

to the Digital Markets Taskforce's Call for Information

1 INTRODUCTION

The British Brands Group provides the voice for brands and has suppliers of branded products as members ([<]). Its mission is to build a climate in the UK where brands can best deliver value and choice to consumers. This requires competition that is both vigorous, fair and safe. Members vary in size with two thirds of members being SMEs. Members supply a range of branded products and the digital retail channel is an important route to the consumer for most.

- 2 Branded suppliers compete using a deep understanding of shopper behaviour and consumer needs and wants to develop differentiated products that resonate with individuals, rationally and often emotionally. Over time and with continuous investment, brands can inspire strong levels of trust. They reduce consumer search costs, allow for fast, accurate decision-making and strengthen competition by competing on quality, innovation and reputation as well as price. Innovation is a key driver of their competitiveness. In the UK grocery channel between 2012-2014 for example, 80% of the innovation in the top five grocery retailers across 75 product categories was brought to market by branded suppliers (source: Kantar Worldpanel).
- 3 Branded products require significant up-front investment to sustain and strengthen their reputations and competitiveness. This includes investment in R&D, production, reputation, advertising, distribution and brand protection. The scale and up-front nature of the investment carries significant risk and means that access to the greatest number of shoppers via wide, competitive distribution is required to achieve the necessary economies of scale to deliver competitive value. This however makes brands vulnerable where powerful retailers, whether digital or bricks-and-mortar, have buyer power, act as gatekeepers to the consumer and transfer costs and risks unduly to suppliers without complementary benefits in return.
- 4 Many members supply branded products to grocery supermarkets so we have many years' experience of a sector with high levels of retail concentration, buyer power, associated unfair trading practices, strong gatekeeper functions and competition from retailers' private label products, with associated self-preferencing. The grocery market is unquestionably competitive but nevertheless one in which adverse effects of competition (AECs) have been found, for example with excessive risks and unexpected costs being transferred to suppliers, damaging their scope to invest in quality, innovation and range¹. We also have worked since 2001 on various behavioural remedies introduced by the Competition Commission on a practical, day-to-day level, including as a leading training provider.

¹ Competition Commission, *The supply of groceries in the UK market investigation 2008*, paragraphs 36-38

- 5 Large digital retailers and platforms [X] have developed a compelling and competitive consumer proposition, proving agile in extending this into new markets. While bringing strong consumer benefits, we have seen sufficient instances of unfair trading, including undue costs being passed to suppliers and harm to brand reputations, to cause significant concern. Meanwhile, search engines and on-line advertisers including social media platforms are powerful drivers of millions of consumers to websites, some of which sell illicit products and fakes.
- 6 The Group strongly supports the work of the Digital Markets Taskforce in developing an *ex ante* approach to regulate large digital companies that provide an important route to market for products of all kinds. Furthermore, our experience of the Groceries Supply Code of Practice (GSCOP) gives strong confidence that a legally binding, enforced code can be highly effective in stimulating fair trading while at the same time allowing greater levels of innovation, efficiency and choice.
- 7 **WHO SHOULD BE COVERED?**

In considering how to assess whether a firm has 'Strategic Market Status' (SMS), our response focuses primarily on those firms funded on a pay-to-play basis as opposed to by advertising, although many of the concerns are common to any platform through which branded products can be promoted or sold. We also focus on those factors of particular significance to branded suppliers. These factors represent neither an inclusive nor an exclusive list, being instead considerations for the Taskforce to explore as it defines its approach.
- 8 The digital firms that are of particular significance in the operation of a market are those that (1) hold a key position in the supply chain between branded suppliers and their consumers and (2) are considered important or unavoidable for many suppliers to the extent that they have the power to set the rules on market access and interaction with consumers and are able to negotiate on a 'take-it-or-leave-it' basis.
- 9 When digital firms evolve into complex entities providing their own products (private label), integrated services (cloud storage, payment solutions, fulfilment, delivery), content (advertising, search) and extensive data capture, their influence on the market becomes particularly strong and fuels rapid growth
- 10 We flag that search engines may have substantial market influence in relation to searches. Consumers mostly access websites belonging to brands online through search engines and sometimes inadvertently link to websites seeking fakes and illicit products. While search engines usually claim little control over the accessibility of websites due to the role of algorithms, there is little transparency on the algorithms used, with branded products being disadvantaged.
- 11 Listed below are some factors that warrant consideration in determining SMS.
- 12 *Market power*

In the 2000 Supermarkets Market Investigation, the Competition Commission stated that "any main party with more than 8 per cent share of grocery purchases for resale from its stores ... are, for the most part, able to control their relationship with suppliers to their own advantage, whilst the smaller multiples are not able to do so to anywhere

near the same extent.” (Supermarkets, Volume 1, paragraph 2.458). It is clear that market power may have adverse effects well below traditional levels of dominance.

13 *Switching costs*

Where costs to the consumer of switching platforms are greater than the costs of switching product choices, for example in the absence of conveniently comparable alternatives, consumers may be locked into the platform, distorting consumer choice and competition at the product level and increasing bargaining power of digital firms with suppliers.

14 *Vertical integration*

Firms that are vertically integrated, developing and selling their own (private label) products, hold particularly powerful market positions. They are able to use privileged and commercially confidential information from sellers and suppliers that is not available to others in order to develop private label products. This acts as a barrier for suppliers and strengthens the negotiating position of the firm vis-à-vis its suppliers by providing ready access to alternatives. At the same time, data on shopper behaviour and control over the sales environment and marketing levers provide the scope to preference products to their advantage. The overall effect is downward pressure on suppliers’ innovation.

15 *Control over marketing levers*

Where firms control the essential marketing levers of Product, Place, Price and Promotions, they control the dynamics of competition and consumer choice, the impact of which grows with scale. The outcome may distort competition between suppliers and also between retailers.

16 *Control over the reputation of others, including competitors*

Reputation is a crucial factor of competition for branded products and reputational damage through the actions of third parties², whether or not intended, can have significant consequences. The sale of counterfeits is perhaps the most cited instance, though there are many others – fake or misleading reviews; third-party seller product descriptions which are inaccurate; copycat products that misleadingly imply similar performance and/or reputation as the original; misleading and inaccurate product comparisons; and imported branded products that are of a different specification to the UK variant and/or do not comply with UK regulations. Where reputational damage is caused to a branded product on a platform that also sells its own (private label) products, then horizontal competition between the two products will be harmed.

17 The attributes that differentiate digital from traditional markets are a combination of network effects, economies of scale, economies of scope from data, low or no marginal

² 14.37% of fake goods detained at our borders now prove to be dangerous to consumers. The latest [Europe-wide report](#) calculates that 10% of consumers have been misled into buying counterfeit goods. When these fake products prove to be poorly made and do not meet expectations, then those buyers will often blame legitimate manufacturers.

In such cases, consumers will often leave negative reviews online. This can have a damaging impact on the reputation of a company, fostering the view that the real brand manufactures low-quality products. On key e-commerce platforms [Amazon] which uses a combined listings system. In the circumstances, a fake bought from an official listing, can result in a consumer leaving negative reviews on the same official list. As these reviews are used as community the effect can be dramatic.

costs, low distribution costs compared to traditional retailers, global reach, a strong consumer proposition (range, purchase and delivery) and strong consumer tie-in across services (e.g. Amazon Prime, now with free delivery of groceries for orders over £40). The common denominator across all attributes that are likely to confer 'strategic market status' is scale.

- 18 Digital markets have the ability to evolve fast and routes to market can change rapidly so agility and flexibility will be key features of any regulatory approach to firms of SMS selling direct to consumers or facilitating such sales. For example, Instagram has very recently started end-to-end sales within its app, rather than linking to external platforms. Uber quickly became a popular route to market for products. Products can be purchased from social media such as Facebook, Instagram and Pinterest and sales may feature in private chats in Facebook, including WhatsApp, facilitating sales of illicit products.
- 19 Turnover may be one measure to determine SMS but has limitations. This is the approach adopted for designation under the GSCOP Order, after the Competition Commission concluded that retailers with a grocery turnover greater than £1 billion should be regulated³. However, large firms with strong market positions in important sub-sets of the defined market, such as Boots and Holland & Barrett in the case of grocery, are not designated because they are deemed not to exceed the turnover threshold. This means they do not bear any related compliance costs and may breach GSCOP without challenge, potentially distorting competition between retailers. A further difficulty with a turnover threshold is properly identifying the turnover which relates to the market in question (in the case of GSCOP, turnover from grocery sales).
- 20 Were turnover to be used as the basis for designation, it would be important for an individual firm's turnover in the relevant market to be scrutinised and verified by an independent third party, rather than the regulator relying on self-declaration by the firm.
- 21 An alternative measure may be the *Significant Market Power* test in the telecommunications market. The EC Guidelines⁴ set out a number of criteria for effective competition, not being a comprehensive list of all possible criteria but the types of evidence that could apply. The criteria are also not cumulative and could apply in any combination.
- 22 Whichever approach is adopted, the speed of change in digital markets is such that regular reviews of any thresholds for regulatory intervention as well as regular reviews of digital markets themselves to identify those firms that may be developing or have recently developed SMS will be important. As an illustration, the designation of retailers under the GSCOP Order is now undertaken annually, something not envisaged when the Order was first published, and has resulted in three new designations in recent years.

³ Competition Commission, *The supply of groceries in the UK market investigation* 2008, paragraphs 11.410-12

⁴ Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, OJ [2002]C 165/6

- 23 In determining to whom any code should apply and how, for example whether to the whole firm or parts, it is essential to consider:
- situations where a supplier may have dealings with many parts of the same firm, with the firm having the scope to leverage its power by using an unregulated part to secure unfair terms or other concessions to the benefit of a regulated part or the firm overall;
 - the complexity of corporate structures and agreements and how they may shift rapidly in complex and unexpected ways. For example, in grocery, Asda purchases fresh produce through a subsidiary International Procurement and Logistics (IPL) and in 2018 Tesco's moved into the wholesale market with its purchase of Booker. GSCOP proved sufficiently flexible to accommodate both, although the latter could only be achieved by voluntary agreement with Tesco rather than a requirement under the Code. The effectiveness of any code should not be reliant on the goodwill of any party;
 - situations where a firm with SMS collaborates with a third party, such that the market power of the SMS firm may be leveraged via that third party;
 - the application of a code to any buying alliances which include firms with SMS.
- 24 Far from being neutral digital sources of information and non-partisan fosterers of communities of interest, firms with SMS are likely to be complex entities with significant market power and access to extensive data which combined can result in significant effects on upstream and downstream markets. Strong incentives are required for such firms to act fairly and lawfully, in ways that promote competition and safeguard consumers. Liability under relevant regulations would be an important component of such incentives.
- 25 WHAT PRACTICES CAUSE CONCERN?
- 'Fair trading' is the critical area for our members on which any *ex ante* approach should focus. We support the Furman Report's principles that business users are:
- provided with access to designated platforms on a fair, consistent and transparent basis;
 - provided with prominence, rankings and reviews on designated platforms on a fair, consistent, and transparent basis; and
 - not unfairly restricted from, or penalised for, utilising alternative platforms or routes to market.
- 26 In the context of fair trading, the areas of harm for members fall under the following themes:
- fair and lawful dealing;
 - contractual compliance;
 - commercial confidentiality, notably where conflicts of commercial interest arise;
 - influence (direct and indirect) over the reputation of business users and their products; and
 - consumers' ability to make fully informed, accurate purchasing decisions.

- 27 The 2008 groceries market investigation found that the transfer of excessive risks and unexpected costs from retailers represented an AEC⁵. The resulting remedy, GSCOP, has ‘fair and lawful dealing’ at its core⁶. We fully endorse this approach and recommend an even more flexible and holistic approach to regulation in the digital markets sector given their rapid pace of change and evolution. This includes our strong support for provisions that empower consumers to make accurate, informed choices, with the clear presentation of options and without misleading information.
- 28 [✕]
- 29 *The imposition of unfair terms*
This includes: [✕].
- 30 *The imposition of unfair procedures*
This includes: [✕].
- 31 *Withholding of information to lock in trading partners*
An example is [✕].
- 32 *Withholding of information to hamper trading partners*
[✕].
- 33 *Misuse of algorithms*
[✕].
- 34 *Control of trading partner reputation*
The long-term reputation of branded products is key to their competitiveness and an important consideration for consumers, building trust and enabling fast purchasing decisions with high levels of confidence. Activities that unjustly undermine reputation and consumer trust are therefore of particular concern.
- 35 The sale of counterfeit products online is just such a practice, has reached significant scale and is not well policed by firms. Provisions that inhibit such sales would act strongly in the interest of consumers and ensure that branded products do not compete online with unlawful products. The guiding principle should be that what is illegal offline should be illegal online and specific obligations would include:
- an obligation to prevent proactively the sale of illegal goods;
 - an obligation for online platforms to verify the identity of sellers;
 - an obligation to share information on confirmed illicit sellers for enforcement purposes;
 - a clear set of transparency and reporting obligations;
 - an approach to notice and takedown systems that is harmonised across operators; and
 - an obligation to inform consumers that purchased fakes when such goods removed by the platform.

⁵ Competition Commission, *The supply of groceries in the UK market investigation 2008*, paragraphs 9.82-4

⁶ The Groceries (Supply Chain Practices) Market Investigation Order 2009, Schedule 1, Part 2

- 36 Advertising plays a significant role in fuelling the trade in counterfeits, where links lead to sites selling fakes and other illicit products, and search results may yield websites selling such goods. Such sites can be of high quality, falsely reassuring consumers that they are purchasing genuine products.
- 37 Platforms have been taking the sale of counterfeits increasingly seriously, though more is required to contain and prevent the practice. Reputational harm however takes many forms online and present significant challenges for brand owners, particularly where resolution requires the co-operation of the platform which is often not forthcoming. For example:
- fake product reviews. These mislead consumers and are not effectively policed;
 - price gouging by third party sellers, seen during the Covid pandemic, undermining brand trust and goodwill;
 - product descriptions used by third party sellers of branded products that are misleading and/or inaccurate;
 - the sale of branded products that are not specified for the UK market, are imported without the brand owner's consent and/or may not comply with UK regulations (such as labelling), undermining the consumer experience;
 - copycat products and misleading marketing where brand rights are infringed and/or brand assets exploited, suggesting misleadingly a connection to the brand that does not exist.
- 38 Competition between branded products and private label products raises concerns when confidential commercial information provided by the brand owner as a supplier or customer is misused in the development of competing private label products and, once those products are on the market, benefit from self-preferencing to distort consumer decision-making.
- 39 Confidentiality is the primary concern in how such information is used and we note that the European voluntary Supply Chain Initiative's [Principles of Good Practice](#) included the following provision:
- Confidentiality of information must be respected unless the information is already public or has been independently obtained by the receiving party lawfully and in good faith.
Confidential information shall be used by the recipient party only for the purpose for which it was communicated.
- 40 Ethical boundaries would further reinforce confidentiality, with teams working on the marketing and sales of branded products being distinct from teams specifying, producing and marketing private label products, with no confidential information passing between the two.
- 41 More broadly, practices that cause concern may be unlawful and fall under the scope of various regulatory regimes including competition law, Consumer Protection Regulations and intellectual property law. We urge against a regulatory silo approach to digital markets, with the overlaps recognised between regulatory regimes and the Digital Markets Unit able to take a holistic approach, both in terms of identifying the market practices to address and then how best to remedy them. Weak enforcement can result in unlawful practices flourishing unchallenged so a holistic enforcement regime for digital markets would contribute to more vigorous competition, higher levels

of consumer protection and an IP framework that works effectively in encouraging innovation, choice and reputation-building (see paragraph 49 below).

42 ENFORCEMENT

Our experience of GSCOP demonstrates that a code of practice can be a highly effective *ex ante* mechanism for ensuring markets work well, changing commercial behaviour for the better and encouraging a culture of compliance in a large, diverse retail market where significant buyer power is present.

43 The main success of GSCOP has been to incentivise designated retailers to resolve potential and actual breaches at point of negotiation, not on the basis of complaints. This constructive and mutual approach to resolving issues is in sharp contrast to the pre-GSCOP 'take-it-or-leave-it', 'not my responsibility' or 'deathly silence' negotiating styles of some. The strong incentive to resolve issues as they arise accounts for the relatively low level of enforcement required of the Groceries Code Adjudicator (GCA) who has undertaken only two investigations and six arbitrations in seven years, despite the market comprising some 8,000 suppliers to 13 designated retailers.

44 This approach to market regulation has not come at significant cost and has not inhibited retailers' ability to negotiate lower prices from suppliers on the basis of the fair application of their buyer power. Indeed, the GCA in her most recent annual review (pages 12 -13), points to evidence that, during her tenure,

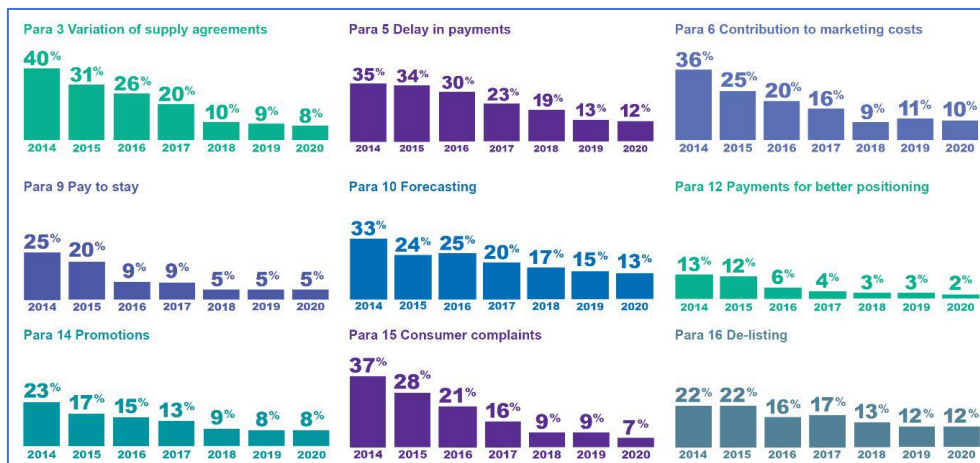
- competition in the sector has increased;
- the regulated retailers have become exemplars for paying on time;
- communication between retailers and suppliers has become stronger and more effective, yielding value during the Covid crisis; and
- consumers have benefitted from an increase in innovative products.

45 The key elements of GSCOP and the monitoring and enforcement undertaken by the GCA that make the remedy so positively transformational and effective are the combination of:

- a principles-based code based on fair and lawful dealing;
- a credible, independent adjudicator with a duty to encourage and monitor compliance and enforce the code;
- the power for the enforcer to gather information / evidence from any source;
- the power for the enforcer to levy significant fines (1% of total UK sales turnover);
- a collaborative approach between the enforcer and regulated retailers;
- a strong incentive for retailers to resolve issues at point of negotiation;
- the burden on the regulated retailers to demonstrate compliance;
- information from suppliers covered by strict confidentiality to overcome fear of reprisals;
- the ability for the enforcer to publish guidance and case studies,
- high levels of transparency, for example via the Adjudicator's annual supplier survey and the scope to generate publicity for her activities;
- a duty on regulated retailers to train staff regularly and report formally annually;
- accountability for compliance to lie within a non-trading function of the regulated retailer; and

- regular reviews of the enforcer (every 3 years) and an annual review of the designation of retailers, with the scope for both to lead to change as the market evolves.

- 46 Speed and flexibility are key characteristics required of any remedy and which are delivered by GSCOP. The burden of compliance being placed on the regulated retailer and the role of the Adjudicator in interpreting the Code means that relatively broad wording has yielded flexibility without on the one hand inhibiting effectiveness and compliance and on the other giving rise to unexpected or unintended consequences.
- 47 Over and above the positive effects on choice, competition, innovation and efficiency highlighted above, the combination of the code and the adjudicator has led to marked improvements in nine key areas regulated by the code as set out in the graphs on the next page⁷, measured by the number of suppliers raising concerns.



- 48 GSCOP and the GCA is also a model for the designation of firms, the imposition of a code, the appointment of and funding for a monitor / enforcer, the frequency of reviews and rights of appeal. It was developed in full recognition of the fact that suppliers are likely to be reticent in coming forward themselves through fear of harming the all-important commercial relationship with a key distributor of their products, a factor that also needs to be taken into account in digital markets.
- 49 It may not be necessary to include provisions in a code of conduct that are already adequately expressed in law, such as the Consumer Protection Regulations and intellectual property legislation. An important consideration however is the role of the enforcer of any code of practice in relation to these laws such that they work effectively and holistically in digital markets. For example, the enforcer may be designated under the Enterprise Act to ensure consumers are not misled and have a role in resolving infringements of intellectual property rights where detailed evidence and cross-examination is not required.

31st July 2020

⁷ Groceries Code Adjudicator, Annual Report and Accounts 1st April 2019 – 31st March 2020, page 9

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