

# PLB competition in the assessment of market power in EU and UK merger cases: developments in the last five years

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## When do PLBs play a role in the analysis of mergers?

- § When branded goods manufacturers merge, the issue of the role of Private Label Brands (“PLBs”) is usually raised in relation to:
- The assessment of the market power of the merging parties i.e. are PLBs in the same market as branded products and do they constrain the pricing of branded products?
    - Retail
    - Wholesale
  - The assessment of the market power of the retailers – i.e. do they confer buyer power on retailers?

## Historically....

- § At wholesale PLBs and branded goods are frequently in separate markets
- § Differing approaches to whether PLBs are in the same market as branded goods at the retail level
  - Also differing approach to whether the competitive assessment should be focused on the retail or wholesale market
- § In P&G/Gillette in 2005 PLBs appeared to play a significant role in the assessment of buyer power: although not subsequently followed...

## The role of PLBs in market definition

- § A number of cases in which the Commission has acknowledged that at retail PLBs compete with branded goods in a range of product areas:
- *Unilever/Sara Lee (2010)* “private label deodorants are considered to be part of the same market as branded products in this Decision as they compete with brands for the end-consumer”
  - *SCA/Georgia Pacific Europe (2012)*: market investigation confirmed that at retail PLB and branded consumer tissues compete
  - *Orkla/Reiber & Sons (2013)*: the market investigation confirmed that at retail branded and PLB ketchups and mustards are in the same market

## The role of PLBs in market definition

§ OFT approach in A.G. Barr/Britvic (2013):

- Whether PLBs are in the same market as branded beverages depends on the individual beverage segment concerned
- Insufficient evidence that retailers use PLBs in negotiations (wholesale market)
- Insufficient evidence of switching by end-consumers between branded and PLBs (retail market)
- Not all retailers can develop PLBs (buyer power?)

§ Princes/Premier Foods (OFT 2011): On whether own label ambient pies were in the same market as branded (or whether their shares should be attributed to retailers), the OFT cited a lack of evidence that:

- The price differential between branded and own label products was narrowing
- Customers were switching to own label
- Branding was not important
- There was a continuous scale of pricing
- Consumers would switch in response to delisting or promotional activity

## Is winning the market definition argument at retail enough to demonstrate a lack of market power?

§ Branded product manufacturers operate at the wholesale level of supply not the retail level

§ SCA/Georgia Pacific (2012):

- No need to define the market at retail as the parties are not active there
- Upstream, branded products and PLBs are in separate markets

§ Kraft/Cadbury (2010):

- Market assessed on the basis of the upstream level of supply in which only branded chocolate competes

## Perhaps not enough but still important to the competitive assessment

### § SCA/Georgia Pacific (2012):

- Although the focus of the competitive assessment is on the upstream separate markets, the competitive interaction downstream is crucial for the assessment of the case

### § Kraft/Cadbury(2010):

- At the downstream level the market investigation has show that branded and PLBs are generally in competition with each other and that the quality is the same
- Therefore the competitive interaction downstream between them will be taken into account in the analysis



## If the merging parties also produce PLBs...

- § It also depends on the extent to which the merging parties supply PLBs
- Arla Foods/Milk Link (2012) where the parties supplied 60-50% of PLBs
  - SCA/Georgia Pacific (2012)
  - Princes/Premier Foods (2011)



## PLBs and buyer power: pushing the door open in 2005

- § *P&G/Gillette (2005)*: buyer power arguments were accepted at an EU level at least in relation to conglomerate effects. On PLBs the Commission noted that:
- Large retailers can credibly threaten to integrate PLBs on their shelves and PLBs suffer less from delisting
  - There is an asymmetry of information re. prices on PLBs that benefits retailers
  - Retailers pursue dual pricing strategies and would not abandon PLBs regardless of price
  - Category management can be used by retailers with a large PLB presence to eliminate some element of branded competition

## PLBs and buyer power: the door is jammed

### § *Unilever/Sara Lee* (2010): the arguments:

- Retailers have a dual role as customer and as gatekeeper/competitor in relation to the manufacture of PLBs
- They can resist price increases by:
  - Credibly threatening to vertical integrate into PLBs
  - Negotiate more effectively if they have increased visibility over costs

### § The Commission was unconvinced:

- PLB shares at retail are generally lower than in other consumer goods markets
- Competitors reported that PLBs have little impact on branded pricing
- PLBs do not prosper because of need for spending on advertising and brand awareness
- Customers would not switch in response to a small permanent price increase

## PLBs and buyer power: the door is jammed

### § *Kraft/Cadbury* (2010):

- The Commission rejected arguments that retailers (in Poland) could delist branded products in favour of PLBs on the basis that:
  - PLBs were only present in the “modern trade” which accounted for less than 50% of sales
  - Even in the modern trade PLBs exercised only a limited constraint on pricing of branded goods.
  - The merging parties have “must have” brands

### § *Arla Foods/Milk Link* (2012):

- The Commission rejected arguments that because PLBs account for over 80% of the market retailers could easily switch – primarily because the merging parties accounted for around 60-70% of PLBs as well as a significant percentage of branded long life milk

## PLBs and buyer power: can the door be opened again?

- § Orkla/Rieber & Son (2013): the existence of buyer power acknowledged:
  - The retail market was highly concentrated (3 retailers accounting for 90-100%)
  - Delisting is possible and retailers have launched PLBs
  
- § Cautionary note:
  - Other branded competition
  - No concerns raised by the market investigation



## PLBs and buyer power in the UK

### § A.G. Barr/Britvic:

- PLBs are significant in some product categories
- Although this varies significantly
- Of itself this is not indicative of the ability of retailers to be able to switch to PLBs
- In differentiated markets the assessment should be done brand-by-brand or at least store-by-store

## Concluding remarks

- § PLBs may play a role in the assessment of the market power of the merging parties but:
  - Dependent on the ability of the parties to demonstrate price competition between branded and PLB products
  - May not be sufficient if the merging parties also have PLB products
- § Buyer power remains a difficult argument regardless of the fact that retailers are also competitors with PLBs

**Thank-You**

**Any Questions?**

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