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EC Guidelines on vertical restraints and the definition of manufacturers

Trends in Retail Competition:

Private labels, brands and competition policy

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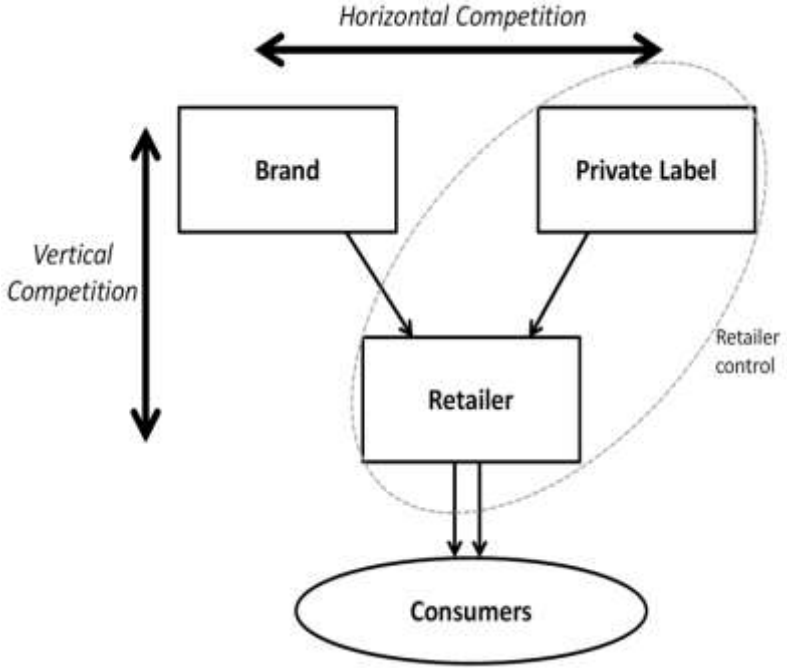
10 June 2016

Agenda

- The dual role of retailers
- Scenario – Swedish retailers claim not to be competitors
- EC Guidelines on vertical restraints and the definition of manufacturers
- The view of the Commission and the Courts
- Concluding remarks

The dual role

The dual role



Source: Assessing Brand and Private Label Competition, Paul W. Dobson, Ratula Chakraborty, (2015) 26 ECLR

Dual role – competition concerns

- Retailer = gatekeeper position + controlling shelf outline → strong buyer power
- No real price competition – ”in-store cartel”.
- Requests for ingrediens down to recepie level.
- Information from supplier to retailer regarding launch date for new innovative products.
- In the long run →higher prices and less innovation

Swedish scenario: retailers claim to be non-competitors

- Private label → competition both on wholesale level and on the shelf.
- However, Swedish retailers claims that they are not competitors with reference to the EC Guidelines on vertical restraints and the definition of manufacturers.

Point 27 in the Guidelines

- Iii) Vertical agreements between competitors
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Who is then a competitor according to Swedish retailers?

- A supplier and the retailer with an identical private label →NO

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- Two suppliers of which one has production in its own factory and the other has outsourced the manufacturing → NO

Supplier - outsourced production

- A supplier with outsourced production and a retailer with a private label → YES

Supplier - outsourced production

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With the logic of the retailers - does this mean….

- That suppliers and retailer may freely exchange information about costs?
- Coordinate their prices levels?
- Coordinate product introductions?
- Etc?

EC vertical guidelines

- Point 27 – regulates relationship in relation to manufacturer of PL and retailer and not retailers' relationship with manufacturers in general.

The Commission's view in merger cases

- E.g. SCA/Procter & Gamble, Case COMP/M.4533

- *"the growth of private labels is also driven by both increasing shelf space being devoted by retailers to their own private label products at the expense of manufacturer branded products, and by the success of their comparative product offering at similar or lower prices. Retailers are increasingly promoting their own brands, with many retailers actively advertising their labels with marketing strategies similar to those of brand manufacturers."*

Case law

- *”When assessing the market strength of an undertaking which is party to a concentration, the market shares of the products which it manufactures as subcontractor for retailers which resell those products under their own labels cannot, in principle, be imputed, in whole or in part, to the market share held by that undertaking in regard to similar products which it sells under its own brand. Since the retailers sell those products under their own-labels in order to compete with the products sold under the manufacturers´ brands, the market share which they hold as a result of those sales must therefore, as a general rule, be attributed to them for the purposes of assessing the competition to which the manufacturers of premium and secondary brands are subject.”*
- Case T-290/94, Kaysersberg v the Commission EUT:1997:186 p. 176.

Final comments

- Further guidance from the Commission would be appreciated.

Thanks for your attention!
Questions?

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