



Unchallenged Market Power? The Tale of Supermarkets, Private labels and Competition Law

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Agenda

- Competitive Effects
- Enforcement Choices
- EU Competition Law
- Article 102 TFEU
- Gap in Enforcement?
- National Provisions
- Concluding Remarks



Competitive Effects

- Starting point – lower prices, greater choice, innovation and competitive pressure.
- Short term *vis-à-vis* long term effects.

I. Lower Costs

- Short term loss.
- Economies of scale.
- Reputation umbrella.
- Lower risks, innovation follower.
- High profit margins.



2. Lower Prices

- Range from ‘value’ to ‘premium’ products.
- Competitive pressure on brands’ producers.
- Note the retailer’s control over pricing, the possible use of artificial price differentials and value destroying promotions.

40 per cent of consumers who purchase private labels, do so due to the lower prices of goods. 30 per cent see these labels as being a better value than brand equivalent.

UK Competition Commission Grocery Market Inquiry



3. Restricts Brand Power

- Restricts the market power of dominant brands or a multi-product brands.
- Facilitates entry which otherwise will not be possible.
- Lower prices, better quality, more innovation.

4. Innovation

- (+) Pressure on brands.
- (+) Private label innovation.
- (-) Innovation follower.



5. Choice

- Wider choice?
- Profit margins and delisting.
- The elimination of slow selling brands.



6. Foreclosure and Access to Shelf

- Control over distribution channel
- Preference for private label.
- Must stock brands and slower selling brands.
- The effects of one stop shop culture → Switching costs between outlets increases retailers' market power.
- A loss of 20% of sales for the manufacturer involves a serious risk of bankruptcy.

'... in time I believe you will see only two offerings per category on the shelf – the national brand leader and the store brand. There will be no space for the second or third brand player in the category.' (Wal-Mart)



7. Market Transparency

- Brand recognition.
- Private labels.

8. Free Riding

- Innovation follower.
- Access to information.
- Copycat packaging...
..... Cloning



9. Marketing and Advertising

- Reliability umbrella
- Internal references to private labels
- Control over in store marketing.
- Only 1/3 of grocery store purchases are planned in advance.



Enforcement choices

The case for limited intervention - If it ain't broken, don't fix it...

- Focus on efficiencies and innovation.
- Self policing
- Empirical data - The growth of private labels has reached its optimum point.
- 'It would seem mistaken to assume that private-label growth will continue to grow indefinitely and ultimately eliminate all branded products.' (*Kimberley Clark/Scott*)
- leading brands successfully reacting to private labels.
- UK Competition Commission 2008 Grocery Market Report



Enforcement choices

The case for intervention - challenge the unchallenged...

- Focus on long term harmful effects
- In the future supermarkets will make only two offerings per category on the shelf.
- In various product categories the retailer 'has selectively delisted secondary brands or weaker producer's brands ... and replaced them with own brands.' (*Rewe/Meinl*)
- The dependence of the producer on the supermarket.
- Confederation of the Food and Drink Industries of the EU (CIAA)



Competition Law Enforcement

- Can traditional analysis reflect the combined horizontal/vertical effects and the rise in market power?
- Ex-ante analysis
 - ECMR
 - Increased concentration.
 - Spiral effect and increased consolidation.
 - Buyer power.



EU Competition Law

- Ex post analysis

- Article 101 TFEU

- Buying alliances.
 - Agreements etc.
 - Commission's Guidelines on Vertical Restraints.
 - Category management agreements

- Article 102 TFEU



Article 102 TFEU

-Dominance

- Market definition.
- Market power below the threshold of dominance (asymmetry of information, in-store competition, control of shelf space, foreclosure, dependency ...)

-Collective dominance

-*Cumulative effects as alternative?*

- UK - The four large supermarkets -75%
- Around 40% of products sold in these supermarkets are private labels.

- Abuse of non dominant position?



Gap in enforcement?

Internal analysis – No

External analysis –

- A new market reality?
- US Supreme Court : ‘...all competitive effects are by definition horizontal effects.’ *Business Electronics Corp. v. Sharp Electronics Corp*
- Robert L. Steiner: Vertical competition exists
- Rob Walton, Wal-Mart Chairman: ‘The manufacturer’s price is something that’s determined largely by negotiating power of retailers that carry his merchandise’, ie by vertical upstream competition.’



Beyond EU Competition Law

- National Competition Regimes
- Sector investigations - UK, Austria, Hungary, Germany
- UK Groceries Supply Code of Practice
 - Section 16 – restrictions on delisting



Concluding Remarks

... Is there a problem that needs fixing?

Paper available:

[2010] 33(2) World Competition 261-278

Also on the subject see:

A Ezrachi & U Bernitz (eds) *Private labels, Brands, and Competition Policy – The Changing Landscape of Retail Competition* (OUP 2009)