



Institute of European and Comparative Law
in conjunction with the Centre for Competition Law and Policy

Trends in Retail Competition: Private labels, brands and competition policy

Report on the sixth annual symposium
on retail competition

Held in Oxford on 28th May 2010

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OVERVIEW

Private label continues to profoundly affect retail competition across Europe. Many categories now include private label products, segmented to offer shoppers various levels of quality and price. Private label ranges offer consumers choice and contribute to competition between retailers by differentiating one retailer from another and building store loyalty. Private label also increases competition with branded goods suppliers, but its form is unlike classic inter-brand competition. Notably the private label competitor is also an important retail customer for the brand owner. This has been a significant theme arising in the previous symposia and was explored further this year. This symposium was the sixth to be hosted by the Oxford Institute of European and Comparative Law in conjunction with the Centre for Competition Law and Policy and sponsored by the law firm Bristows. The symposium included four sessions of presentations as well as two roundtable discussions in which delegates were encouraged to participate. The event was held under the Chatham House Rule. The symposium was chaired by Professor Ulf Bernitz of the Oxford/Stockholm Wallenberg Venture.

INTRODUCTION

The following represents the programme for the symposium:

SESSION 1: AN INTRODUCTION

- 10.00 **Branded and own label product trends in European grocery markets**
Helen Passingham-Hughes, *Europanel*
- 10.30 **The EU supply chain and the role of private labels**
Isabel Ortiz, *DG Enterprise & Industry, European Commission*
- 10.50 **Bringing innovative products to consumers in modern markets**
Tim Brooks, *Marketing Director, GlaxoSmithKline Consumer Healthcare*

SESSION 2: TWO MASKS, ONE FACE

- 11.30 **The tale of supermarkets, private labels and competition law**
Dr Ariel Ezrachi, *Centre for Competition Policy, Oxford*
- 11.50 **Switch marketing – a European perspective**
Paul Reeskamp, *Allen & Overy*
- 12.10 **Roundtable discussion 1**
Chairman: Sean-Paul Brankin, *Crowell & Moring*
Panel: Representatives of the competition authorities of Belgium, France, Hungary, Norway and Portugal

SESSION 3: RULES OF BEHAVIOUR

- 14.00 **Comparative perspectives on resale price maintenance**
Professor Andy Gavil, *Howard University School of Law*
- 14.20 **Implications of the EC's guidelines on vertical agreements**
Pat Treacy, *Bristows*

SESSION 4: POWER IN THE RELATIONSHIP

- 14.40 **Identifying buyer power and its positive and negative effects**
Dr Nicola Mazzarotto, *Competition Commission*
- 15.00 **Remedies to the adverse effects of buyer power**
Myriam Vander Stichele, *SOMO*
- 15.40 **Roundtable discussion 2**
Chairman: Andrés Font-Galarza, *Gibson Dunn & Crutcher*
Panel: Representatives of the competition authorities of Germany, Ireland, Sweden and the UK (*Competition Commission and Office of Fair Trading*)

SESSION 1: AN INTRODUCTION

Branded and own label product trends in European grocery markets

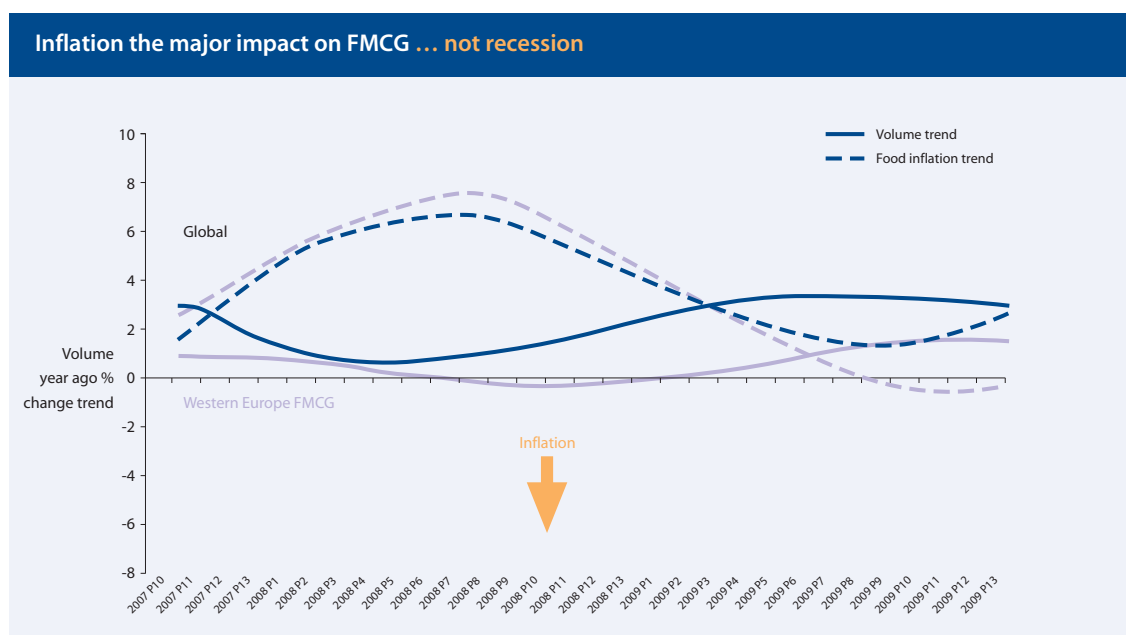
Helen Passingham-Hughes, *Europanel*

Over the last couple of years price inflation has been markedly volatile across the EU, especially for food. This volatility has not been seen since the introduction of the euro and reflects the recent economic contraction. Over this period consumer confidence has been low, but in recent months consumer confidence has begun to recover.

Historically, during contractions purchasing patterns change. Adverts have less impact on consumers and price cuts have greater impact. Despite that, branded products tend to survive best by increasing advertising and innovation rather than competing through discounts. Failure to innovate and advertise during a recession is a high-risk strategy.

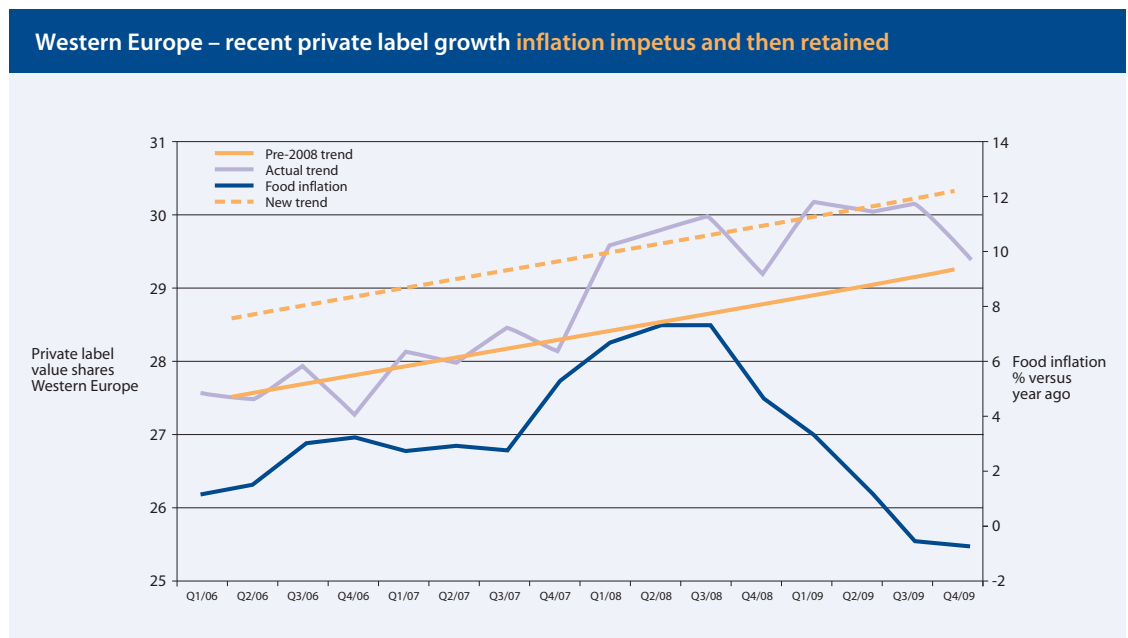
The spread of private labels across Europe is continuing and, as always, is particularly fast because of the current contraction. Judging by past trends, it is expected that private labels will lose market share once the contraction ends, however despite this decline it is expected that private labels will have made a net gain in market share.

Recession and inflation have both affected consumer purchasing habits. There is some debate as to which of these factors has a greater influence on consumer habits. Careful analysis reveals that inflation has a much stronger impact on consumer spending than does the recession. For fast moving consumer goods (FMCG) as inflation increased during 2007 and 2008 volumes of purchases reduced. Recently, as inflation has dampened growth in FMCG has been strong.



Similarly, following a collapse in the markets for durable goods during the first three quarters of 2009 volumes are now generally up. The reason that inflation appears to have more lasting influence on consumer behaviour is that the effects of recession kick in early but then remain fairly static. Once a recession begins and consumers fear for their jobs, they reduce their spending. Increasingly such consumers turn to private labels as they seek value for money. This change in behaviour across the population resulting from fear of unemployment is so significant that subsequent job losses of a limited number of the population have comparatively little impact on overall consumer spending.

The past year has also seen a trend away from down-trading (i.e. selling greater volume for reduced prices). This is also linked to the much lower rates of inflation across Europe. Private labels continue on an upward trajectory, and indeed during the recession this trajectory has increased significantly, although it is now beginning decline as inflation decreases.



Similarly, discount retailers have also enjoyed an increase in their market share, although this increase is not as marked as the increase in private label sales.

In terms of shopping behaviour increased inflation leads consumers to reduce their discretionary spending. Consumers tend to make fewer shopping trips but purchase greater quantities during these trips. Consumers also exhibit reduced loyalty to retailers and tend to 'shop around' more while inflation is high. Retailers have responded with increased use of promotions to attract consumers. Because of the greater frequency of promotions, business models relying on everyday discounts have not been as successful as they might otherwise have been. Consumers also tend to spend less money away from home, increasing spending on home entertainment and home eating rather than in restaurants and outside activities.

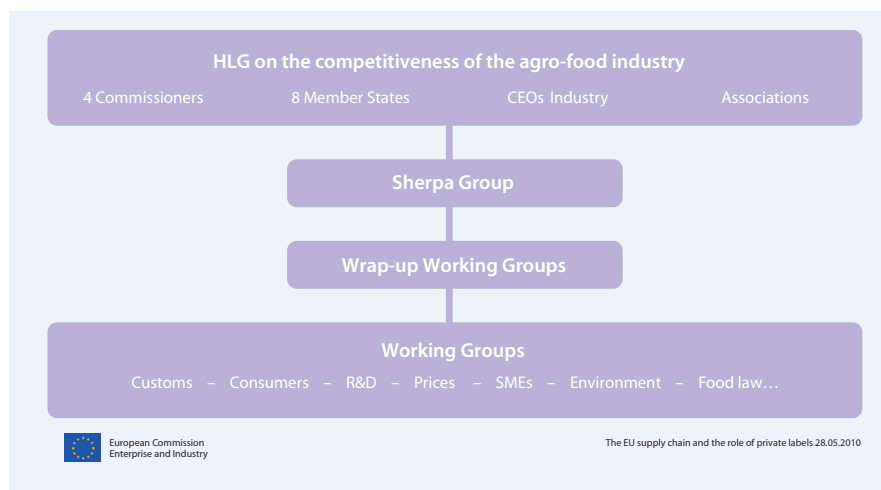
Historically, the brands that succeed are those that act counter-cyclically, i.e. increase spending on marketing and innovation during contractions. Lower investment in innovation and marketing tends to lead to a drop in market share. The lesson for brand owners is clear – it is important to buck the trend and seek to expand during economic contractions. Failure to do so will see private labels increase their share of the market.

The EU supply chain and the role of private labels

Isabel Ortiz, *DG Enterprise & Industry, European Commission*

The EU has been involved in a number of initiatives to improve competitiveness in the EU food supply chain. Action is needed because competition is relatively weak in comparison with other major economies; it is below average in general and behind that of the US, Canada and Brazil in particular.

The two main EU-level initiatives to improve competitiveness are the High Level Group on the Competitiveness of the Agro-Food Industry¹ (HLG) and the Single Market Review of the food market (Market Monitoring). The HLG was set up following a conference promoting the leadership of the agro-food industry (September 2007), with the following structure:



The HLG's structure was effectively three-tiered:

- the High Level Group addresses the issues that determine the future competitiveness of the agro-food industry;
- the Sherpa sub-group prepares the discussions and position papers and recommends actions and/or policy measures to the High Level Group;
- the wrap-up and working groups relate to the characteristics of specific aspects of the agro-food industry, encouraging involvement of all the sectors to create a bottom-up platform.

The mandate of the HLG was to identify the factors, future challenges and trends that can influence competition within the EU's agro-food industry. Its task was to formulate recommendations for action in public policy and the regulatory framework over the short-, medium- and long-term. The HLG made 30 policy recommendations in March 2009 and published a roadmap of key initiatives in July 2009.

One key area of discussion within the HLG was the role of private labels in the food supply chain. This proved a contentious issue. It was recognised that private labels widen the range of available products, but may create foreclosure effects. It was also recognised that retailers have now become direct competitors to the agro-food processing industry. Several pros and cons of private labels were identified. It was recognised that private labels provide opportunities for small companies to enter the market and

¹ Established by Commission Decision of 28 April 2008 (2008/359/EC).

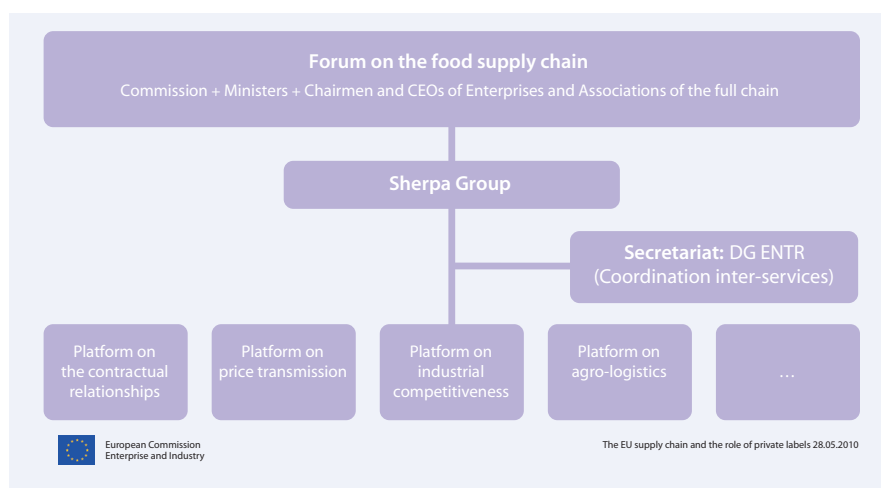
may lead to innovation and increased choice. However, it was also recognised that private labels may sometimes risk deceiving consumers and may increase producer dependency.

The HLG concluded that there was a lack of adequate data and information on the effects of private label to reach well-founded conclusions. It therefore reached recommendation 16: 'The European Commission should study the effect of private labels on the competitiveness of the agro-food industry, in particular on SMEs,² and examine ways to reduce, if appropriate, the imbalances of power in the food supply chain.'

Following this recommendation, the Commission selected the firm Landbow-Economisch Institute (LEI) BV by open tender to produce a report to analyse this issue. The research will examine relevant European and national studies and seek to understand the structure and relationship between the various food supply chain stakeholders in the context of the existing EU and national legal framework. The report focused on the position in Germany, France, Hungary, Italy, the Netherlands and the UK. The final report is expected in June 2010.

The Commission's Market Monitoring is a new tool designed for studying sectors showing sub-optimal economic performance in depth. Food was among the first set of sectors identified as of concern. The Market Monitoring made 10 recommendations which are found in the Commission's Communication on 'a better functioning food supply chain.'³ The Communication noted that action was needed to eliminate unfair contractual practices between businesses. The Communication also noted that a common approach to the relevant competition issues was needed.

The Commission has set up a High Level Forum for a Better Functioning Food Supply Chain⁴ to follow the 30 HLG recommendations and the initiatives presented in the Communication. The mandate of the High Level Forum will be extended to allow discussion of the recommendations in the Communication and its composition will also be extended to provide greater representation of retailers. This extension of its mandate will ensure that consistency is maintained with both the recommendations of the HLG and the conclusions of the Market Monitoring on food. The planned structure of the High Level Forum is:



The Sherpa Group will begin work after the decision is enacted, and the first meeting of the High Level Forum will probably occur this autumn.

The Commission plans to establish a Platform on Contractual Relationship intended to establish a dialogue at EU level on the relationships among the players in the food chain. It will identify parameters of importance for the good functioning of the food chain and possibly establish a code of conduct for business-to-business relations. The impact of private labels will form one aspect of this work.

² SME: Small and medium sized enterprise.

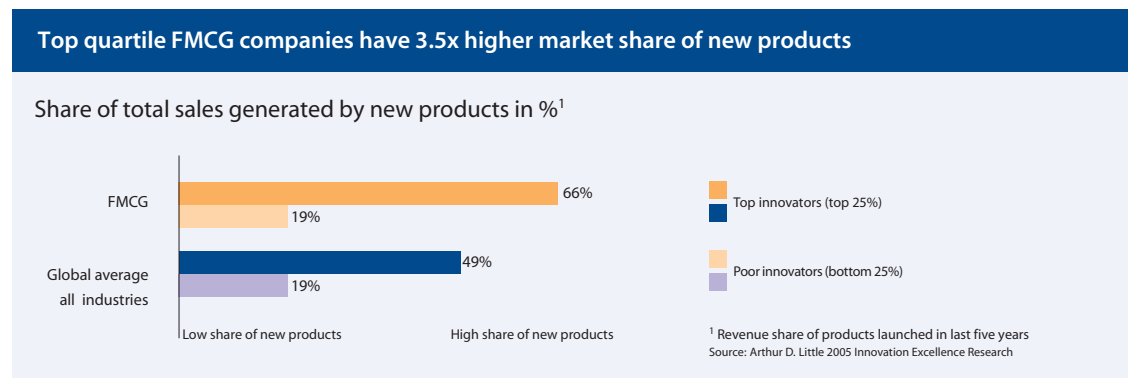
³ Policy recommendations (COM (2009) 591).

⁴ The decision was adopted on the 30th July 2010 and published in the Official Journal of the European Union O.J.2010/C 210/03 of the 3rd August 2010.

Bringing innovative products to consumers in modern markets

Tim Brooks, *Marketing Director, GlaxoSmithKline Consumer Healthcare*

The importance of innovation in modern markets cannot be overestimated. Innovation brings better products to consumers and allows companies to grow. The alternative is for companies to compete by seeking to deliver the same product as everyone else but at a lower price. Such a strategy is unlikely to generate long-term growth because a rival, even if inefficient to begin with, should be able to improve efficiency quickly. By contrast, innovation leads to growth in revenue and profit. Economic studies reveal that new products from top innovators gain higher market shares. This is especially true for fast moving consumer goods, where such companies are more than three times as successful as the rest.



Innovation is a significant challenge. It is expensive and risky; if companies could avoid innovating, they would. However, failing to innovate leads to failure in the market. It is not possible to rely on consumers to tell you what they want – often they do not know. Successful businesses such as Google and Facebook were not developed in response to consumer demand – few consumers could have imagined these businesses before they existed. Instead, companies seek to understand how the consumer lives and then try to respond, predicting what the consumer might want. The products and services which will succeed are those that add value to the consumer.

The challenge of innovation is daunting. It is expensive and time-consuming, but gaining insight into the lives of consumers is a major source of competitive advantage. Innovation carries with it a high risk of failure. Studies show that only 1 in 5 new products endure longer than 3 years. There is no guarantee of success and innovators must anticipate that some of their ideas will fail.

In the retail industry innovation has become particularly challenging in recent years. First, retailers have become quicker and more skilled in creating private label rivals. Nowadays, a successful innovative product can expect to face private label competition within 12 weeks. As the head start enjoyed by the innovator shrinks, the window to recoup the costs of innovation narrows. Second, during recession retailers seek to reduce the number of distinct products which they stock to reduce costs. Third, innovators must manage the high risk of failure during a recession – risks that tend not to be borne by private labels which tend to follow successful brands.

The relationship between innovative brand owners and retailers with private labels is particularly awkward as the retailer is both a customer and competitor. Innovators must share information on a new product with the retailer to secure essential distribution; yet retailers, unless contractually constrained, which is not often possible, can use this information to speed up the production of rival private labels. Similarly, retailers need access to the innovator's know-how to help them promote the branded product; information which may then be used to develop better private label products.

As innovation becomes increasingly difficult, the nature of innovation by brand owners is changing. Brand owners are becoming more risk-averse, increasingly relying on smaller incremental innovations rather than fundamentally new products – a trend exacerbated by private labels. This is bad for consumers as it reduces the dynamism of the market. Although private labels may arguably lead to cheaper products, they may damage long-term investment in innovation and new products.

Innovation is taking on new forms due to the increased risks. There is more collaboration which allows the risk of failure to be shared – especially true in the pharmaceutical sector. Also, larger companies increasingly seek to acquire and expand small start-ups that have developed a niche market, allowing larger companies to reduce their development risks.

Careful use of branding is essential to the development of a market opportunity, allowing an innovator to own the advances it offers to consumers. It creates trust in the new product and helps the innovator to define the category it has helped create. A good example is the Apple iPod which has iconic status and become a much-loved brand among consumers.

To avoid stagnation, the right environment is needed for innovation-led growth. This may involve encouraging investment in intellectual property, a conducive tax regime and/or more effective rights for brand owners to counter blatantly imitative competition. There is still great demand for innovative products and advances in technology have created some great opportunities, yet increasing complexity and the speed of copying may mean that radical innovations never come to market. This would be a massive loss as it is fundamental innovation which has the greatest positive impact on our economy.

SESSION 2: TWO MASKS, ONE FACE

The tale of supermarkets, private labels and competition law

Dr Ariel Ezrachi, *Centre for Competition Policy, Oxford*

Recent decades have witnessed a distinct increase in the sales and popularity of private labels. The growing market share of private labels has transformed the landscape of retail competition in developed countries. Major retailers are no longer confined to their traditional roles of purchasers and distributors of branded goods. By selling their own label products within their outlet they compete with their upstream brand suppliers on sales and shelf space.

This 'vertical competition' is not confined solely to 'value' categories of products. These days, retailers offer private label goods catering for the value, specialised and premium markets. These developments, and the increasing confidence that consumers have in private labels, have increased the bargaining position and market power of retailers as their labels compete directly with the leading manufacturer's brand and its 'value' alternatives.

Over the past decades private labels have significantly developed in Western Europe. In the UK, for example, the growth in private labels has been led by the major grocery retailers, placing the UK as the market with the highest proportion of private label sales. It is estimated that around 50% of sales in major UK supermarkets are attributed to their private labels. This is in addition to stores such as Marks & Spencer, Aldi and Lidl which base all, or almost all, of their food sales on private labels.

The increased role played by private labels has been reinforced in recent decades with the ongoing shift in the UK from local, specialized shops to a supermarket buying experience. These supermarkets exhibit ever growing buying power and are subsequently able to offer customers lower prices for their private labels. The recent economic downturn and the increased price sensitivity of consumers have further cemented the growth and popularity of private labels. This proliferation raises two interesting and interlinked questions about the possible pro-, and anti-competitive effects of private labels and whether these effects trigger, or ought to trigger, antitrust intervention.

Effects on competition

Private labels offer consumers a range of products often at lower prices than competing brands. They also place competitive pressure on brand leaders, generally reducing the price of branded goods across the board. Private labels allow retailers to exploit economies of scale, achieving cost savings by using the 'reputation umbrella' of their retail brand on their private label ranges. This allows the retailer to introduce a new private label without investing in advertising or marketing. Private labels may also provide an important competitive counterbalance in categories which are dominated by a leading brand. In such cases, other brands may find it too expensive and risky to compete with the market leader while private labels may not be so constrained. In this way they may facilitate entry which would not otherwise occur.

With respect to innovation private labels may generate both positive and negative effects. Their presence increases pressure on brand owners to innovate and offer superior products. Retailers may themselves engage in innovation, and sometimes even develop new categories outright – as happened in the UK in the ethnic cuisine categories. However, private labels may also weaken innovation, especially when the retailer is too quick in following the innovation of others, thereby undermining the profitability of the innovator. In this respect a retailer, in its capacity as a distributor of brands, has access to confidential information from various suppliers, which improves its position vis-à-vis competing brands.

Private labels may have long-term negative effects. When private label penetration is successful it will occupy shelf space alongside the ‘must have’ and other brands. Other, slower selling brands face the risk of being delisted. Studies suggest that in a market like the UK with a small number of large supermarkets, the loss of one main distribution channel is likely to lead to the end of a brand. Thus, consumer choice is gradually reduced as retailers stock only a few leading brands and private labels. Even ‘must have’ products may see a reduction in their shelf space allocation below the extent necessary for them to perform their eye-catching function.

Private labels may also lead to a reduction in price transparency. Whereas consumers can easily compare the prices of well-known brands across retailers to assess value for money, different private labels are not comparable. The reduced price transparency may therefore soften price competition between different private labels and between rival retailers.

Policy choices – competition law

In the face of competing factors of visible short-term pro-competitive effects and possible long-term anti-competitive effects, competition enforcement agencies face a dilemma. On the one hand there is a strong argument against intervention. Some studies suggest that the growth of private labels has reached an optimum. It may be argued that the relationship between brands and private labels necessitates coexistence and that retailers have an incentive to self-police their use of private labels to ensure the viability of brands. Indeed, there is some evidence that leading brands are successfully challenging the rise of private labels.

Those who favour intervention focus attention on the perceived long-term harmful effects of private labels and the fear that eventually all secondary brands will be eliminated from the market. This would lead to the situation where in each store consumers could only choose between the brand leader and the private label. The Confederation of the Food and Drink Industries of the EU (CIAA) has called on the Commission to focus greater attention upon the functioning of the food supply chain. According to the CIAA retailers may derive unfair advantages from being both customer and competitor.

European competition law

Without taking a stand on the merit in intervention, it is interesting to examine whether the EU's existing competition law can tackle the possible negative effects generated by private labels. *Ex-ante* analysis under the Merger Regulation is not relevant for the day-to-day scrutiny of the retail market as it is only activated when certain concentrations occur. Merger cases do however provide insight into practice on the ground. Indeed, in the Commission's *Rewe/Meinl* decision, it was noted that certain retailers had selectively delisted secondary brands and replaced them with own brands.

The EU's *ex-post* controls against anti-competitive practices are found in Articles 101 and 102 TFEU, of which Article 102 is the more relevant. Article 102 applies where there is a dominant market position and an abuse of that dominance. Although market power may exist in the relationship between retailer and supplier, such market power will not necessarily imply a position of dominance. In virtually all cases, the relevant market includes a number of distribution channels offered by competing supermarkets, none of which occupy a dominant position. No position of collective dominance exists either: although the proliferation of private labels in different retail chains may result in foreclosure, these effects are not the result of joint policies or activities. Thus Article 102 is not likely to be triggered.

Gap in enforcement?

In an *ex-post* setting, European Competition law, and more specifically Article 102 TFEU, will rarely challenge the unilateral use of private labels by the supermarket due to a lack of dominance. This raises the question of whether there is a gap in enforcement. On this point, of major significance is the writing of Robert Steiner who draws attention to the failure of competition analysis to encompass the existence of 'vertical competition'.

National provisions may provide partial relief in addressing this alleged gap. Indeed some Member States have at their disposal a wider toolbox which goes beyond the remit of Article 102 TFEU and includes, for example, sector inquiries. Also noteworthy is the UK GSCOP which provides an additional and valuable enforcement tool which can also be used to confront delisting of brands.

At the heart of the debate remains the question of whether the possible anti-competitive effects which stem from the proliferation of private labels merit intervention. Consensus on this underlying question and on whether private labels present a competitive problem which needs fixing, is yet to emerge.

For a detailed analysis see:

Ariel Ezrachi *Unchallenged Market Power? The Tale of Supermarkets, Private Labels, and Competition Law* (2010) 33 *World Competition* 2

Switch marketing – a European perspective

Paul Reeskamp, *Allen & Overy*

Private labels create a paradox for brand owners. In no normal situation would a supplier use its main competitor to distribute its wares: Burger King's manufacturing unit would not ask McDonald's to sell its Whoppers; yet this is exactly what happens when a brand owner sells through a retailer which owns private labels!

The main problem with selling through a retailer which sells private labels is that the retailer as well as wanting to distribute your products also wishes to win your market share. To this end, retailers use 'switch marketing' to cajole or persuade consumers to purchase the retailer's private label rather than the branded product.

For some brand owners a possible solution is to open up their own chain of retail outlets. This is increasingly common among owners of high-value branded goods such as perfumes and electronics. For lower cost products such as breakfast cereal or soap powder, such a route is commercially infeasible. Even for high-value products the costs of setting up a vertically integrated company may be prohibitive.

The basic characteristic of switch marketing is to present the consumer with a choice between a well-known brand and a cheaper imitation private label. This might take the form of traditional posters and leaflets or internet pop-ups, which present alternatives when you type in the name of a well-known brand.

In the Netherlands, the supermarket Ahold ran a switch campaign using the following slogan: 'Ahold house-brand: at least as good, way cheaper.' Ahold claimed that it had been testing its private label for years and that only its best tested products made it to the shelves. To this end Ahold set up highly visible 'blind-test' stands in many of its stores where consumers would be offered the chance to blind test leading brands against selected Ahold private labels. The Ahold products which 'passed' this blind-testing were decorated with a distinctive 'blind-test approved' logo.

Brand owners challenged Ahold's campaign on the basis that its marketing was misleading. They argued that the advert created the overall message that all of Ahold's private label products were at least as good as the corresponding brands, but much cheaper. Ahold initially argued that the claim only related to its private labels bearing the 'blind-test approved' logo. However, the ECJ has taken a very broad view of comparative advertising, in view of the fact that Ahold's slogan did not limit itself to the blind-tested products this argument was unlikely to succeed.

Under the Comparative Advertising Directive⁵ the creator of a comparative advert must furnish proof of the accuracy of a factual claim within a limited period of time and if no evidence can be provided the claim will be deemed inaccurate. In the Netherlands the advertiser must provide the evidence within two days and if an advert is found to be inaccurate a complainant may obtain a cessation order without having to prove loss or damage.

In the recent *L'Oréal v. Bellure*⁶ case, Bellure marketed its perfumes through a catalogue which listed well-known brands as comparators for its own fragrances. Bellure's fragrances were said to 'smell like' the branded perfumes. L'Oréal challenged the catalogue as a form of trade mark infringement. The case is of interest because traditionally it was thought that a trade mark could only be infringed where the origin of the goods was brought into question. In the comparative advertising the origin of goods is not called into question – indeed, the advertiser makes clear that the consumer should buy not the brand-owner's products but the advertiser's.

⁵ Directive 2006/114/EC concerning misleading and comparative advertising (2006) OJ L 376/21.

⁶ Case C-487/07.

The ECJ ruled that a third party attempting to ride on the coat-tails of a trade mark with a reputation is taking unfair advantage of that mark. Such an action could constitute both unlawful advertising and trade mark infringement. The ECJ interpreted the 'imitation prohibition' of Article 4(g) broadly and stated that this article could be violated by advertising which implicitly communicates the idea that a product is an imitation of the trade marked good. The ECJ also interpreted the harm requirement broadly, finding that the function of a trade mark included not only guaranteeing the quality of the goods or services in question but also guaranteeing its function of 'communication, investment or advertising'.

The case is of interest in the field of switch marketing because it is now clear that the trade mark must not only guarantee the origin of goods but also its investment protection function. Switch advertising which implies that a product is an imitation of a trade marked good can therefore be challenged as a trade mark infringement. This is especially relevant in the arena of private labels since private labels often use very similar 'get-up' to that used by leading brands. The ECJ in the recent *Carbonell v. La Espanola*⁷ case has further strengthened this potential line of argument by noting that supermarket consumers tend to have a lower level of attention and are guided by the visual impact rather than word marks.

In summary, brand owners should be prepared to challenge claims made by private labels that they are 'as good as' to provide proof to back their claims. If such claims cannot be supported they should be stopped. In any event, claims that products are 'as good as' some other products may be viewed with suspicion. In such situations overall visual impact is key. In the face of increasingly strong private labels, brand owners need to defend their interests.

⁷ Case C-498/07.

Roundtable discussion 1

Facilitated by Sean-Paul Brankin, *Crowell & Moring*

This section sets out briefly the most important points made during the first roundtable discussion that followed the presentations in sessions 1 and 2.⁸

- Private labels are continuing to spread across the EEA, however, the rate of expansion of private labels is not equal in all Member States. Private labels are spreading faster in some than others.
- In terms of inter-retailer competition, it is the top-level retailers that have been particularly successful; they are able to offer top brands together with cheaper private labels. Discounters have been less successful and have been hit by 'match price' offers.
- The recent economic turmoil caused by rapid inflation followed by recession has caused disruption in retail markets; the cheapest products are doing well and their margin rate is still high in historical terms.
- Generally, the recent global economic crisis has led to a loss of faith in market mechanisms. With this increased scepticism comes increased pressure to examine the effects of buyer power.
- There is also pressure either to apply Article 102 to novel situations, i.e. stretching its application, or to introduce new sector-specific rules providing competition authorities with greater powers.
- It was noted that stretching Article 102 could have negative effects on consumers as over-broad application – e.g. to situations of alleged collective dominance – would reduce legal certainty.
- The merits of rules aimed at curbing retailers' buyer power or protecting producers were discussed. The 'economic dependency', 'no-negotiation' and 'restrictive trade practice' rules were discussed as well as non-binding codes of practice with similar aims, and restrictions on companies with 'significant' market power, rather than 'dominance', were also discussed.
- It was noted that sector-specific rules and codes can have a negative impact on consumers as well as positive, especially if the rule focuses on the impact on the supplier rather than the consumer.
- It was noted that sector-specific rules should be made in the interest of consumers and not of lobby groups. It was agreed that thorough and transparent fact finding is essential prior to the creation of sector-specific rules or codes.
- It was suggested that an ombudsman might be of use to help resolve issues between suppliers and retailers.
- It was suggested that retailer buyer power and private labels might not be the root cause of competition problems. If competition in the downstream retail markets is healthy, buyer power and private labels are less problematic.
- Tackling barriers to entry in the retail level of the market may help counter the adverse effects of excessive buyer power and private labels.

⁸ The Chatham House Rule applied to the discussion, and so the contributors are not named.

SESSION 3: RULES OF BEHAVIOUR

Comparative perspectives on resale price maintenance

Professor Andy Gavil, *Howard University School of Law*

The law of resale price maintenance (RPM) is undergoing a transition in the US following the Supreme Court decision of *Leegin*⁹ in 2007. Despite this milestone ruling there is less uniformity in the application of antitrust rules in relation to resale price maintenance than one might expect.

By a 5–4 majority the Supreme Court in *Leegin* overruled the nearly century-old decision of *Dr Miles*,¹⁰ which set out a per se rule against minimum RPM. Essentially, in *Leegin* the Supreme Court recognised that although RPM can be anti-competitive, it can also serve legitimate pro-competitive purposes such as strengthening inter-brand competition by reducing intra-brand competition in ways virtually indistinguishable from permissible non-price restraints. As such, the per se prohibition was no longer justifiable. The Supreme Court invited antitrust agencies and the courts to develop ‘fair and effective’ methods for applying the rule of reason to RPM.

Under the Supreme Court’s analysis, RPM can lead to anti-competitive effects in one of four ways: by facilitating supplier-led cartels; by facilitating retailer-led cartels; by allowing a dominant manufacturer to incentivise retailers not to sell the products of smaller rivals; or by a dominant retailer requesting a manufacturer to impose RPM on its rivals to forestall innovation in distribution which decreases costs. The Supreme Court stated that vertical RPM would be more likely to be anti-competitive where widely utilised by suppliers; where the vertical restraint is put in place at the request of a retailer; and where dominance is an issue (i.e. where the relevant entity has market power).

At the federal level both the Department of Justice (DOJ) and Federal Trade Commission (FTC) filed amicus briefs supporting the overruling of *Dr Miles*. Since that time, however, a change in administration has produced some differences of opinion between the two federal antitrust enforcement agencies. Whereas the DOJ appears to favour working within *Leegin* to develop a workable rule of reason approach, at least the Chairman of the FTC seems to favour overruling *Leegin* legislatively and restoring the per se rule of *Dr Miles*. There have been two separate attempts in Congress to restore the per se rule in *Dr Miles* through legislation, but despite the support of the FTC Chairman, the bills have not passed and the general level of support for such a measure is unclear.

At the state level, most legislatures and courts follow the federal position, but some states enacted legislative provisions against RPM before *Leegin* and these laws will remain in force. So far Maryland is the only state to expressly repeal *Leegin*. State Attorneys General, who enforce antitrust at the state level, have been hostile to *Leegin*, with 37 supporting an amicus brief opposing the overruling of *Dr Miles*. Since *Leegin* a number of per se cases have been filed in various states including New York and California. Thus, RPM is not subject to the rule of reason throughout the US.

Assuming Congress does not repeal *Leegin*, it is likely that the DOJ and FTC will continue to refine the tests and presumptions for anti-competitive effects. Few cases are likely to arise as RPM has never been a high priority in the eyes of federal antitrust enforcers. Regardless of *Leegin*, some states will continue to prosecute per se cases and this will inevitably mean that uptake of RPM will be slow as companies will

⁹ *Leegin Creative Leather Products, Inc v. PSKS, Inc* 551 U.S. 877 (2007).

¹⁰ *Dr Miles Medical Co v. John D. Park & Sons Co* 220 U.S. 373 (1911).

need to exercise caution before introducing RPM. Companies will also be cautious of the risk of private damages actions.

In the EU there has never been a per se rule against RPM. There has, however, been a long history of scepticism towards RPM and strong legal presumptions against it. Under the Commission's new vertical restraints block exemption,¹¹ RPM is a 'hardcore' restraint which automatically excludes an agreement from the safe harbour of the exemption, although without creating a presumption of illegality. Theoretically, it is possible to justify RPM under Article 101(3) TFEU and the new Vertical Guidelines¹² discuss the possibility of permissible forms of RPM. So far however, there is very little case law to guide analysis of RPM and firms may be unwilling to test the new Guidelines.

While both the EU and US recognise that RPM may facilitate collusion or exclusion, the EU approach focuses more on the anti-competitive effects of RPM, while the US approach focuses more on possible gains or losses of efficiencies. For example, the EU Guidelines assess whether a 'softening' of competition occurs, something outside the focus of the US approach. Fundamentally though, the two approaches recognise the potential pro-competitive effects of RPM.

Despite common beliefs underpinning the two approaches, procedural factors mean that RPM is more risky to employ in the EU than the US (at least from the perspective of federal enforcement). Under US law the complainant must overcome a heavy burden of proof to establish the existence of an agreement with an anti-competitive effect. Only then does the burden shift to the defendant to demonstrate efficiencies. By contrast, in the EU all agreements containing RPM automatically fall outside the scope of the block exemption, a complainant must merely establish the existence of an agreement and it is effectively for the defendant to prove that the conditions within Article 101(3) are satisfied.

Generally both the EU and US are showing a greater tolerance of RPM. In the US this tolerance is more pronounced at the federal than the state level. However, procedural presumptions reveal different economic presumptions; namely, the EU is more confident of harms than the US. *Leegin* encapsulates the policy choice of permitting RPM which protects supplier autonomy, allowing the restriction of intra-brand competition to promote inter-brand competition. The alternative is to restrict RPM, limiting supplier autonomy and leaving market forces to establish retailer margin. Under this alternative route intra-brand competition is relied upon to stimulate inter-brand competition: retailers complaining about insufficient margins incentivise suppliers to become more efficient and offer lower prices. The EU's approach is closer to the latter; it may be the case that neither approach stimulates competition flawlessly.

¹¹ Regulation 330/2010 (EU) OJ (2010) L102/1.

¹² Guidelines on Vertical Restraints ('the Vertical Guidelines'), OJ (2010) C130/1.

Implications of the EC's guidelines on vertical agreements

Pat Treacy, *Bristows*

The European Commission has recently published the new Vertical Restraints Block Exemption¹³ (the 'Regulation') and Vertical Guidelines.¹⁴ The Regulation enters into force on 01 June 2010, subject to a one year transitional phase for vertical agreements in existence on 31 May 2010. The Regulation and the Vertical Guidelines contain significant new rules and guidance which will be of interest to many in the retail sector.

The most noteworthy change is that the new Regulation provides that both the supplier's and the distributor's market shares must be less than 30% for the block exemption to apply. Under the previous regime generally only the market share of the supplier was taken into account. This change is aimed at tightening controls over buyers to reflect the recent increases in buyer power. However, the change will lead to major headaches for suppliers trying to establish competition law compliant distribution arrangements. The old regime effectively acted as a one stop shop: if the supplier knew that its share was under 30% it did not need to consider buyers' shares. Suppliers will now need to consider whether to (a) negotiate one set of agreements for buyers within the 30% threshold and another set of agreements for buyers above the threshold; or (b) use a one-size-fits-all approach, applying the same (looser) obligations on buyers with high market share as on those with lower market share. If the supplier chooses to negotiate two sets of agreements it will also need to consider imposing reporting obligations on buyers so that it is notified when the buyer's market share crosses the 30% threshold.

A more welcome change is the extra guidance provided in the new Vertical Guidelines on internet selling. As before, sending unsolicited emails will constitute 'active' selling, but making a website widely accessible will not constitute active selling, unless it is specifically targeted at certain customers outside the exclusive territory. Notably, the Vertical Guidelines explicitly state that the language setting of a website cannot by itself act as an indicator of targeting of consumers based in different Member States. The Vertical Guidelines also give further examples of hardcore restrictions on passive selling; the examples all imply significant limits on suppliers' ability to restrict online supplies. The examples suggest that it will be 'hardcore' to:

- prevent customers in an exclusive territory from viewing another distributor's website by automatically rerouting such customers to their home distributor's website, or terminating transactions once it is clear that the buyer is from outside the relevant territory;
- impose a requirement that distributors must sell a certain proportion of goods offline;
- impose higher prices on distributors for goods resold online than those sold offline;
- impose a blanket ban on internet sales without objective justification (e.g. health and safety reasons).

As previously, although an agreement that contains a hardcore restriction falls outside of the block exemption, it may still be exempt on an individual basis. It might be possible to argue that rerouting is justifiable to ensure that safety information is displayed in the relevant language. The Vertical Guidelines also give suppliers some leeway to control offline sales as they are permitted to require their distributors to operate a 'bricks and mortar' outlet before selling online, and may require that the distributor sells an absolute amount (in value or volume) offline.

¹³ Regulation 330/2010/EU, OJ (2010) L102/1.

¹⁴ OJ (2010) C130/1.

The Vertical Guidelines now also provide guidance on the individual exemption of resale price maintenance (RPM) under Article 101(3). This topic was covered in greater detail in the previous presentation; suffice it to say that it is interesting that the Commission now formally acknowledges the potential pro-competitive effects of supplier-led RPM. The Vertical Guidelines also note that a short-term prohibition of passive selling into an exclusive territory may sometimes fall outside the scope of Article 101(1) if it is genuinely necessary to protect the recoupment of investments made by distributors to launch new products.

The Vertical Guidelines also discuss for the first time the competition law analysis of upfront access payments (fees required by distributors to access their systems, e.g. slotting fees) and category management agreements, whereby a supplier is entrusted with managing a category of products (including competing products), and give guidance on when these might be considered pro-competitive even where 30% market thresholds are not met. The Vertical Guidelines note that upfront access payments can reduce asymmetry of information between buyers and sellers and can create competition for access to shelf space. Upfront access payments also pass on the risk of a product not selling well to the supplier, which can help prevent free-riding by suppliers. The Vertical Guidelines note that category management agreements can promote access to the supplier's expertise and may increase responsiveness to customer demand. In general, where a market is characterised by strong inter-brand competition and low switching costs category management will be less likely to raise competition law issues.

In response to the new Regulation suppliers may need to review their existing supply relationships once the one year transition period expires and plan future agreements very carefully. If the buyer has a market share above 30% it will be necessary to consider if a planned or existing agreement will be fully enforceable. However, a buyer's strong market share might not be problematic for the supplier alone. Presumably, if an agreement falls out of the scope of the block exemption due to the buyer's high market share it is likely to be the clauses favouring the buyer which are considered incompatible with Article 101. Suppliers may be able to use the new Regulation to aid them in the negotiating of new vertical supply arrangements, and buyers will also need to be aware of the implications of the new Vertical Guidelines.

In general, the new Vertical Guidelines indicate that the Commission is serious about making an economics-based assessment of vertical agreements. This will lead to greater flexibility and a shift away from a tick-box approach. This flexibility may advantage some suppliers and buyers but will also increase complexity and reduce legal certainty. It is unclear whether the Commission's aim to redress increasing buyer power has been achieved through the new Regulation. Undoubtedly though, the new regime will be of great significance for the retail industry.

SESSION 4: POWER IN THE RELATIONSHIP

Identifying buyer power and its positive and negative effects

Dr Nicola Mazzarotto, *Competition Commission*

Before considering buyer power and its effects on competition, it is necessary to set out an analytical framework – what is buyer power? A simple definition would be ‘market power held by the buyer’ but this is too general to lead to a specific methodology. A more specific definition is necessary for the concept to be of use.

From an economic perspective, there are two very distinct frameworks for describing how sellers and buyers interact.

- The ‘market framework’ is of use where the supply side of the market is fragmented and competitive; here prices are established by the market – some farm produce may fit into this framework. In the market framework, the buyer’s size relative to other buyers might be of use in establishing buyer power.
- The ‘bargaining framework’ is of use where the supply side is relatively concentrated and trading prices are established through (often confidential) individual negotiations. In this framework an indicator of buyer power is the available outside options to buyer and seller. In other words, buyer power will be greatest where the seller has fewest alternative possible purchasers to sell to.

Under the market framework, buyer power can to some extent be seen as a mirror image of seller market power if buyers face a supply curve that ‘slopes up’. With increasing marginal cost of supply, the incentive to lower input prices translates into lower quantity sold in the intermediate (and ultimately the final) market. This is known as ‘demand withholding’. In such markets an indicator of buyer power is buyer size relative to the market. However, it is questionable if many markets are subject to an increasing marginal cost of supply. The UK Competition Commission Groceries Market Inquiry did not find evidence of demand withholding in the four sectors it analysed. Although, in the proposed Stonegate/Deans merger in the eggs sector, concerns of demand withholding were raised.

Under the bargaining framework, buyer power is typically seen as beneficial (countervailing the market power held by sellers) or neutral (leading to transfer of rents from seller to buyer). However, in certain narrow circumstances, buyer power could permit powerful buyers to exploit supplier investment decisions thereby discouraging supplier investment, ultimately to the detriment of consumers. However, whether this impact on suppliers’ ability to invest and innovate results from buyer power is likely to be very case-specific as buyer power per se can also in principle increase incentives to invest. It is important to identify the mechanism (e.g. a certain practice) through which buyer power is thought to adversely affect investment. In the Groceries Market Inquiry the Competition Commission found that the practice of retrospectively altering commercial agreements with suppliers was likely to impose too much risk on suppliers and ultimately lower incentives to invest and innovate. The Competition Commission sought to address this issue by introducing the Groceries Supply Code of Practice (GSCOP) and through the establishment of an ‘Adjudicator’.

Buyer power can also have positive effects on competition. For example, buyer power might lead to 'buying efficiencies' or it might be held by customers who could use it to counter detriment which might otherwise arise from a merger of suppliers. Both buying efficiencies and 'countervailing buyer power' should be understood and assessed in the context of the market in which they arise, bearing in mind the frameworks mentioned earlier. This is important as the existence of powerful buyers can sometimes be invoked as a defence in too simplistic a way. In reality, large buyers do not always counteract supplier power. Countervailing buyer power is more likely to effectively prevent a merger of suppliers from leading to higher prices if buyer power originates from the buyers' ability to integrate backwards or sponsor entry into the suppliers' market – and is hence unlikely to be reduced by a merger. In any event, an assessment of the reality of buyer power must remain an integral part of substantial lessening of competition analysis. It should not be a mere afterthought or trump card played by the merging parties.

In sum, in order to assess buyer power properly it is important to understand its context, as well as to identify its source and how it manifests itself. There is no general approach to assess the effects of buyer power per se. Similarly, the indicators of buyer power and the analysis framework will depend on the context and the issue under consideration. In this process buyers and sellers can assist authorities by explaining the negotiating process in detail and the determinants of bargaining strength as well as the context of any possible adverse effects (e.g. on innovation) or countervailing forces.

Remedies to the adverse effects of buyer power

Myriam Vander Stichele, *SOMO*

Not all competition authorities and/or governments believe that buyer power has negative effects. For instance, private labels are considered to fight inflation and increase competition with big brands. Some private labels are innovative new products created in response to consumer needs. However, this picture is incomplete. Not all stakeholders have their voice heard in the debate about private labels and the lobby by larger retailers argues that the profit margins of large brand manufacturers are higher.

In order to have a full understanding, there is a need for a full sector enquiry into the retail sector in the EU which covers the whole supply chain within and outside the EU, and involves all stakeholders. The rapid spread of private labels has not been matched by increased monitoring and understanding of the competitive effects. Retail buying alliances can negotiate substantial discounts for private labels from international suppliers. However, it is unclear to what extent these savings are the result of buyer power, abusive practices, or whether savings are passed on to consumers.

Before an enquiry, consideration would need to be given to its scope, resources and legal powers. The enquiry could be led by competition authorities, or governmental representatives, at national and/or EU level. The enquiry would need to understand profit margins throughout the supply chain and establish how prices are transmitted to the consumer. It would also need to examine the full contractual and non-contractual relationships between suppliers and retailers or their buying houses and buying alliances, e.g. payments, conditions of delivery and negotiation methods. The enquiry would need to look beyond the EU since many food products are sourced globally nowadays. The enquiry would assess the market shares of all those participating in the supply chain and the dependency of suppliers on large supermarket chains. There should be a particular focus on the role of private labels in enhancing retailers' buyer power and abuses, and anti-competitive impacts of private labels (vertical integration).

A full sector enquiry would also reveal suppliers' levels of willingness to reveal abusive buyer-power-related malpractices. The enquiry would investigate appropriate and effective remedies. For instance, possible solutions include voluntary codes of practice and self-regulation but they may not be appropriate if suppliers' fear leads to substantial under-reporting of malpractices. In such circumstances an independent regulator, similar to a telecoms regulator, might be tasked with carrying out proactive monitoring and enforcement of rules. In this context, the enquiry could see if lessons from regulated sectors would help us understand whether external regulation is appropriate. The enquiry could also assess the application of existing competition law and its effectiveness in combating excessive buyer power.

A code of practice is one possible solution to excessive buyer power that has been put in practice by the UK with the introduction of the Groceries Supply Code of Practice (GSCOP). Codes of practice might also be introduced by retailers themselves as part of their corporate social responsibility policy. One question is whether to establish an EU-wide code or a series of national codes. A second is whether to employ an 'Anglo-Saxon' principles-based approach, or a more prescriptive 'continental' approach. A third concerns a code's contents and scope. A fourth is whether a code should be voluntary or mandatory (and if mandatory, how it is to be enforced).

A code's effectiveness depends greatly on its enforcement. The UK's SCOP was considered by many to be ineffective in practice. It has now been amended to include greater mandatory elements. Any code to tackle buyer power would be most effective if a combination of national and EU-wide bodies existed with responsibilities for its implementation and enforcement. Alternatively an independent body could monitor, adapt and interpret the code. Such a body could also react to complaints from all stakeholders and proactively investigate implementation of the code. Such a body would be able to enforce and, ideally, sanction non-compliance with the code through fines or other means.

An alternative or complimentary approach to tackling the negative effects of buyer power might be to introduce an 'Unfair Business-to-Business Commercial Practices Directive' comparable with the existing Unfair Commercial Practices Directive, which deals with business-to-consumer practices. Such a directive would contain a list of prohibited unfair practices and act as an EU-wide common denominator for business practices. One problem with EU directives is that the Member States may not implement or enforce them correctly or uniformly given differences in legal traditions and supervision, but on the other hand that might deal with the diverse retail situations in EU countries. There may also be a lack of supervision of trans-border commercial practices between Member States, unless special EU-wide mechanisms to enforce the Directive were put in place.

One of the unfair practices relates to late payments. The current EU Late Payments Directive needs legal review to improve it and ensure stricter enforcement.

A new solution would be the introduction of a 'Model Fair Contract Law' which would only cover supplier-retailer relations when there is a contract except if compulsory contracting was considered. Such a law would inevitably reduce freedom of contract, but would be supported by France's long experience that dealing with buyer power malpractices needs legal constraints within the frame of the relation between suppliers and buyers. An EU-wide harmonised fair contract law would introduce minimum standards for all such relations. Preferably this law would also extend to contracts with non-EU suppliers to ensure retailers do not turn to outside suppliers to avoid the rules. However, it is not clear how non-EU suppliers could enforce this law, or would be able to turn to existing and non-existing international commercial law.

Existing national and EU competition laws could also be employed to better police abusive buyer power, for instance the uncompetitive behaviour of slotting allowances and rebates. It should be recognised that retailer-side concentration in markets where private labels are strong is different to normal retailer-side concentration, e.g. it can lead to foreclosure and lack of inter-brand competition since retailers act as gatekeepers to the retail market. Also, anti-competitive behaviour of some buying alliances, and in particular those for private labels, would need to be scrutinized. During retail mergers, more attention might be needed to levels of concentration at regional level within a country. Some national competition laws in some EU countries already take those elements into account, and could become practice throughout the EU through the EU procedure of harmonisation of national laws.

More radical solutions are, for instance, shifting competition rules towards the stated aim of guaranteeing consumer choice and quality, as well as market functioning between businesses, and away from the approach by which unequal bargaining power is not addressed unless price competition to lower prices for consumers is affected. Competition law could be adjusted to take into account the interests of producers and non-economic objectives such as job creation

and protection of SMEs.¹⁵ At least cartel law should be adapted to allow farmers' cooperatives and other farmers' groups with a higher market share than 15% (current EU limit) if retailers have larger market shares.

Other new solutions might include monitoring of stakeholders' margins such as the pilot project for a 'European farm prices and margins observatory', banning below-cost sales, dealing with buyer power abusive practices towards non-EU suppliers, for instance through cooperation clauses in free trade agreements, and separating large retailers from their buying functions.

¹⁵ SME: Small and medium sized enterprise.

Roundtable discussion 2

Facilitated by Andrés Font-Galarza, *Gibson Dunn & Crutcher*

This section sets out briefly the most important points made during the second roundtable discussion that followed the presentations in sessions 3 and 4.¹⁶

- The panel discussed the difficulties in obtaining information about retail markets characterised by buyer power and private labels.
- It was noted that suppliers were more likely to make complaints against other suppliers than retailers with private labels because of the fear of repercussions from the retailer; whether under general competition rules or sector-specific rules of codes of practice.
- Similarly, where suppliers are requested to provide information in the event of a proposed merger of two retailers, they appear reluctant to provide information.
- It was noted that efforts to avoid reliance on complaints to discover problems by actively policing sector-specific rules and codes through the competition authority hiring auditors to look for breaches were costly and ineffectual.
- However, competition authorities do sometimes launch an investigation on their own initiative after receiving a complaint, thus protecting the anonymity of the party which alerted them to the problem.
- It was noted that buyer power can only be proven to exist through the use of extensive expert economic evidence. It is too simplistic to examine buyer power in abstract. It is necessary to examine what particular features allow the retailer to exercise its buyer power to extract a discount.
- Individual acts by retailers, although they may appear to demonstrate buyer power, may also feature in healthy competitive markets, e.g. delisting a supplier may be indicative of an attempt to extract discounts or may simply indicate that a particular product line is insufficiently profitable.
- Buyer power per se is not problematic; intervention is only necessary if buyer power leads to an effect on consumer welfare. However, consumers have an interest not just in low prices, but also in having a range of products to choose between.
- Buyer alliances between smaller retailers can have positive competitive effects and may increase efficiency and enable these smaller retailers to compete more effectively against vertically integrated companies.
- Concern was raised that retailers with significant buyer power appear to thrive at the expense of other links in the supply chain. Discussion of the role of competition law and other forms of regulation ensued.
- It was noted that competition rules cannot pursue consumer welfare and other interests concurrently because there is no logical way to balance these competing interests.

¹⁶ The Chatham House Rule applied to the discussion, and so the contributors are not named.

- There is an inherent risk that lobby groups seek to capture competition rules for their own ends. It would be best if separate rules were suggested and discussed if perceived imbalances between companies exist. A fixing of profit margins might be popular with certain interest groups but would likely harm competition and would be unlikely to become law.
- Alternatively, a business-to-business unfair practices directive might possibly redress imbalances between companies, but may also reduce efficiency. Similarly, other regulations, e.g. planning restrictions, which inadvertently restrict competition by raising barriers to entry, might be revised to take account of competition arguments.

Annex 1

Biographies of speakers

Helen Passingham-Hughes

Kantar Europanel

Helen Passingham-Hughes was appointed as the Managing Director for Europanel (Joint venture between GfK Panel Services and Kantar Worldpanel (formerly TNS)) in October 2008 and is responsible for the strategic direction of Europanel. In this role Helen leads the central Europanel team comprising over 50 people who are responsible for aligning data across up to 54 countries for our global and European panel clients.

Helen rejoined TNS in 1997 as Managing Director for a UK custom division and in 2000 moved to Asia to establish the Worldpanel network. On returning to the UK Helen was a Global Partnership Account Director managing the TNS Custom relationships with both Diageo and Nestlé.

Helen is British and graduated with a degree in Business Studies. She joined the market research industry, and Worldpanel UK, in 1991 leaving in 1992 to support the commercial set up of IRI in the UK where she spent five years.

Isabel Ortiz

DG Enterprise, European Commission

Isabel has been a Policy Officer at DG Enterprise and Industry, Food Industry Unit (European Commission), Brussels, since March 2008. Her main task is to contribute to the preparation of food legislation proposals with a view to enhance the competitiveness of the food industry.

Before joining the European Commission she was EC Law lecturer for the Spanish Public Administration and researcher in EC Law (Marie Curie Fellow 5th Framework Program) at the Amsterdam Centre for International Law (University of Amsterdam), ESADE-University Ramon Llull, Barcelona (Spain), Université Catholique de Louvain-la-Neuve (Belgium) and University of Montpellier I (France).

She holds a PhD in Law (specialisation in Constitutional European Union Law) awarded by the Universities of Montpellier I (France) and Autònoma of Barcelona (Spain).

Tim Brooks

GlaxoSmithKline Consumer Healthcare

Tim has been with GlaxoSmithKline Consumer Healthcare for 11 years.

He joined in 1999 from brand strategy and innovation consultancy, The Distillery, where he was a board Director. GSK (then SmithKline Beecham) were a client and asked him to join them. The Distillery's clients included Unilever, Kraft, Courage, Dulux and Mars.

Prior to that he was a board director at DIA; a UK top 5 packaging and design consultancy.

At GSK he started in Category Management, GSK's Global Strategic marketing group, managing key global strategy, innovation and advertising projects for Panadol.

Tim joined the UK business in 2003 and led brand groups in Healthcare and Mouthcare. Five years ago he was promoted to his current position as UK Marketing Director – Healthcare.

He manages a broad portfolio of brands including NiQuitin, alli, Beechams, Panadol, Piriton, Breathe Right, Nytol and Night Nurse. He also manages the Research and Innovation functions.

Ariel Ezrachi

Centre for Competition Policy, Oxford

Ariel Ezrachi is Director of the University of Oxford Centre for Competition Law and Policy. He is the Slaughter and May University Lecturer in Competition Law and a Fellow of Pembroke College, Oxford. In addition to his teaching within the University he develops training programmes in competition law and policy for the private and public sectors, including training programmes for European judges endorsed and subsidised by the European Commission (2006–10). His recently published papers focus on passive investments, excessive pricing, private labels and cross-border mergers and acquisitions. Recent books include: Ezrachi *EU Competition Law, An Analytical Guide to the Leading Cases* (Hart, 2nd edition 2010), Ezrachi and Bernitz (eds.) *Private Labels, Brands and Competition Policy* (OUP, 2009), Ezrachi (ed.) *Article 82 EC – Reflections on its recent evolution* (Hart, 2009).

Paul Reeskamp

Allen & Overy

Paul Reeskamp joined Allen & Overy Amsterdam as a partner in January 2000. He has been in IP litigation for more than 20 years and is the head of the Amsterdam Intellectual Property department. He has consistently been ranked (Chambers) as a leading individual in the field of intellectual property and trademark and unfair competition law and regularly publishes and lectures on IP matters, both in the Netherlands and abroad. Paul is on the editorial board of the Benelux Trademark Bulletin and is one of the Dutch reporters for the World Trademark Review. He is a WIPO domain name panellist as well. Paul is an active member both of INTA and Marques, where he has served on various committees. In 2007 he was awarded the prestigious 'Wim Mak Award' from the Benelux Trademark and Design Law Association for his article on trademark law and comparative advertising. He is recognised as being 'An innovative thinker who analyses cases critically and won't just go with the tide' (Chambers, 2009). He has been involved in numerous comparative advertising cases and advises the FNLI (Dutch Association for the Food & Beverages Industry) on comparative advertising issues regarding household brands versus premium brands.

Sean-Paul Brankin

(Chairman, morning roundtable) *Crowell & Moring*

Sean-Paul Brankin joined Crowell & Moring's Brussels office as part of its worldwide Antitrust Group in December 2007. Prior to that he was a Legal Director at the UK Office of Fair Trading (OFT), where he was in charge of internal case scrutiny and headed the competition team in the OFT's legal and policy unit. Before joining the OFT, Sean-Paul had worked in private practice from 1994 for leading US and UK firms in London, Brussels and Paris advising on EU and UK antitrust law.

Sean-Paul has been involved in a range of contentious matters before the European Commission and UK competition authorities as well as litigation before the European courts, the UK Competition Appeals Tribunal and national courts in the UK and elsewhere. He has advised in a number of high-profile cartel cases in the UK and at the EU level.

Sean-Paul has developed significant practical expertise in a range of industries, including pharmaceuticals, food and FMCGs, consumer electronics, chemicals and financial services. He has particular experience in advising clients on issues relating to dominance and the IP/antitrust interface.

Sean-Paul is a regular speaker on competition law matters, having appeared at events organised by among others IBC, Hawksmere and C5 in the past 12 months, including the IBC Advanced Competition Law event in London. He holds a first class degree in law from the University of Cambridge and an LL.M. from the University of Virginia.

Professor Andy Gavil

Howard University School of Law

Professor Andy Gavil is a member of the faculty of the Howard University School of Law, where he has taught courses on antitrust law and civil litigation since 1989. During May–June 2010, he was a visiting professor at the Centre for Competition Policy at the University of East Anglia, Norwich, UK. He has written, lectured and commented extensively in the US and abroad on antitrust law, jurisdiction and procedure. With William E. Kovacic and Jonathan B. Baker, he is the author of *Antitrust Law in Perspective: Cases Concepts and Problems in Competition Policy* (2nd edition 2008). His current research focuses on multidistrict antitrust litigation in the United States and a comparative study of resale price maintenance. He is also at work with co-author Professor Harry First on *Microsoft and the Globalization of Antitrust Law: Competition Policy for the Twenty-First Century*, which will be published by MIT Press.

Pat Treacy

Bristows

Pat has specialised in EU and competition law for almost 25 years. She heads the competition law team at Bristows and is widely recognised as having particular expertise in advising on the interface between competition law and intellectual property law. She advises on the competition law aspects of agreements and commercial conduct, particularly in the context of key sectors such as Consumer Products, IT, and pharmaceuticals. Pat represents clients in dealings with the competition authorities and also before the courts, both at national and EU level. Pat is a member of the Competition Law Association; of the UK Association for European Law; and of the British Institute of International and Comparative Law. She is on the editorial board of the *Journal of Intellectual Property Law and Practice* and writes and lectures widely on competition law.

Dr Nicola Mazzarotto*Competition Commission*

Dr Nicola Mazzarotto studied economics at the London School of Economics and the University of East Anglia where he completed a PhD in Economics with a thesis on Buyer Power: economic theory and competition policy towards the retail sector. He worked as a competition economist at DG Competition of the European Commission, the Office of Fair Trading, the OECD and the Competition Commission, where he is Head of Policy Analysis. He led the economic analysis of many merger cases (such as the London Stock Exchange mergers; BSkyB/ITV, and others) and has worked on the Groceries market investigation as well as headed the economic analysis for the Groceries Remittal inquiry. He also led much of the work for the production of the forthcoming joint merger guidelines by the Competition Commission and the Office of Fair Trading. Nicola has published on Industrial Economics and Competition Policy in various journals and books.

Myriam Vander Stichele*SOMO – Centre for Research on Multinational Corporations*

Myriam Vander Stichele has a degree in History at the University of Leuven (B) and is Master of Philosophy in International Relations at the University of Cambridge (UK). She has been a Fellow of the Transnational Institute (TNI) since 1991. She is a senior researcher at SOMO which is a non-profit research foundation on transnational companies with special focus on societal issues. She is responsible for the financial sector programme as well as the trade and investment programme. She has been doing research on the agricultural sector since 2004, during which time she has focused on the impact of supermarket operations around the world – but recently mostly in the EU. She is a member of a civil society network – Agribusiness Action Initiatives (AAI), which is promoting the debate on remedies for negative impact of supermarket behaviour.

Andrés Font-Galarza*(Chairman, afternoon roundtable) Gibson Dunn*

Andrés Font Galarza is a partner based in the Brussels office of Gibson Dunn.

Mr Galarza is a former senior official of the European Commission's Directorate General for Competition, where he spent 13 years, including three as Deputy Head of the Unit in charge of enforcing EC Competition Law in the sector of consumer goods and foodstuffs.

Mr Galarza's practice encompasses antitrust issues relating to mergers, joint ventures, distribution issues, monopolisation and cartels. In addition, he provides strategic and policy advice to clients in regulatory matters affecting sectors such as consumer good brands, pharmaceuticals, energy, information and communication technologies (ICT) and the EU internal market freedoms. He also has comprehensive government experience in seminal ICT cases (media and music publishing, information industries, consumer electronics and software) involving complex regulatory issues.

He is a regular lecturer on antitrust and competition matters in many international forums, and has numerous publications with editions in several languages (eg. English, Spanish, French, Chinese).

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