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 shown 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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