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Institute of European and Comparative Law, University of Oxford

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

Report on the eleventh annual symposium on
competition amongst retailers and suppliers

Held on Friday 22nd May 2015
at Mary Sunley Building, St Catherine's College Oxford

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Overview

This report provides an overview of the eleventh annual symposium discussing Trends in Retail Competition.

The symposium focused on the nature of competition between branded and private label products and the relationship between retailers and their suppliers.

A major focus of the day was the level of choice and innovation in the grocery market, stimulated and provoked by an important quantitative study commissioned by DG Competition. Recent competition authority investigations were discussed, along with approaches to market definition and the effects of such issues as trust and, separately, similarity of packaging on shopper behaviour and the working of the market. A panel discussion at the end of the programme allowed for further exploration of these themes and the recently-announced European Commission e-commerce sector inquiry.

The event was hosted by the Oxford Institute of European and Comparative Law in conjunction with the Centre for Competition Law and Policy and was sponsored by Bristows LLP. It was held under the Chatham House Rule.

- 09.30 Introduction
Professor Ulf Bernitz
- 09.40 The impact of modern retail on choice and innovation
Philippe Chauve, DG Competition, European Commission
- 10.10 The sector inquiry into the German food retail sector
Birgit Krueger, Bundeskartellamt
- 10.35 Buying alliances and the analysis of market power
Koen Platteau, Simmons & Simmons
- 11.24 Market concentration of retailers and suppliers and the assessment of market power
Rosemary Choueka, Bristows
- 11.45 **DEFINING AND DELIVERING INNOVATION AND CONSUMER CHOICE**
- Innovation and vertical competition
Professor Roman Inderst, Goethe University
- Defining consumer choice and measuring performance in grocery
Dr Michael Bauer, CMS Hasche Sigle
- Assessing the environment for innovation
Jan Peter van der Veer, RBB Economics
- 13.50 **NEW INSIGHTS INTO COMPETITION BETWEEN BRANDED AND PRIVATE LABEL PRODUCTS**
- How consumer trust affects performance — does innovation matter?
Dr Oliver Koll and Richard Herbert, Europanel
- Para-sight!: Using eye movements to understand shopper attention
Dr Tim Holmes, Acuity Intelligence
- Private label imitation: implications for consumer choice
Dr Anocha Aribarg, University of Michigan
- 15.15 Defining markets where branded and private label products are present
Nicole Kar, Linklaters
- 15.40 **PANEL DISCUSSION**
- Chairman Dr Philip Marsden, Competition and Markets Authority
Panellists Ravi Bhatiani, Independent Retail Europe
 Philippe Chauve, European Commission
 Ariel Ezrachi, Centre for Competition Law and Policy
 Andrés Font Galarza, Gibson Dunn
 Andreas Gayk, Markenverband
- 16.45 Closing remarks
Professor Ulf Bernitz

Impact of modern retail on choice, innovation and prices

Philippe Chauve, *Head of the Food Task Force, DG Competition, European Commission*

This session outlined the results of the Competition Commission's investigation into choice and innovation in the European food retail sector.

Status of consumer welfare in the food supply chain

Two projects shed light on consumer welfare in the food supply chain: the European Central Bank (ECB) study on food prices during 2009 – 2011 and the European Commission “modern retail study” on choice and innovation in food in Europe during 2004 – 2012.

European Central Bank work on market structure and prices

As part of its work to understand the inflation mechanism, the ECB examined consumer prices and has published several studies on its findings. The ECB used an AC Nielsen scanner dataset covering 9 member states across 45 food products from 2009 – 2011. The studies looked at the difference in price levels across the Eurozone and the drivers of those differences. The ECB controlled for income levels, VAT, unemployment, population density and the business cycle.

The studies found that:

- downstream retail competition (i.e. lower local retail concentration) is associated with lower prices for the end consumer;
- higher retail concentration in the procurement market (including buyer groups) is associated with lower prices for the end consumer; and
- concentration of suppliers has a large impact on price differentials across EU countries – lower concentration of suppliers is associated with lower prices.

The Commission study on the EU retail sector

This study was prompted by complaints at national and EU level that large retailers impose detrimental conditions on food suppliers, reducing their means to invest and so decreasing choice and innovation.

The objective of the study was to deliver quantitative evidence on the evolution of choice and innovation and identify possible positive and negative drivers on innovation. The study assessed many potential drivers such as concentration factors, imbalances, economic environment, socio-demographic factors, private label penetration, shop characteristics and shop openings.

The Commission appointed consultants to construct a comprehensive database from a representative sample of EU member states. This contained more than three hundred shops, over one hundred local areas in seven member states during the period 2004 – 2012. The study covered only moderately concentrated national retail markets. The database covered, amongst other things:

different levels of local retail concentration; different levels of supplier concentration; various situations of imbalances between retailers and suppliers at national level in given product categories; and different types of shops. The final data set covered more than 100,000 different products in 23 product categories from 2004 – 2012.

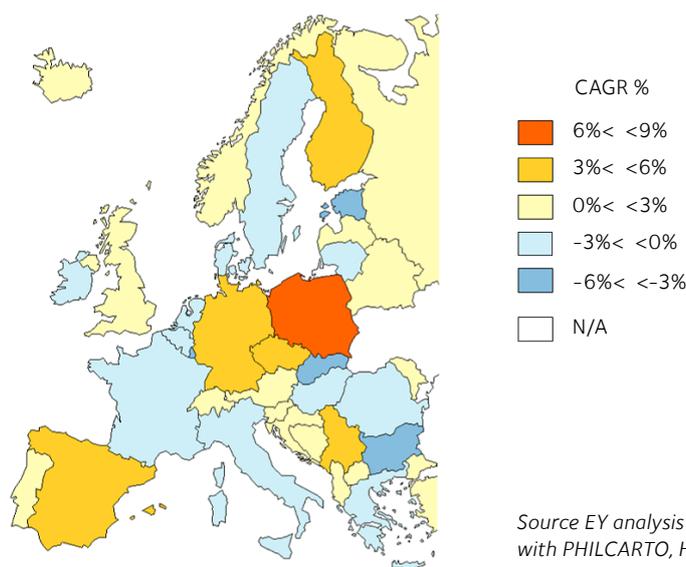
Main conclusions of the Commission Retail Study

This presentation gives a brief overview of the conclusions.

1. The concentration of modern retailers at wholesale level

Overall, retailer concentration (both modern retailers and traditional retail shops) has increased due to the increasing share of modern retail. However, as shown below, concentration of modern retail at national level has actually decreased in a majority of EU member states.

Evolution of modern retail concentration across Europe (at national level)



Source EY analysis based on © Planet Retail, with PHILCARTO, HHI 2004 - 2012

On average, retailer concentration is higher than supplier concentration; however, there are many individual markets where suppliers are more concentrated than retailers (almost half of the situations assessed in a sample of more than 300 markets covering 23 product categories in fourteen member states).

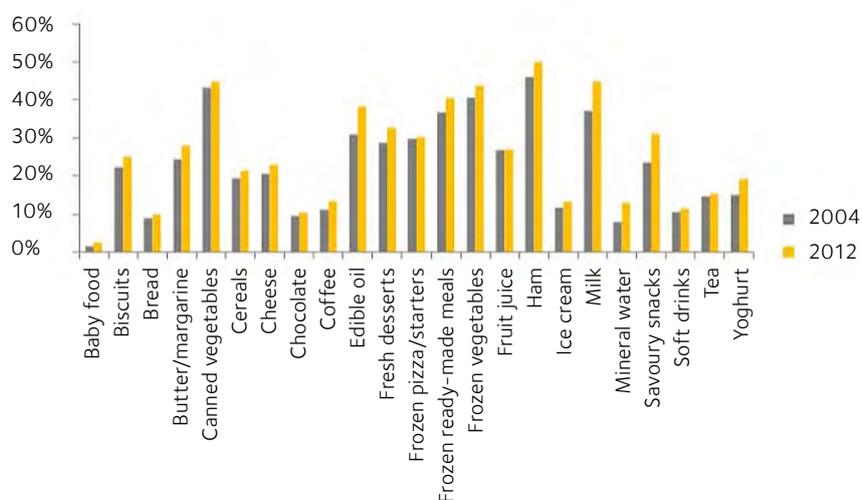
2. The concentration of suppliers at wholesale level

The market structure of suppliers varies widely between product category and member state. In some categories the top three suppliers constitute over two thirds of the market, such as Baby Food (79%) and Coffee (66%). In others, the top three suppliers constitute a much smaller percentage of the market, such as Ham (32%) and Bread (18%). Supplier concentration per member state (averaged across product categories) increased between 2004 – 2012 in twelve of the fourteen member states.

3. Private labels and brands

In fourteen member states the market share of private labels has increased. However, in each of the member states brands still dominate. The percentage of private labels sold in each product category has also gone up between 2004 and 2012 (see below).

Percentage of private label sales share by product category - average across 14 MS (national level) (source: EY analysis based on © Euromonitor International)



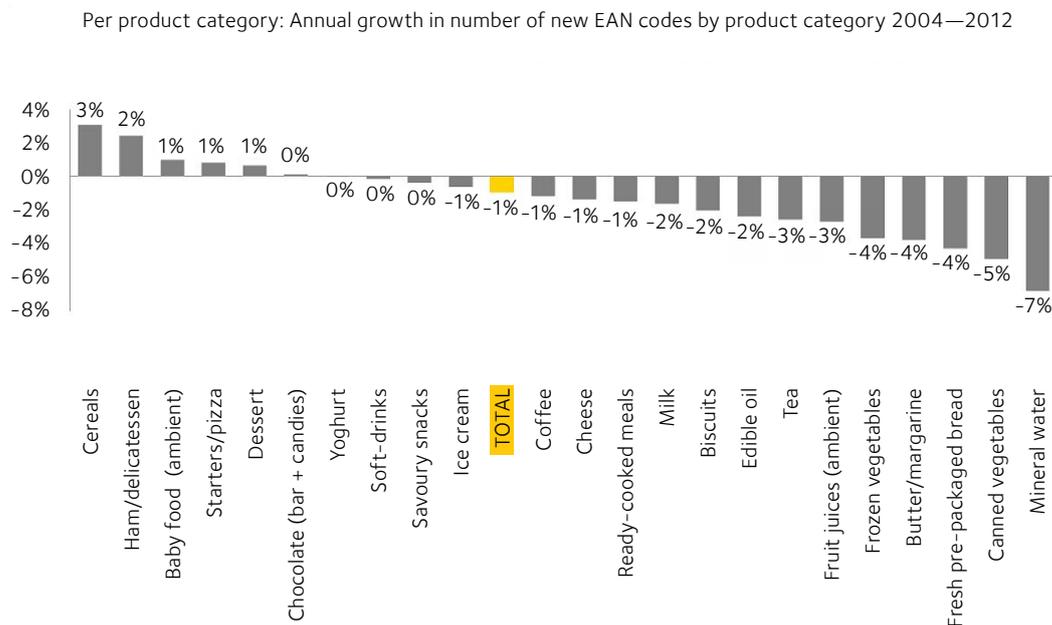
4. Choice on retailers' shop shelves

Choice on the shelves has increased in the last decade in terms of the number of different products available and the different brand suppliers. Choice was measured on what consumers see on the shelves; it was noted that this is only one dimension of choice. The average annual growth of the total number of EAN by product category from 2004 – 2012 was 5%; the highest annual growth was 8% (Ham/delicatessen category); the lowest was 2% (Butter/margarine). The study measured other dimensions of choice (number of package sizes, number of suppliers of brands). It was noted that choice also increased in these other dimensions, in particular, the number of suppliers of brands on shop shelves in a product category increased.

5. Innovation on retailers' shop shelves

There is no single, universally accepted, definition of innovation; therefore the answer to this question depends on which definition is taken. The Commission decided against a single measurement, examining instead a number of indicators such as: the total universe of new products (very wide definition based on new EAN codes excluding promotions); innovations in packaging; range extensions (such as new flavours); new formulations of products (e.g. new ingredients) and new products not identified as packaging, range extensions and reformulations.

The study found that innovation increased until 2008. However, since 2008 there has been a decline in the innovation rate in most product categories, with a trend towards more packaging innovation.



6. Private label impact on choice and innovation

The initial results of the study indicated there was a linear relationship between choice and innovation and their drivers for many products. However graphical analysis of the results suggested a non-linear relationship between choice/innovation and private label penetration at local level (in shops). This led the consultants to check for a non-linear relationship between choice/innovation and private label penetration at local level.

When refining the analysis (including a non-linear specification for private label penetration and a linear specification for all other drivers), the consultants found two different results for choice and innovation. There is no significant relationship between private label share and choice. In contrast, there seems to be a significant negative non-linear relationship between private label penetration and innovation; the higher the share of private labels, the larger the decrease in innovation.

7. The main likely drivers of choice and innovation

The study found several possible positive and negative drivers for choice and innovation:

Positive:

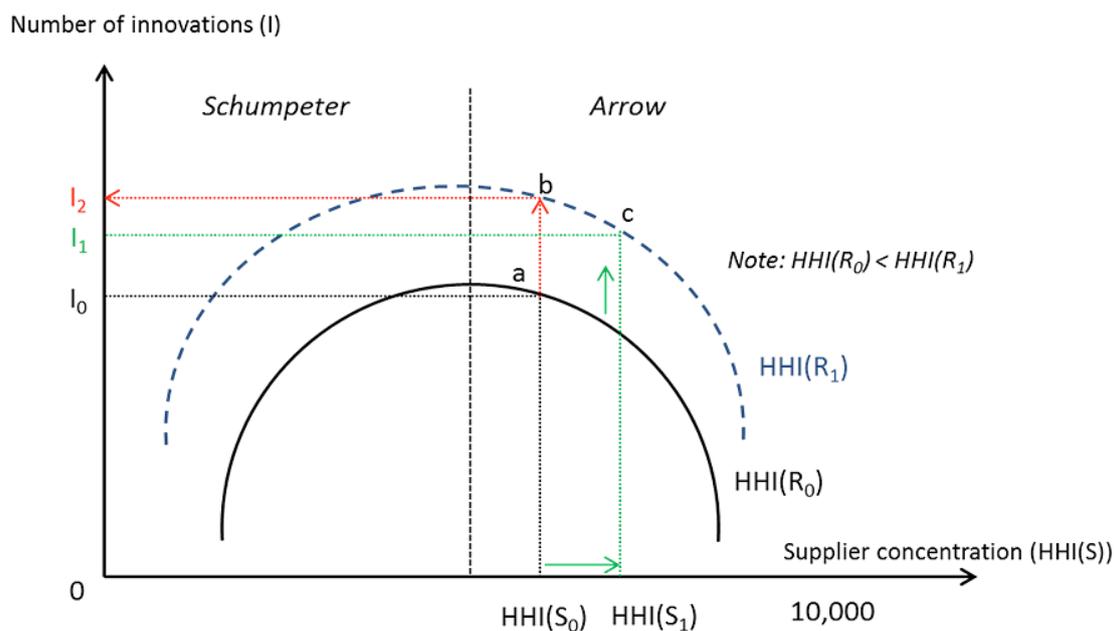
- the opening of a new shop in local consumer shopping areas has the largest effect on increasing innovation on the shelves in that area;
- expansion of the modern retail outlets in terms of floor space means there is more room for a larger range of products, increasing choice and innovation;
- in general, the larger the product category, the more choice and innovation will be present;
- counterintuitively, an increase in the relative wholesale concentration of retailers in relation to their suppliers has a positive effect on innovation.

Negative:

- an economic environment, as measured by local unemployment rates and local GDP/capita, can reduce choice and innovation in a market;
- higher levels of supplier concentration, at a national level, reduce innovation;
- an increase in the penetration of private labels in the shops reduces innovation. This is a quadratic relationship, not a linear one (unlike for other drivers).

Key results concerning retailers

If one considers a combination of the two traditional views of innovation, Schumpeter and Arrow, the study seems to show how innovation is related to supplier concentration and may be affected by increased retailer concentration. The graph below shows that, all else equal, after a certain threshold, innovation decreases as supplier concentration increases. However a simultaneous increase in retailer concentration can alter this outcome, by shifting the original curve (black, continuous) upwards (dotted, blue). The associated increase in innovation from the rise in retail concentration outweighs the decrease in innovation from the rise in supplier concentration.



Source: The Commission's modern retail study – A. Renckens/P. Chauve analysis

Competition issues

It was noted that concentration is a poor proxy for competition. For example, a decrease in innovation and choice on the shelves could be a result of concentration of the supplier or retailer, or it could be a result of evolving customer preferences in a particular area. Whether highly concentrated national retail markets constitute a competition problem is still to be investigated by the Commission. Currently, there has been no anti-trust litigation based on a reduction of customer choice or innovation. There have, however, been cases where the national competition authority has intervened in retailer buying alliances, for example Centrale Italiana in Italy and Norgesgruppen/ICA in Norway, because the benefits gained from the alliance did not appear to be passed on to consumers.

Conclusion – future policy

Three main conclusions were drawn from this investigation into the European food retail sector:

- there is concern over entry at the local level. A dynamic market for entry at the local level is needed and this is something the Commission should take more interest in.
- the Commission currently has no recommendation at this stage concerning the issues between private labels and brands. There is still intense debate over intervention in this area. The results of the study need to be analysed further.
- the Commission needs to be very careful about mergers of manufacturers as the study indicates that a concentration in suppliers leads to a decrease in innovation. Imbalances in bargaining power in favour of retailers do not appear to negatively affect innovation, at least in most European markets (where retailers are moderately concentrated at national level).

Sector inquiry into the German food retail sector

Birgit Krueger, *Bundeskartellamt*

Introduction

The overall objective of the inquiry by the German Competition Authority (GCA) was to improve understanding of food retail in Germany and to explore the market structure and the competition conditions of the sales and procurement markets. This inquiry looked at concentration and competition at both a regional and local level. It was prompted by ongoing concentration in food retail and a large number of complaints about unfair practices and exploitation of buyer power in negotiations. Key objectives were to:

- provide econometric insights into the different aspects of buyer power;
- identify the key drivers of buyer power to create a better framework for the assessment of merger cases; and
- better understand market structures.

Experience gained from sector investigations in other countries was also used in this inquiry.

Approach and structure of the investigation

There were two aspects to the sector inquiry, Upstream and Downstream. The Downstream inquiry compared structural indicators such as turnover, total sales, floor space, outlet density, customer reach, competitive impact of private labels and distribution channel concepts.

The more important Upstream study looked at procurement markets, analysing their structure taking into account various indicators such as purchasing volume or supplier and buyer structure. The case studies focused on seven individual, specially-selected procurement markets and an econometric analysis carried out.

Sales markets

Germany's main retailers, Edeka, Rewe, Schwarz Group and ALDI hold 80 - 90% market share. Edeka and Rewe continue to expand via mergers and buying alliances resulting in a continuous increase in retailer concentration. This is further compounded by a new generation of buying alliances. One problem highlighted by the inquiry is that smaller retailers and new entrants do not have much opportunity to grow.

The inquiry also showed that although there has been a slight assimilation of the distribution channels, a graduated competitive relationship between retailers is still apparent.

Procurement markets

The inquiry looked at seven different product markets with varying supplier / retailer concentrations and different levels of private label penetration. One issue was the definition of “market” on the procurement side. Interestingly, procurement markets for private labels and branded products were often found to be quite separate. Similarly, the costs and distribution structures of brand manufacturers in many cases varied greatly from those of private labels.

In all the procurement markets studied, food retail is the most important sales channel for food manufacturers, with the number of alternative distribution channels declining. In all the distribution channels, including export, a group of leading food retailers (Edeka, Rewe, Aldi and Schwarz Group) account for the largest share of total demand, creating high concentration on the retailer side. This is irrespective of whether the markets for private labels and brands are separated.

On the manufacturers’ side, in each market, a substantial proportion of goods and services are supplied by a leading group of four to five, at times fewer, companies. The GCA noted that it was necessary to assess buyer power and market power closely.

For manufacturers, shifting sales to other distribution channels is difficult, possibly because it is not economically viable to do so or because alternative distribution channels do not have capacity. Either way, the retail sector is becoming more important to manufacturers, increasing the power of retailers.

Econometric Investigation of the procurement markets

The GCA tried to find a basis on which to compare products between manufacturers and retailers. Therefore the investigation focused on branded products. Stratified random sampling of all listed products with European Article Numbers (EANs) was carried out, with data requests sent to retailers and suppliers.

Thousands of different models were used to analyse the data. The econometric analysis used:

- two separate data sets (supplier and retailer data sets);
- six alternative estimation models; and
- 4,860 alternatives of ways to measure the relevant factors.

This led to 58,320 alternative estimations in total; 192 models were discussed in the report.

Results of the econometric analysis

Bargaining is a “tug of war” with many different variables. These variables include outside options for the supplier and retailer, the impact of other competing products, volumes and brand strength.

High purchasing volumes lead to low purchasing prices, with leading retailers benefiting from the resulting economies of scale. These leading retailers are “gatekeepers” to the market for manufacturers’ products and even strong manufacturers can find themselves in a weak bargaining position. In addition, the positions of smaller retailers are weak in comparison to leading retailers.

It was noted that some manufacturers will make brands as well as private labels. However, this creates a further obstruction for manufacturers to negotiate price increases for their brands as the provision of private labels at lower prices constrains the prices they can charge.

In assessing bargaining power, the GCA took into account brand strength. In about 6% of the samples the products of a certain manufacturer were said to be indispensable for the retail trade. The bargaining position of the retailer is sometimes strengthened if the manufacturer also supplies private labels but this depends on the individual case. The position of retailers is further improved by the new generation of buying alliances. At the horizontal, rather than the vertical, level a retailer offering both branded and private label products will enjoy an advantage over its competitors.

Consequences for the future application of competition law

The GCA considered that Germany should have strict merger controls in order to prevent the German food retail sector becoming over concentrated. Each acquisition by one of the large retailers should be subject to an in-depth analysis. Additionally, the “new buying practices” involving large companies should be carefully examined for abusive behaviour. Such buying practices should now be considered as part of the effects of concentration, with significant long-term effects on competition.

It is recognised that there have been a number of complaints regarding abusive practices, in particular against Edeka, Rewe, the Schwarz Group and Aldi. Whether the complaint is valid must be investigated on a case by case basis.

Buying alliances and the analysis of market power

Koen Platteau, *Simmons & Simmons LLP*

Overview

This presentation examined the recent practices of national competition authorities, particularly France, in relation to buying alliances.

Buying alliances

There is now a distinction between two types of buying alliances or joint purchasing agreements. The first is the traditional pooling of purchasing volumes; the second is a “new generation” of buying alliance. The new generation of buying alliance goes beyond mere pooling. There are concentration elements in these alliances, with the larger company often exerting a form of control over its smaller partners; they often include additional terms such as an assimilation of product ranges, the inclusion of private labels and sometimes territorial protection. These alliances can be the pre-stage of a merger, although the form of control the larger company exhibits over the smaller company at this stage typically falls just short of the concept of control for merger purposes. The enforcement focus of authorities is on this new generation of agreement.

EU Horizontal Guidelines

The EU Horizontal Guidelines provide the framework for assessing buying alliances under Article 101 TFEU. It is important to examine market power on the selling market (selling to consumers) and on the procurement market (buying power of retailers). In particular, on the selling market, the risk that the better purchase prices achieved as a result of the alliance are not passed on to the consumer is assessed; on the procurement market, the risk of reduced output, quality and innovation in products is assessed, along with the risk of foreclosure of other purchasers outside the buying alliance.

The Horizontal Guidelines state that it is unlikely that there will be competition concerns if the combined market share of the participating parties is less than 15%. This is known as the “safe harbour”. However, there is no presumption of anti-competitive behaviour above this threshold. Instead a detailed assessment of the effects on the market will be carried out. Market concentration will be looked at in the context of suppliers and retailers. On the procurement market, the countervailing power of the must-have brands will be taken into account.

The Horizontal Guidelines also discuss the risk of collusion between partners in the alliance. For example, they can lead to the exchange of sensitive commercial information between partners.

National competition authorities

In recent years, there have been several investigations by national competition authorities into new generation buying alliances. In 2014 the German Competition Authority conducted an inquiry into the food retail sector. Also in 2014, the Italian Competition Authority conducted an investigation into a buying alliance between Coop Italia, Despar, Discoverde and Sigma (the Centrale Italiana buying alliance). The Italian Commission did not allow the Centrale Italiana buying alliance to continue. However, it did allow limited purchasing cooperation between three of the companies (Coop Italia, Discoverde and Sigma) because their combined market share on procurement markets was under 20%.

French Competition Authority

Between September and December 2014 there were three alliance agreements between six of the main French retail groups (Système U with Auchan (which subsequently announced even further integration of their activities); EMC with ITM; and Carrefour with Cora) with a combined market share over 70%. The French Government and Senate had concerns over the impact of these buying alliances on competition and therefore sought an opinion from the French Competition Authority (FCA).

By way of background to these alliances, there had been a price war between retail distributors leading to a drop in margins. The retailers claimed that the buying alliances were necessary to re-establish competitiveness in the market. The alliances covered a different range of products (although never including private label products) and varied in form (sometimes purely contractual, sometimes establishing separate legal structures).

The FCA followed the approach taken in the Horizontal Guidelines. First the FCA assessed market definition and established whether the market participants had market power. Factors taken into account were: families of products; private label product status (assessed on a case by case basis); and the national markets. The market share for each of the buying alliances was above 15% on the selling markets and on certain procurement markets. The FCA noted that countervailing buyer power and entry barriers required further examination, but considered it likely the retailers had market power.

The opinion then considered competition risks in both the selling and the procurement markets. In the selling market, the FCA concentrated on the risk of collusion between the partners. The FCA considered that the characteristics of the market were conducive to coordination and that a risk existed even when a distinct legal entity is set up.

Turning to the purchasing market, the FCA was not convinced that the alliances would have a negative impact on product output, innovation and quality at the level of the suppliers. There was a possible risk of foreclosure of other suppliers but this required further examination. The FCA noted the need for retailers to select suppliers on objective grounds.

The FCA took no view as to whether the buying alliances result in efficiency gains or if these gains are passed on to the consumers. However it agreed that the case appears to be difficult. The FCA recommended that an Article 101 notification obligation for joint purchasing agreements be established, proposing a draft amendment to the French Competition Act. This would require notification at least two months before implementation if certain turnover thresholds are met. This amendment is likely to become law in the near future.

Conclusion

The competition law position of buying alliances must be assessed on a case by case basis. However, in this fast moving world, this is an area to look out for. National competition authorities are likely to take the lead on this issue. In France, the announced Système U / Auchan integration project will be an important test case.

Market concentration of retailers and suppliers and the assessment of market power

Rosemary Choueka, *Bristows LLP*

Overview

This presentation first looked at the concepts of market concentration and market power. This was followed by a discussion and short critique of the study commissioned by DG Competition and its relevance to market concentration.

Market concentration

In simple terms, market concentration is a reflection of how many players are in the market. This therefore requires the identification of the relevant market. Competition lawyers and businesses will often differ in their view on the definition of the market. Generally, markets are accepted as being temporal, and containing substitutable products. Market concentration can be measured by looking at market shares, HHIs¹ and concentration ratios. The Commission has issued guidance that an HHI of less than 1,000 is a low market concentration, 1,000 – 1,800 is moderate, and a market with an HHI of over 1,800 is highly concentrated. Care should be taken when using HHIs as a market concentration indicator as they are static and therefore a crude estimation of concentration; but they are a useful starting point.

Market concentration gives an indicator of the market power of the market members. This information is key, both for business plans as well as for competition law assessment.

Market power

The higher the concentration of a particular market, the more likely it is that the market players will hold market power. This presents a concern for competition law as the exercise of market power could suppress innovation and reduce market choice, ultimately harming the consumers.

As Whish and Bailey put it:

“Competition law is concerned, above all, with the problems that occur where one or more firms possess, or will possess after a merger, market power. Market power presents undertakings with the possibility of profitably raising prices over a period of time; the expression ‘raising price’ here includes, and is shorthand for, other ways in which competition can be restricted, for example, by limiting output, suppressing innovation, reducing the variety or quality of goods or services or by depriving consumers of wealth, all of which are clearly inimical to consumer welfare.”

¹ Herfindahl-Hirschman Index (HHI) is a commonly accepted measure of market concentration. It is the sum of the squares of the market shares of each firm competing in the market.

The European Commission's Guidance on Article 102 Enforcement Priorities states that there are three issues relevant to an assessment of market power:

1. constraints imposed by actual competitors;
2. constraints imposed by the possibility of expansion of existing competitors and of new entrants; and
3. constraints imposed by countervailing buyer power.

DG Comp study and market concentration

When looking at retailer concentration, the study focused on "modern retail" (hypermarkets, supermarkets and discounters). This is because the competitive dynamic within the modern retail markets is different from that including traditional retailers. The Commission also felt that it was much easier to measure the competitive dynamics in the modern retail markets as they contain retailer chains. The study assessed concentration on three scales: pan-European, national and local. At the pan-European level, the top 10 retailers had increased their market shares; the retailers in the group also stayed the same. The analysis varied between member states. Interestingly, concentration actually decreased in sixteen of the member states. Taking the analysis down to the local level, the Commission only looked at four member states, but in these local concentration appeared to have decreased.

The study used the market concentration as a proxy for market power. Interestingly, it looked in particular at the imbalances in concentration, based on the ratio of retailer to market concentration, in order to assess market power. The results of the study are not overly conclusive one way or another. As regards choice, there was no evidence that retailer concentration has an impact on choice; and the impact of supplier concentration was also negligible. As regards innovation, the results suggest that supplier concentration reduces innovation in a market, but retailer concentration actually increases innovation.

A critique of the study

A key omission in this study was the exclusion of very concentrated markets. It should also be noted that market concentration does not equal market power; there are other factors that the study did not take into account. A further criticism of this study was that the Commission did not consider the retailer's role as gatekeeper to the market, despite this being very important and having a significant effect on the market as a whole.

DEFINING AND DELIVERING INNOVATION AND CONSUMER CHOICE

Implications of Buyer Power and Private Labels on “Vertical Competition” and Innovation

Professor Dr. Roman Inderst, *Goethe University*

Overview

This presentation looked at the effects of the changing role of the retailer on vertical competition, with a particular focus on the German market.

Vertical competition over functions

Historically, economists have viewed the retail part of the production and distribution chain as largely irrelevant, a bridge between product manufacturers and consumers. However, economic research shows that the role of retailers is changing. Retailers are becoming more important across all functions, such as distribution, advertising, certification of quality and (most importantly for the purposes of this analysis) innovation. The structure of the vertical chain is changing.

The question for competition policy is whether vertical competition is functioning well and producing increased innovation, or whether the exercise of retailer market/buyer power leads to inefficiencies.

Changing role of private labels in Germany

A study of the market shares of brands against private labels in Germany shows that the private label market share (budget and premium private labels combined) has increased by 30% between 2007 and 2012.

One market where this increase is particularly relevant is in the German organic food and drinks market, where the market shares of private labels have steadily increased between 2007 and 2012. Between 2009 and 2010, the private label product percentage of the market overtook the branded product percentage and this market share continued to increase to 2012.

Formal analysis of competition over innovation

When undertaking a formal analysis of the question of competition to innovate, two hypothetical models were analysed. The first model comprised one manufacturer and one retailer. It assessed the competition to innovate between the retailer and manufacturer and the effect that this would have on manufacturer innovation. The second model contained one large and several small retailers and looked at how retailer innovation could affect competition between retailers. The key decision variable in the analysis was the incentive to invest in innovation.

MODEL 1

This model looked at the first order effects of competition to innovate between retailers and manufacturers on the levels of innovation. It is necessary to keep in mind the retailer's role as the gatekeeper to the market. If the retailer's size is such that it is able to innovate through private brands, this innovation can inefficiently crowd out manufacturer innovation.

If a retailer invests in innovation it can retain all of the resulting profits, instead of sharing them with the manufacturers. This would be particularly appealing if the cost of innovation is less than the percentage of the profit it would pass on to the manufacturer. The retailer will therefore have a large incentive to invest (the "rent appropriation motive"). In addition, if the retailer decides that it will innovate, as gate-keeper it has the power to prevent the manufacturer's products from entering the market (the "hold up effect"). The retailer can therefore create a barrier to the manufacturer's products entering the market, reducing the manufacturer's incentive to invest in innovation. This incentive is further reduced by the threat of retailer imitation causing the manufacturer's turnover from the innovation to be short lived.

MODEL 2

This model looks at the effect that a retailer's investment in innovation could have on competition with other retailers. As shown by the thought experiment in model 1, if a larger retailer invests in innovation, the incentives for manufacturers to innovate decrease. If manufacturers no longer innovate, smaller retailers (who are not able to invest in innovation themselves) have no access to innovation. This results in the reduction of competition between retailers and further retail consolidation. This is labelled the "innovation waterbed effect".

Conclusion for Competition policy

The results of this conceptual work indicate the detrimental effects on competition that a shift of functions from brand manufacturers to large retailers could potentially have. However, there is a reluctance to establish a causal link with empirical data. The large retailers' position as gate-keepers to the market could lead to "rent appropriation" and "hold up", both of which widen the gap between the retailers' and manufacturers' incentives to innovate. This could lead to a decrease in manufacturer innovation, thus reducing smaller retailers' access to innovation and reducing competition (the "waterbed effect").

These circumstances could lead to possible grounds for competition authority interference. However, it could also be only an additional effect in the "buyer power trade-off". More generally, this analysis supports the creation of a level playing field for vertical competition.

Defining consumer choice and measuring performance in grocery

Dr. Michael Bauer, *CMS Hasche Sigle*

Overview

This presentation concerned the study commissioned by DG Comp on choice and innovation in the food retail sector and how it might translate into policy and case law.

Definitions and methodology

In the study, choice is defined in a number of ways. The study assessed the product choice per shop: the product assortment, variety of packaging sizes, variety of prices and the variety of alternative suppliers. It also looked at the number of retail shops per shopping area. The econometric analysis study covered two distinct time periods: from 2004 – 2012, analysing 296 shops in 5 member states; from 2008 – 2012, analysing 337 shops in 7 member states. In addition, six case studies in selected member states were analysed for illustrative purposes. The results were analysed in order to identify possible driving factors behind any increase in choice.

Key findings

There appeared to be an increase in choice in four of the choice measurements (as shown in the table below). However, it should be noted that over time, and in particular between 2008 – 2012, the increase in choice slowed in each of the measurement categories. The reason for this deceleration is unknown and requires further investigation.

Choice Increased 2004/2012	Measured by “alternative products”:	5.1% p/a
	Measured by “variety of sizes”:	3.5% p/a
	Measured by “no. of brand suppliers”:	3.9% p/a
<i>but increase slows down</i>	Measured by “no. of modern retails shops”:	1.6% p/a
	<i>For all criteria increase was much higher in period 1</i>	

One further key finding was that choice as measured by the range of prices decreased in the period 2004 – 2012.

The study found evidence that the type, size and economic prosperity of a shop as well as the product category turnover were driving factors behind the increase in choice. An increase in market entries on a local level was another driving factor. This is particularly interesting since it appears there could be a link between a decrease in concentration at a local level and an increase in choice (or between an increase of concentration and a decrease of choice).

The study showed little or no evidence that an imbalance of supplier/retailer power, retail/supplier concentration or private label penetration were driving factors in the increase in choice. From a competition law and enforcement perspective, the most interesting relationship in the study was that between choice and concentration. However, the results on this were inconsistent and inconclusive, there appearing to be no overall link between the two.

Comments

The study only assessed quantitative, not qualitative, criteria. No data was collected on the type and source of the product ingredients or process. However, despite being in favour of a study looking at innovation and choice in relation to the qualitative criteria, it was felt that it would be difficult, if not impossible, to measure product quality.

The study only looked at modern retail shops (defined as shops with a floor space of over 400 square meters). Although the study seemed to indicate an increase in the number of modern retail shops, this actually reflects a decrease in the traditional type of grocery shop, creating a decrease in choice. The study showed an increase in the number of products per shopping area. However, there were also indications of retailer concentration in each shopping area. The fact that on the one hand the study did not find a general link between concentration and choice but on the other hand identified market entries on local level as a driving fact behind choice is inconsistent.

In this context it was noted that an obvious weakness of the study was the failure to investigate markets with a high retailer concentration. Therefore, it did not undertake a complete choice/concentration analysis. The effect that an increase in concentration has on choice for a member state with low retail concentration may not be comparable to the effect on choice in a member state with a high retail concentration. In fact, a separate investigation into the highly concentrated German market, which was not included in the DG Comp study, has found that the average number of products available had decreased, i.e. the result for this one highly concentrated market was different from the results in the DG Comp study of less concentrated markets.

Another weakness of the study was that choice was quantified by counting European Article Numbers (EANs) on sale in stores. However, this method provides an imperfect measurement of choice. If a branded product is replaced by a private label range, consumers no longer decide on the source of the products since this is selected by the retailer. However, the difficulty of finding an alternative measure to assess product choice meant that this shortcoming had to be accepted.

Conclusions

The DG Comp study demonstrated a substantial decline in the growth of choice in the EU but still found that choice increased. However, there are a number of flaws resulting in the need for the outcomes to be considered with care. For example, markets with high concentration were not assessed; various important elements were not reflected in the data collected; and the choice/concentration analyses would need to control for additional (in-country) elements before further weight is attributed to the results. The outcome of the study may, and should, be used as a starting point for further discussions; however, it should not be used for building the underlying data set and assumptions for case law. Finally, the future assessment of customer choice will also need to take into account the growing importance of retail alliances since these will likely lead to more aligned product offerings.

Assessing the environment for innovation in retail where private labels are present

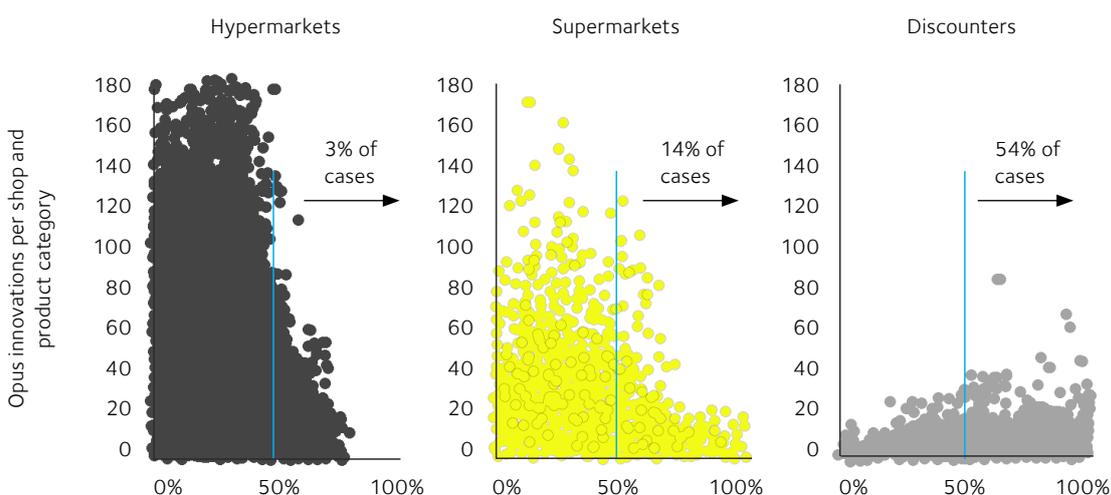
Jan Peter van der Veer, *RBB Economics*

Overview

This presentation discussed the results of a study commissioned by DG Comp into choice and innovation in the food retail sector, in particular the relationship between private label penetration and innovation.

A “tipping point”?

The authors of the study investigated whether there was a “tipping point” percentage of private label penetration beyond which the number of innovations falls off quickly. The final, composite, results of the study are shown in the graphs below.



Each dot represents the number of innovations per product category, in a particular shop, in one year. These graphs show the results from the different product markets in the shops looked at over the course of the study. The “tipping effect” is most noticeable in the hypermarket and supermarket shop categories.

Is the market failing?

The results suggest that as the private label penetration in the market increases, innovation decreases. This could be cause for concern since it might be caused by a market failure. If private labels are able to rapidly copy manufacturers’ innovations, the returns that manufacturers will earn on their innovations will decrease. Such “free riding” can undermine the incentives for manufacturers to invest in innovations to begin with.

However, there are other potential explanations for the downturn in innovation which would not represent cause for concern. For example, certain categories may have less scope for innovation than others as consumers may not always be willing to pay for innovations. In such categories, the number of innovations would be low regardless of the share of private label.

Assessing the evidence

To investigate these issues in more detail, the presentation discussed 22 charts, included in the DG Comp study, showing the relationships between private label penetration and innovation within individual product categories. The results shown on these charts can broadly be grouped into five cases:

- markets with relatively limited private label shares;
- markets with relatively limited room for innovation;
- markets with an “inverted U” relationship between private label penetration and innovation levels;
- markets where a higher private label share is associated with less innovation; and
- markets where a higher private label share is actually associated with more innovation.

In the first category, it is unlikely that an obvious tipping point will be present if the private label share of the market is small to begin with. In the second category, if there is not much scope for innovation purely due to the characteristics of the product, there will be little innovation in that market no matter what the private label penetration is. Crucially, most of the 22 charts fall in the third and fourth categories. These do appear to offer evidence of the existence of a tipping point.

Concluding remarks

The “tipping point” analysis of the relationship between private label penetration and innovation in a market appears to be fairly robust. It is not only found across the data set as a whole (as shown in the graphs above) but also in many individual product categories. It was found that this overall result would not change if the categories which have relatively limited room for innovation to begin with were excluded. However, this analysis does not demonstrate causality. It is still possible that in some cases the low level of innovation is explained by a lack of consumer demand for innovation in that category, rather than a market failure.

It was further noted that the relationship between private label penetration and innovation frequently takes the form of an “inverted U” shape – as the penetration of private label increases, innovation initially increases as well (before ultimately falling back). This suggests that private labels can, to a certain extent, be important drivers of innovation.

Other “tipping points” in the levels of innovation may exist but the study has not been able to collect data in relation to these. In particular, the study was not able to fully consider the impact of retail concentration on innovation.

NEW INSIGHTS INTO COMPETITION BETWEEN BRANDED & PRIVATE LABEL PRODUCTS

How consumer trust affects performance – does innovation matter?

Richard Herbert and Oliver Koll, *Europanel*

Overview

This study explored the link between consumer attitudes towards brands and their actual purchasing behaviour. Consumer attitudes were investigated in 9 countries, across 30 categories and 757 brands. The study on purchasing behaviour covered 16 countries, 79 categories and over 10,000 brands during a 4 year period.

Does trust matter?

We know that few brands grow because they manage to increase loyalty or frequency of purchase but mostly by attracting new buyers. There was near to a one to one relationship between the annual volume share change of a brand in a market and the change in brand popularity (market penetration).

The study investigated how this attraction is related to brand trust: Consumers were asked two questions which had been separately validated by academic research as probative of this area: “does this brand deliver what it promises?” and “is this a brand that I trust?”. These questions were asked in relation to different brands presented to consumers. On the basis of these questions we allocated brands into three groups according to the resulting trust score: top, middle and lower. The results show that brands in the higher trust tiers also achieved a corresponding higher market share and market penetration. The most trusted brands are also the ones that have been growing over the last couple of years.

It was found that for the top trust tier brands, one in three consumers would recommend the brand to others. In contrast, only one in seven would recommend lower tier brands. In addition to this, 17% of consumers stated that they would be willing to pay more for a top tier brand than other brands. Again in contrast, only 7% said the same of a lower tier brand.

In conclusion, trust matters. There is a virtuous cycle between building trust and attracting more consumers. Trust helps a brand grow faster, it fosters advocacy of the brand, it engenders a willingness in consumers to pay more and interestingly, high trust can be found in brands of different price levels, from relatively cheap to very premium.

Who do consumers trust most?

The study suggested that there are few universally trusted brands. The same brand can be in the top tier of its category in one country but in the bottom tier in another. One common feature however is that bigger brands tend to engender more trust. In general it was found that the most trusted brands are more often food brands, neither too expensive nor too cheap and more often brands present in multiple countries as opposed to local brands (the high level of trust may be responsible for such brands’ ability to move beyond their home market). How can you build trust?

How can you build trust?

Four sets of drivers were explored for building trust: marketing activity, emotional resonance, reputation and functional performance. This presentation focussed on marketing activity, particularly innovation.

Marketing Activity: Innovation

The results showed that high perceived innovation activity by a brand is related to higher levels of trust. In line with this, actual innovative behaviour also links strongly with higher trust in the brand. However, promotions need to be deployed wisely: The study suggests that too much promotional activity reduces trust.

Each year, on average, only 8% of the stock keeping units (SKUs) are new¹. Of these new SKUs, one third of them are private label products and two thirds are branded products. Four out of five of these new products are actually renovations² rather than pure innovations. Around 66% of brands launch new products annually but only 30% launch innovative products. The study shows that the top three brands are 30% more active in the areas of both innovation and renovation than average brands.

Other factors:

- reputation: Consumers are more receptive to a brand being “of our time” than having a global presence. The longer a brand has been around, the more it will be trusted;
- functional performance: Consistently good quality products are more likely to enjoy high trust than products offering superior quality or good value for money (both of which also help building trust);
- emotional resonance: The prestige of a brand and the trust associated with it are almost synonymous.

Conclusion

Trust does matter since it attracts buyers and delivers growth to a brand. This leads to a virtuous cycle involving trust and growth. In order to maintain trust and deliver growth to a brand, a balance must be struck between long term brand building (through innovation, increasing brand prestige and maintaining consistently good quality products) and short term sales campaigns.

¹ Averaged over results taken from Austria, Belgium, France, Germany, the Netherlands, the UK and Hungary.

² A renovation is a reworking of a previous innovation, rather than a brand new idea/product.

Para-sight! Using eye movements to understand the effect of parasitic products on shopper attention

Dr Tim Holmes, *Acuity Intelligence Ltd.*

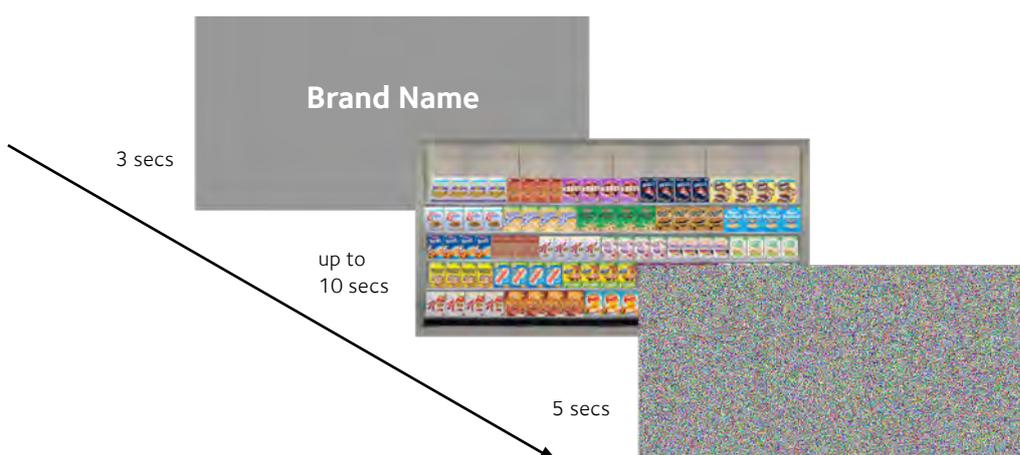
Overview

This study concentrated on a mixture of market and academic research. It looked at the mimicry by private labels of branded products and their effect on consumer decision making.

The study

The study focused on the decision-making process when participants were asked to pick out a particular product from an array of products. The aim was to see how often the participant picked the parasite product over the branded product and to identify the factors that make confusion more probable.

The study comprised eight branded products with matched products in similar packaging drawn from four categories (biscuits, shampoo, butter and cereals), representing a range of product sizes and types. The participants were first shown a familiar brand name that they must identify on a screen; this stayed on screen for three seconds. They were then shown an array of products on the screen for up to ten seconds. The products were presented as life size. During these ten seconds, the participants had to identify the location of the brand they had been previously shown. Following this, the screen showed five seconds of retinal clearing stimulation, in preparation for the next round. The eye movements of the participants were measured during the experiment.



The array of shelves that the participants were shown contained: only the branded product; only the parasite; both the branded product and parasite; or neither the branded product nor the parasite. The study also varied the appearance of the products, with some of the arrays being blurred, others in black and white, and some being blurred and black and white.

The participants were screened so that they were the primary household shopper and free from any uncorrected visual disorder. An array of ages was assessed and the gender split in the participants was fairly equal. 120 gaze samples were selected from each of the participants every second. There were 28 participants (15 male and 13 female) and each one undertook 64 trials (in 4 blocks of 16). In total, 1,792 trials were completed.

Results

The results were split into the “searching step” and the “decision step”. The “search step” results show how long it took the participants to identify the location of the branded product and/ or the parasite. The “decision step” focused on the error rate in identification of the branded product when the decision was made. The results are summarised in the table below.

	Null (neither brand nor parasite present)	Branded product only	Branded product and parasite	Parasite only
Search step: Time to locate brand and parasite		Participants took an average of 3.12 seconds to locate the branded product	Parasites were located first, after 2.57 seconds, followed by the branded products after 3.31 seconds	Parasites were located by 3.51 seconds.
Decision step: Error rate on brand detection (general)	15% incorrectly thought the brand was present.	29% could not identify the branded product in the 10 seconds allowed.	31% incorrectly identified the parasite as the brand	50% incorrectly identified the parasite as the brand
Error rate on brand detection (cereal)	There was only an 8% error rate	12% could not identify the branded cereal	4% incorrectly identified the parasite cereal as the branded product	Only 9% incorrectly identified the branded cereal as being present

At the end of each participant’s trial, they were asked to identify the brands and parasites that they had seen during the trial. 90% correctly identified the brands they had been shown in the study. Only 13% correctly identified the parasites. 17% incorrectly identified products which had not been present in the study.

Conclusion

This is an ongoing study. The next step is to confirm the results in real world circumstances by installing mobile eye-tracking systems in store. It will also be necessary to test more products and categories; the resilience of cereal packs is particularly interesting and by testing other products it will be possible to assess whether a factor such as the size of pack is determinative in the error rates. The final step is to develop defence tools and tactics for the branded products to use to reduce the attention diverting effect of parasites during the search and decision-making process.

This study shows that parasitic products interfere with finding the brand during the search step of the purchase process. The presence of parasitic products results in incorrect decisions being made at the point of sale and they interfere with the automatic decision making in the brain. This interference is more severe for customers with reduced visual acuity. However, it is possible for brands to develop defences against parasites that will work in reducing their inference effects.

Defining markets where branded and private label products are present: “How posh is your scotch?”

Nicole Kar, *Linklaters LLP*

Why does market definition matter?

How a particular market is defined can be particularly important in merger control. In a branded/branded merger or a private label/private label merger, if the scope of the market includes both branded and private label products, the market share of the merging firms is likely to decrease. Consequently, firms often argue that private labels and branded products fall within the same market. Alternatively, the merging firms may wish to argue for two separate markets in a branded/private label merger, for example in an attempt to reduce their overall market share.

In a more general antitrust context (for example, Article 101 or 102 enforcement), if a market is defined as containing both private label and branded products, the analysis of market power is complicated due to the presence of both horizontal and vertical competition between retailers and manufacturers. Others have written extensively on this topic. Competition enforcement has not yet clearly articulated the correct analysis here. Another complication is that branded and private label products may be part of the same retail market, but distinct wholesale markets, and it is dangerous to read across between the two.

As competition authorities are fond of saying, market definition is a means, and not an end, in terms of analysing market power. In the majority of merger decisions the question of whether private labels and brands form part of the same market is left open; it is not finally concluded on by competition authorities.

Authorities have instead tended to make assessments in the alternative or on the narrowest/worst case basis. The issues involved in reaching a view on the economic scope of markets are nuanced and the area is a dangerous area to make generalisations but a few observations from the previous cases: first, there may be significant differences in how a product is marketed and the range available depending on the country in question (leading sometimes to radically different approaches to market definition); second, price points and differences based on the ranging of private labels in a particular category, for example whether a private label offering is positioned as premium, mid-range or value can be important.

Competitive constraints between branded and private label

When assessing whether a private label product and branded product are in the same market, authorities will look at the competitive constraints between the two. Based on a survey we at Linklaters have done of a selection of previous European Commission cases, in around 57% of merger cases in the EU some degree of constraint imposed by private label products on branded products has been found. However, this is ultimately a question of evidence and not a starting position.

Factors which swing the balance

The key question when assessing whether a private label constrains the branded equivalent is whether a hypothetical monopolist supplier of branded goods could introduce a small but significant non-transitory price increase (e.g. 5-10%) without losing sales to private label suppliers. The factors to take into account at the retail level differ from the wholesale level. For example, at the retail level, whether the brand is a “must have” from a retailer perspective can be a factor. Additionally, factors such as product characteristics and similarities, the correlation between promotional activity and changes in response customer behaviour as a result, and the range, price points and placement of products can be taken into account. On the wholesale level, competition authorities will take into account the potential existence of countervailing retailer power.

From a data/analysis perspective, market research reports, price correlation analysis, event analysis (e.g. to consider the impact of events like de-listing of products and promotions), margin data and bidding data/procurement trends may be used to inform whether constraint between private and branded products exists.

So what does this theory mean in practice?

Case studies – Diageo and United Spirits

Diageo/United Spirits is an interesting case given that it shows different outcomes in relation to market definition as between the on and off trade and as between vodka and whiskey.

Branded vodka

In both the on-trade and off-trade¹ markets, branded vodka was considered to be in a different market from private label. Even though the empirical evidence from end customers suggested that there may be some substitutability between private label and branded vodka, the OFT was cautious since it did not corroborate the view of retailers. This seemed to show that retailer preferences were not equivalent to customer preferences. Some retailers noted that the profit margins from private label vodkas were less than those for branded, limiting retailers' ability to threaten to switch to private label vodka and therefore limiting the constraint private label puts on the wholesale prices of branded vodka. This was one of the factors that led the OFT to decide that constraint between private label and branded products differed as between the on-trade and off-trade markets. The OFT did note that it was taking a cautious, Phase I approach.

Blended bottled Scotch whisky to the off-trade

In the market for supplying blended bottled Scotch whisky to off-trade customers, retailer preference was considered to be driven by customer preference, unlike in the vodka supply market. Interestingly, off-trade customers indicated that branded products constrained private label rather than the other way around. From data collected, it was found that 20-30% of lost sales incurred by Diageo's branded Bell's whisky were to the private label brands of United Spirits and 15-25% of losses were to United Spirits' branded whisky Whyte & Mackay (W&M). Therefore, the private label and branded whiskies constrained each other.

¹ “On-trade” refers to pubs, clubs, bars, restaurants etc.; “Off-trade” refers to off licences, corner shops, wine merchants, wholesalers etc.

Conclusions

The focus has moved away from defining the market in the truest sense. Competition authorities now tend to go straight to the competitive assessment and consider the level of constraint private labels impose on branded products (or vice versa). The authorities will consider competition at the wholesale level as well as looking at end consumer preferences. Ultimately, whether private label and branded products fall into the same market is all about the evidence, but generally it is wise to be prepared for competition authorities to adopt a narrow lens in relation to their analysis, particularly in Phase I.

Roundtable panel discussion

Chairman: Philip Marsden, *Competition and Markets Authority*

Panellists: Ravi Bhatiani, *Independent Retail Europe*

Philippe Chauve, *European Commission*

Ariel Ezrachi, *Centre for Competition Law and Policy*

Andrés Font Galarza, *Gibson Dunn*

Andreas Gayk, *Markenverband*

Private label and branded products – the nature of competition and driving innovation

- The interplay of vertical and horizontal competition in relation to private label (PL) and branded products is central to understanding the food retail market.
- The extent to which traditional tools can be used to analyse the situation was discussed. Some considered competition law ill-equipped to deal with a number of the concerns and that it should be adapted, for example in the assessment of market power. There is a distinction between market share and market power.
- For many shoppers it is easier and cheaper to switch products than supermarkets, strengthening the power of retailers.
- We assume that price equals quality and that we are rational enough to balance the two. However, if the shopper is less able to differentiate between good and bad quality products, there is less incentive for manufacturers to produce good quality products.
- Whether PL and branded products are in the same market does not address the problem of whether the respective manufacturers are competing on the same level. A retailer may have a competitive advantage as brand manufacturers may be dependent on them in the vertical chain but have them as competitors in the horizontal (product) market.

“Retail cannibalisation of brands”

- Retailers are more informed than competing brand manufacturers as they will be privy to information gained in their separate role as distributor of the manufacturers’ products in the vertical market.
- It was suggested that confidentiality agreements and imparting information on a strictly “need-to-know” basis might help address this information imbalance. However, in practice this requires the cooperation of both parties which can be difficult.
- Meanwhile Chinese walls will not safeguard a brand manufacturer from a retailer using information gained in its role as distributor, making negotiations challenging.
- The rationale for PL products has evolved. Today, even the most value-focused PL in a category must be able to compete with a brand. Additionally, retailers are accountable for such issues as energy efficiency and product sourcing and PL gives retailers more control.
- Retailers believe that PL plays an important role in the market as they force brands to lower prices.

- The investigation into Edeka explored whether manufacturers depend on retailers for access to the market. It was found that manufacturers could not fulfil their promises to consumers without the cooperation of Edeka, raising the question of whether the vertical market structure and the concept of essential facilities needs re-thinking.
- In relation to buying alliances, the Commission is taking a more effects-based rather than an object-based approach. The Commission is not concerned with buyer power if it does not impact on consumers, its mandate being to protect consumer welfare.
- In non-food retail markets, the concept of the retailer being the gatekeeper to consumers may be out of date due to the role of price comparison websites.

European commission e-commerce sector inquiry

- This inquiry will look at online practices that could segment the internal market. The inquiry will focus on (i) the goods most commonly ordered online (electronics, shoes and clothes); and (ii) the most common online deliveries (films and sport downloads).
- It will look at whether there are specific contractual restrictions that could affect cross-border trade, taking stock of practices and whether they affect competition.
- The inquiry was welcomed for bringing transparency to, and anticipating, the Commission's review of the Vertical Guidelines. It was noted that geo-blocking and its relationship to competition law remains an area of uncertainty for suppliers and retailers (e.g. the Commission states that geo-blocking may be justified in some instances but only gives one example to substantiate).
- In relation to geo-blocking, there may be legal implications arising from this inquiry, including the possibility of a new "duty to deal" on suppliers. Were this to happen, one panellist highlighted the need for the Commission to give a transition period for the new rules.
- Legislation may be needed to address geo-blocking as it will be hard to address under competition law, being unilateral behaviour, and may not trigger Article 102.
- Paragraph 54 of the Guidelines on Vertical Restraints may need to be re-assessed. For example, the implications are not clear of a retailer being required to obtain confirmation from a supplier if it wishes to sell a product through Amazon or similar site. It was recognised that the Guidelines have yet to be revised to provide more clarity for e-commerce markets.
- It is becoming apparent that power in e-commerce does not lie with retailers or suppliers but with Internet market sites as they are the gateway to the market. However, the Internet market should not be defined as a channel of distribution as this makes things more difficult.
- The most significant issue for retailers at present is the move from offline to online sales. Part of this transition affected by selective distribution agreements and further clarification of the law in this area would be welcome.

- Two things in particular need to be taken into account. First, e-commerce is one of the most dynamic markets at present and it is necessary for the inquiry to interact with all players in the market. Secondly, the general tendency in e-commerce to nationalise and the potential for the lock-in effect need to be taken considered.
- The Commission does not seek to unify EU prices, recognising this may be bad for the end user. At the same time, the Commission is concerned that software is being used to set prices depending on their location. Before any action is taken, price differences will need to be analysed. It may be that they are justified. If so, the Commission needs to know why.
- These are early days in the inquiry but the Commission is alert to the risk that regulatory intervention in a market can have a chilling effect.

Biographies

Morning session

Philippe Chauve

DG Competition, European Commission

Philippe is the Head of the Food Task Force at the Directorate General for Competition of the European Commission. The Task Force is working on regulatory and antitrust issues in the food supply chain in Europe. This includes investigations of antitrust cases, the implementation of specific competition rules within the Common Agricultural Policy (concerning inter alia joint sales by farmers), the analysis of suppliers and retailers relationships. The Task Force delivered in particular in 2014 an ambitious study on the impact of competition and other factors on choice and innovation in food products.

Philippe has extensive experience in antitrust enforcement and merger procedures. Before heading the Task Force he was enforcing competition rules in the energy sector, where he carried out a sector inquiry and many antitrust and merger investigations and implemented unprecedented remedies (such as the first large scale divestiture of assets in European Antitrust History in the E.ON electricity cases). In earlier jobs he also negotiated trade agreements for goods and services in the WTO and between the EU and its trading partners.

Birgit Krueger

Bundeskartellamt

Birgit studied economics at the University of Cologne. She joined the Bundeskartellamt in 1991, becoming a case handler and rapporteur in a range of different sections including transport, automotive, treatment of waste, electricity, engineering and medical devices. She was also Head of Unit, "German and EU Merger Control". Since 2007 Birgit has been Chairwoman of the Second Decision Division covering the food industry, agriculture and the food retail sector.

Koen Platteau

Simmons & Simmons LLP

Koen is a partner at Simmons & Simmons and is based in the Brussels office.

Koen advises clients on EU and Belgian competition law matters and has significant experience in merger control, investigations into cartels and abuse of dominance, compliance and audit programmes for companies and trade associations, competition litigation/arbitration and State aid matters. He also advises more broadly on EU law matters such as free movement and various regulatory issues. He was involved in the first "hub & spoke" case in the food sector handled by the Belgian Competition Authority.

He has over 20 years' experience in Brussels advising and representing clients before EU institutions, the Belgian Competition Authority, the EU Courts in Luxembourg and national courts.

He studied law at the Universities of Ghent and Brussels and obtained an LL.M. at The American University in Washington, D.C.

Rosemary Choueka

Bristows LLP

It was with great sadness that we learnt of Rosemary Choueka's untimely death from cancer very shortly after this symposium.

Rosemary specialised in EU and UK competition law and regulation. Following a stage in DG Competition, she developed a wide-ranging practice covering all aspects of competition law, as well as the interpretation and application of state aid rules and the application of public procurement rules and processes. She was a frequent commentator on the intersection of competition and IP law as featured in the blog *The CLIP Board*.

She is greatly missed by those who knew and worked with her. A [page on Bristows' website](#) is dedicated to her memory.

Roman Inderst

Goethe University

Roman is a Professor of Economics and Finance at the Goethe University Frankfurt. Before returning to Germany he was Full Professor of Economics and Full Professor of Accounting & Finance at the London School of Economics. Previous positions include that of tenured Professor of Finance at INSEAD. He currently keeps an affiliation also with Imperial College London.

Roman graduated in Germany and holds degrees in Economics, Sociology and Business Studies. His current research interests include banking regulation, retail finance and consumer protection, as well as competition theory and policy. The leading "Handelsblatt VWL-Ranking" has consecutively ranked him first in terms of current research output among economists in German speaking countries as well as among German speaking economists abroad. He is also a recipient of the Leibnitz Preis (2010) and one of only three German economists who were awarded the highest European research grant (ERC Advanced Grant).

Roman is a frequent adviser to regulatory and competition agencies and firms, in particular on matters of financial regulation, competition & antitrust and consumer protection (e.g., SANCO, FSA, CC, OFT, BMELV). He is a member of the Advisory Council of the German Federal Department of Industry, a member of the Advisory Group at the Chief Economist of DG Comp (EAGCP) and a previous External Consultant/Research Fellow of the ECB.

Michael Bauer

CMS Hasche Sigle

Dr Bauer is a partner at CMS since 2001 and co-head of the CMS EU Law Office in Brussels where he spent most of his career. He is a well-known expert in EU competition law.

Being a competition lawyer for more than 20 years Michael represented clients in more than 250 merger control or cartel cases both on the EU and national level. He represented clients as the lead partner in many complex merger control cases like most recently the second phase EU Commission investigation concerning the Telefónica/E-Plus merger.

Michael has also a particular expertise in advising clients from the FMCG sector. He is heading the 110 lawyers-strong CMS industry sector group for clients from the consumer products sector since 2009. Moreover, he has been advising numerous clients from the FMCG industry in many competition matters. Among his list of permanent clients are various well-known global brands but also smaller players from concentrated FMCG markets. In addition, Michael is advising the German brands association (Markenverband) and is representing the association in competition law cases and in court proceedings.

Jan Peter van der Veer

RBB Economics

Jan Peter is a Partner at RBB Economics with 15 years of experience as an economic consultant. He has a broad experience on all aspects on competition policy and has worked on numerous cases before the European Commission as well as various national competition authorities. He has also advised clients on state aid and trade issues, as well as on many private litigation and arbitration cases related to competition law. Jan Peter furthermore has extensive experience of competition and regulatory issues in liberalising industries. Clients he has worked for include Google, Oracle, Unilever, Shell, Mobistar, Royal Mail and BASF.

Afternoon session**Oliver Koll**

Europanel

Oliver is a branding consultant and scholar. For the past 12 years he has held the position of Strategic Insights Consultant with Europanel, a joint venture of GfK and Kantar Worldpanel which is the world's leading source of insights from consumer panels. In this role, he works with international FMCG companies like Procter & Gamble, Unilever, Pepsi or Birds Eye – mostly on projects investigating the drivers and barriers to growing successful brands.

He also is the founder and managing partner of Institut für Marketing, a branding strategy and monitoring consultancy based in Innsbruck.

Finally, he holds a position as a post-doc fellow in the Marketing Group of the University of Innsbruck where he focuses on research and teaching in the area of brand management. His work has been published in leading marketing journals and he is teaching in executive programs in Austria, Switzerland, or the UK.

Richard Herbert*Europanel*

Richard is responsible for the development of global insight at Europanel working with international consumer datasets and with Europanel's academic partners. He also acts as a consultant with many of Europanel's major international clients on a wide range of topics. He has worked in FMCG market research for over 40 years and has extensive experience within consumer panels, custom research and retail panels. For more than 20 years he has worked internationally with many of the main FMCG global manufacturers and has run international Europanel projects on Brand Growth, Innovation, Private Label and Discounters.

Richard has an Economics degree from the London School of Economics. He is British and based in London.

Tim Holmes*Acuity Intelligence*

Tim isn't your typical academic. After graduating in Mathematics from Sheffield University, Tim travelled the world as software developer living and working in the US, Asia and Switzerland. He returned to University in 2005 to study Psychology and completed his PhD in visual neuroscience and decision making at Royal Holloway, University of London in 2010, where he continues to research and teach. In 2011, together with Jon Ward and Scott Hodgins, he founded Acuity Intelligence, which defines itself as a research company founded on scientific principles but aimed squarely at real-world applications of eye-tracking, biometrics and cognitive neuroscience. As Technical Director, Tim heads up research and development in the company, and has completed projects for the likes of Coca-Cola, P&G, Ralph Lauren, The Guardian and GSK. Tim recently contributed to Radio 4's Design Dimension and has appeared on a number of TV shows including BBC1's Secrets of the Sales.

Nicole Kar*Linklaters*

Nicole has been a partner at Linklaters since 2006 and has a focus on competition law and merger control in the retail sector. Nicole is a long-standing adviser to J Sainsbury plc and has advised on multiple competition authority investigations into the grocery sector including the most recent market investigation and remedies process, the dairy retail initiatives and grocery and supplier OFT investigations (and appeals) and a significant number of retail mergers in the EU and UK in the groceries and food and beverage sectors ranging from ice-cream to pork.

Nicole is the Vice Chair of the Competition Section of the City of London Solicitors Company which has proven an influential voice in the reform and operation of the UK competition regime and a committee member of the Regulatory Policy Committee, a non-governmental independent review body within BIS.

Panel Chairman

Philip Marsden

Competition and Markets Authority

Philip is a Deputy Chair of the UK Competition and Markets Authority, deciding on Phase 2 merger cases and market investigation references, and chairing Case Decision Groups in antitrust cases. Philip is a competition lawyer with a particular interest in abuse of dominance, innovation incentives, consumer welfare, and international competition issues. He is also Professor of Law and Economics at the College of Europe, Bruges, teaching the core LL.M. competition course and is co-founder and General Editor of the European Competition Journal, and the Oxford Competition Law case reporter series. Philip is also a Board member of the Channel Islands Competition and Regulatory Authorities and a member of the Legal Services Consumer Panel.

From 2003–2014 he was Senior Research Fellow at the British Institute of International and Comparative Law in London, and Director of its Competition Law Forum. From 2008–2014 he was Non-executive Director on the Board of the UK Office of Fair Trading. A competition official early on in his career, for the last 25 years he has specialised in advice to firms in the fast-moving consumer goods and high technology sectors, and to governments on competition agency effectiveness and decision-making.

Panelists

Andrés Font Galarza

Partner, Gibson Dunn & Crutcher

Andrés is based in the Brussels office of Gibson, Dunn & Crutcher.

Andrés has more than 20 years' work experience in competition matters including 15 years as an official at the European Commission.

His practice encompasses antitrust issues relating to distribution in particular online commerce, horizontal cooperation, IP, abuse of dominance, cartels, mergers and joint ventures. He has also assisted clients on FCPA and Data Protection/Privacy issues.

He is a regular speaker on antitrust and competition matters and has numerous publications in several languages including with Oxford University Press and Law Press China.

Ravi Bhatiani

Independent Retail Europe

Ravi is the Director Legal Affairs for Independent Retail Europe, the oldest EU retail trade association in Brussels representing 1 trillion euros of turnover and 5.5 million jobs. Ravi is responsible for policy development and legal issues. Ravi has worked at Independent Retail Europe for over four years and has extensively worked on supply chain and competition topics in that time. Indeed, he played a leading role in building and negotiating the EU level Supply Chain Initiative.

Before joining Independent Retail Europe, Ravi worked as a legal adviser in Brussels for a financial services trade association.

Ariel Ezrachi

Centre for Competition Law and Policy, Oxford

Ariel is the Slaughter and May Professor of Competition Law at the University of Oxford and the Director of the University of Oxford Centre for Competition Law and Policy.

He is the co-editor-in-chief of the Journal of Antitrust Enforcement (OUP) and the author, editor and co-editor of numerous books, including – EU Competition Law, An Analytical Guide to the Leading Cases (4th ed, 2014, Hart), Intellectual Property and Competition Law (2011, OUP), Criminalising Cartels: Critical Studies of an International Regulatory Movement (2011, Hart), Global Antitrust and Compliance Handbook (2014, OUP) and Private Labels, Brands and Competition Policy (2009, OUP). Professor Ezrachi develops training and capacity building programmes in competition law and policy for the private and public sectors, including training programmes endorsed and subsidised by the European Commission and the UNCTAD.

Andreas Gayk

Markenverband

Andreas is Director Marketing Policy/Trade Relations and Compliance Officer of Markenverband, the German Brands Association. He has extensive experience in and advises on a broad variety of competition law issues in relation to distribution and fairness in the supply chain. He studied law at the Universities of Würzburg, Freiburg and Tübingen. Prior to joining Markenverband in 2009, he worked both in the FMCG industry and in private practice. Andreas is member of the board of Forschungsinstitut für Wirtschaftsverfassung und Wettbewerb.

Notes

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