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

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I. Introduction

Recent decades have witnessed a distinct increase in the sales and popularity of private labels.¹ The growing market share of private labels has transformed the landscape of retail competition in developed countries. Major retailers are no longer confined to their traditional roles of purchasers and distributors of branded goods. By selling their own label products within their outlet they compete with their upstream brand suppliers on sales and shelf space.

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

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This unique relationship and the increased role played by private labels in Europe, and more specifically the United Kingdom, raises fundamental questions as to their pro-, and possible anti-, competitive effects. It further highlights the shifting power balance between the producer and distributor and between the private label and branded good.

This paper focuses on the effects of private labels, sold in major supermarkets, on retail competition and consumer welfare. In particular, it considers how supermarkets may affect competition due to the fact that they retain control over shelving, in-store promotion and the pricing of branded and own label goods. Furthermore, it reviews the enforcement of European competition laws in a private label environment and the difficulty in balancing the beneficial short-term effects of private labels and their possible, harmful, long-term effects. It subsequently questions whether these difficulties imply a lack of competitive harm or reflect a gap in regulation, as traditional analysis fails to encompass the increased market power of retailers and the existence of vertical competition.²

II. Effects on Competition

Over the past decades private labels have significantly developed in Western Europe.³ In the UK, for example, the growth in private labels has been led by the major grocery retailers, placing the UK as the market with the highest proportion of private labels sales.⁴ It is estimated that around 50 per cent of sales in major UK supermarkets are attributed to their private labels.⁵ This is in addition to stores such as M&S, Aldi and Lidl which base all, or almost all of their food sales on private labels.⁶

The increased role played by private labels has been reinforced in recent decades with the ongoing shift in the UK from local, specialized shops to a supermarket buying experience. These supermarkets exhibit ever growing buying power and are subsequently able to offer customers lower prices for their private labels. The recent economic downturn and the increased price sensitivity of consumers have further cemented the growth and popularity of private labels.⁷ This proliferation raises two interesting and interlinked questions about the possible pro-, and anti-competitive effects of private labels and whether these effects trigger, or ought to trigger, antitrust intervention. The following section addresses the first of these questions and explores the main competitive effects generated by the introduction and proliferation of private labels.

² The term ‘vertical competition’ reflects the competitive pressure between retailers and their manufacturing suppliers as opposed to traditional horizontal competition between retailers operating at the same level. See Robert Steiner’s work for this distinction, for example, Steiner, ‘Does Advertising Lower Consumer Prices?’ (1973) 37 Journal of Marketing 4.
⁶ Other smaller convenient stores also sell private labels, but to a lesser extent.
⁷ The link between economic downturn and sales of private labels has been explored in L Lamey and others, ‘How Business Cycles Contribute to Private Label Success: Evidence from the United States and Europe’ [2007] 71 Journal of Marketing 1.
Lower prices

The starting point of the discussion is a positive one. There is little doubt as to the beneficial impact that private labels have had on price competition. Private labels are generally perceived as beneficial, offering consumers a range of products at lower prices than the competing brands. In addition, the introduction of private labels into a product category increases the competitive pressure on brand leaders and generally reduces the price of branded goods across the board. According to the UK Competition Commission, 40 per cent of consumers who purchase private labels do so due to their lower prices. Moreover, 30 per cent of consumers perceive these labels as being better value than the branded equivalent.\(^8\)

Two qualifying comments are in order. First, it is important to recall that retailers tend to offer different tiers of private labels simultaneously, each targeted at different groups of consumers.\(^9\) Some would provide excellent value at low price; others would champion quality and may sell at a similar price to the leading brand. Lower prices are therefore a characteristic of some private label goods, but not all the full range of private labels offered by major supermarkets.

Second, one should note that the retailer which offers its private label is in control of the pricing of other brands. It is therefore in control of the price differential between the private label and other brands and can manipulate the perceived ‘value’ of goods and in particular its own label. This control however, is not unlimited. In a sufficiently transparent market, the price for leading branded goods is determined by the market forces – the competition between supermarkets – and not by the retailer.

Lower costs

The lower costs of private labels are primarily driven by the cost savings for the retailer and producer. Economies of scale, resulting from internal- or external-growth through consolidation, allow the retailer to outsource the goods at lower prices and pass on some of the savings to consumers. Costs savings are also attributed to the ability to introduce the private label without investing in advertising and marketing. The retailer, being in control of the outlet, can ensure that the private label will reach the shelf and the final consumer. In addition, as the label will benefit from the reputation umbrella associated with the supermarket’s private label range, expensive investment in advertising for each product category is not necessary.\(^10\)

It is important to note however that the cost savings may at times generate negative externalities. For example, they may result from the retailer’s ability and incentive to ride on the research, development, marketing and advertising efforts of the leading brands’ manufacturers and thus curtail the latter’s incentive to invest and innovate. They may also result in increased concentration upstream, at the production level, and thus may limit

\(^8\) Grocery Market Own Label Working Paper (n 5) para 8.


competition in the long term.

Innovation

Private labels generate a mixture of effects on innovation. They may stimulate innovation when the private label, acting as an innovation-follower, offers a similar product as the competing brand. Offering a private label in a product category increases the pressure on the brand owner to innovate and offer superior products.

In addition, at times, the retailer may develop new products to cater for an increase in demand in some categories or to develop new categories outright. Such, for example, has been the case in the UK in the chilled food, fresh pasta and ethnic food categories. In those instances, retailers identified a gap in the market and a consumer need and reacted accordingly by developing new product categories.

On the other hand, when private labels act as innovation-followers, they may at times weaken innovation. That may be the case when the retailer is too quick in following the innovation and undermines the profitability of the innovator. Over time, the inability to profit from innovation due to aggressive follow-up by the retailer may undermine the producer’s incentive to invest in innovation in the first place. In this respect, one should note that the retailer, in its capacity as the distributor of brands, has access to confidential information from various suppliers. It therefore often learns about the innovation ahead of the product launch. This improves the retailer’s position in comparison to other competing brands and may shorten the time it requires to launch its own private-label-follow-on-version to brand innovation. On this point the European Commission noted in its Kesko/Tuko decision that:

‘...private label development is a key element in the power wielded by retailers vis-à-vis branded daily consumer-goods producers. It enables retailers, who are inevitably privy to commercially sensitive details regarding the branded goods producers’ product launches and promotional strategies, to act as competitors as well as key customers of the producers. This privileged position increases the leverage enjoyed by retailers over branded-goods producers.’

This innovation follow-up may be so rapid that it undermines the innovation incentive of the brand producers. Yet, arguably, retailers will self-police the extent to which they follow-up innovation, since, in the long term, their profitability will benefit from the presence of the (leading) brand.

Counterbalancing the leading brand’s market power

At times, the private label provides an important competitive pressure in categories which are dominated by a leading brand. In such cases, other brands might find it impossible, too

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13 As reported by the Competition Commission, some suppliers have reacted to this risk by delaying the release of sensitive information to retailers and limiting its scope. See *Grocery Markets Final Report Own Label Appendix* (n 4) para 40.
14 This point will be discussed in greater detail below. Note also the existence of ‘private label only’ outlets such as M&S and ALDI.
expensive, or risky to enter a product category dominated by a leading brand. On the other hand, the retailer may be in a better position to take on the dominant brand. The retailer’s label reputation and its control over shelving, in-store marketing, promotions and pricing increase the likelihood of successful entry and reduce the associated risks. In this respect, private labels may provide better competition for the leading brands than the secondary and tertiary brands. The introduction of private labels in those instances curtails the leading brand’s market power and ensures more competitive pricing. This role played by private labels was highlighted in the Competition Commission market investigation where Morrisons noted on this subject that it considers that its private labels ‘provided better competition for the brands, than tertiary brands, because they are generally better marketed, better packaged and challenge the ability of the brands to dictate price’.

*Choice, Foreclosure and Market Power*

Although initially the introduction of a private label in a category seems to increase choice, this will eventually be at the expense of slower selling brands. The higher profit margin on the private label often incentivises the supermarket to delist slower selling brands. The penetration of private labels depends on the strength of the existing brands and consumer choice. Interestingly, there are wide variations between different categories. Whereas private label sales of ready meals, fresh pasta, chilled pizza, fruit juice and canned vegetables were reported to comprise 80 percent of total sales, a much lower figure of 20 percent of total sales was registered in the yoghurt, cooking sauces, crisps, snacks, sugar and water categories.

When private label penetration is successful it will occupy shelf space alongside the ‘must-have’ and other leading brands. Other, slower selling brands face the risk of being delisted and pushed out of the outlet. Following their foreclosure from the supermarket, these slower-selling brands may access the market through alternative, smaller, distribution channels or may simply exit the market. However, it is important to note that the impact on delisted brands due to the loss of a major retail channel may be detrimental. It has been suggested that a loss of 22% or even lower shares of turnover involves a serious risk of bankruptcy for the brand producer.

Some brand producers which are ‘fully’ or ‘partially’ pushed out of the market may shift from ‘brand’ to ‘private label’ production. As such, they may produce the label for the supermarket and regain access to the market through the private label channel. Such a position enables them to access the market at a lower risk and engage in large scale production. This large scale production yields efficiencies and cost savings from which consumers benefit. Note however that the distinct buyer power enjoyed by the supermarket

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15 See the submission by Morrisons describing Morrisons’ advantages over secondary and tertiary brands when facing the leading brand. ‘Morrisons considered that own label has provided better competition for the brands, than tertiary brands because they are generally better marketed, better packaged and challenge the ability of the brands to dictate prices. Secondary brands tend not to have the marketing support of the brand leaders and find it difficult to compete against own-label products. Own-label products acquire the well-known reputation of the retailer, which promotes sales over less well-known secondary and tertiary brand reputations’. *Grocery Markets Final Report Own Label Appendix* (n 4) para 23.

16 Ibid.

17 Ibid. para 7.


enables it to increase the pressure on its own label producers. The pressure on the upstream producer and the impact it has on profit margin may push out smaller, less efficient upstream players. The ongoing pressure often stimulates consolidation and concentration upstream and a move from local and regional production to national and global operations.\(^{20}\)

Control of the distribution channel, shelf space, promotion and pricing also empower the retailer in its relationship with the brand manufacturer. Note for example the control of the retailer over information with the increased use of loyalty cards. These ‘enable retailers to make targeted appeals to individual consumers based on known patterns of past purchases and socio-demographic profiles.’\(^{21}\)

On the issue of market power, it is worth noting that the switching costs between outlets are presumably higher than the switching costs between products. The difference in switching costs increases the supermarket’s relative power in its dealing with suppliers and may even put a dent in the power of ‘must stock’ brands.\(^{22}\) Having said this, it is important to acknowledge the limits of this power. As retailers have to respond to consumer demand, their bargaining position is curtailed when dealing with leading and popular brands.\(^{23}\)

**Price transparency**

Brand recognition through advertising and promotion facilitates price transparency, enabling consumers to more easily compare different outlets’ prices of branded goods. This transparency increases the competitive pressure on supermarkets as it limits their ability to increase the price of leading brands above competitive levels.\(^{24}\) Supermarket chains compete with each other through these leading brands, using them as a hook to lure customers into the outlet. By contrast, the role of price transparency as a competitive engine may be hampered in the case of private labels. These labels differ in size, nature and quality between supermarket chains and make it more difficult for consumers to engage in price comparison. The reduced transparency tends to soften the price competition between the private labels of different retail chains.\(^{25}\) On this point the European Commission noted in the *Rewe/Meinl* decision that: \(^{26}\)

‘The prices of well-known branded goods are often used by consumers as a yardstick by which to assess the value-for-money to be obtained from a particular shop. Traders therefore tend to price such goods keenly so as to appear in the consumer's eyes to be offering good value-for-money. This leads to somewhat narrow margins for well-

\(^{20}\) This raises a social debate on the future of local and regional suppliers and farmers and the social cost of mega stores.

\(^{21}\) *Kesko/Tuko* (n 12) para 152.

\(^{22}\) Presentation by Pieter Kuipers, Unilever, ‘Buyer Power’ BIICL, London, 14 March 2007

\(^{23}\) See comments by Asda in *Grocery Markets Final Report Own Label Appendix* (n 4) para 28. Also see for example the *Kimberley Clark/Scott* case (n 54) where the Commission identified both Kleenex and Andrex tissue products as essential market leader brands which were long-standing and heavily supported (paras 133-138). Contrast this with SCA/Procter & Gamble (n 54) where the Commission noted that consumer tissue products are characterized by low brand loyalty and retailers enjoy a very strong buyer power vis-à-vis producers/suppliers on these markets (para 81) although it does acknowledge that Andrex have particular brand power and loyalty in the UK (para 92).


\(^{25}\) *Grocery Markets Final Report Own Label Appendix* (n 4) para 20.

known branded articles. In the case of own brands, however, the consumer is unable to make any direct price comparison. This can be used to achieve a higher margin than in the case of branded goods. Such a strategy is particularly easy to implement in the case of chain-store companies, as the head office has firm control over all branches.’

And more generally, the Commission noted in the *Kesko/Tuko* decision that:

‘Although it is probably necessary for retailers to stock at least one premium brand product in each product group, private label products offer several advantages to Kesko and Tuko in their retail operations. One such advantage is that these products are not sold by other retailers, which are perceived of as competitors. Although private-label products are generally sold at lower retail price than branded products, the margins on these products can in fact be set at a higher level compared to branded products, which are available from competing retailers as well.’

Note however that when the private label serves as a dominant player in a certain product category it is likely to be priced competitively and form a visible part of retail competition. Such is also the case when the private label range is used by the supermarket in price competition against other retailers.

**Copycat packaging**

Copycat packaging involves the display of similar characteristics to the leading brand and induces consumers to purchase the private label instead. It has been shown that copycat packaging may result in an increase of up to 55 per cent in private label market share, compared with a position where the private label uses dissimilar packaging to a rival branded product. Copycat packaging may lead consumers to believe that the product is produced by the brand manufacturer, is of a similar quality and shares the same characteristics as the brand, or is in fact the brand itself. The use of copycat packaging may prove beneficial when the private label lacks reputation as it enables the supermarket to free ride on the rival brand’s reputation.

The European Commission decision in *Rewe/Meinl* provides an illustrative example of the use of copycat packaging:

‘The growth and increasing importance of own brands are having the effect of shifting the balance of power between traders and producers in favour of traders. A trader has own brands produced to his own requirements and under his own logo. The actual producer is no longer visible to the customer and is therefore exchangeable almost at will. This can be illustrated by the example given to the Commission of Billa's own brand "Heidi Teebutter", which, using almost identical packaging, was produced, first by an Austrian producer, then by a Dutch one. The trader thereby enters de facto into direct competition with branded goods producers. The effect is that of a backwards integration into the producer stage.’

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27 Ibid. para 51.
28 *Kesko/Tuko* (n 12) para 134.
29 *Grocery Markets Final Report Own Label Appendix* (n 4) para 25.
30 *Grocery Market Own Label Working Paper* (n 5) paras 31-36.
31 *Rewe/Meinl* (n 26) para 112.
Two points on the limit of this practice should, however, be made. First, intellectual property law may be used to curtail the possibility of copycat packaging. Note however that the threshold for intervention under intellectual property law does not eliminate weaker forms of copycat. Second, as has been the experience in the UK, some private labels have developed a strong reputation which positions them in parallel with leading brands. In such cases, copycat packaging becomes irrelevant as the private label competes like any other leading brand.

*Marketing & promotion*

The retailer’s control over the outlet, both in terms of shelf space allocation and visual merchandising and promotion, provides additional opportunities to determine the nature and extent of marketing communication in relation to private labels in ways which are not immediately available to suppliers.\(^{32}\) It is important to note that a high proportion of consumer decision-making, particularly for low involvement goods, is made in-store. For example, US studies have shown that only around one third of grocery store purchases are planned in advance.\(^{33}\) Assuming that both the private label and branded product in a certain category are equally fast selling, the difference in profitability creates a strong incentive for the retailer to promote the private label more than the advertised branded product. It thus further empowers its position as distributor and competitor.

**III. Policy choices - Competition Law**

The mixture of effects described above is challenging from a competition law perspective. Whereas there is little doubt as to the benefit and efficiencies being derived in the short term from the sale of private labels, there is less certainty as to their medium and long term effects.

*The case for limited intervention – if it ain’t broke, don’t fix it*

The uncertainty as to the mid and long term effects of private labels may support claims for limited or no intervention. The case in favour of limited intervention is based on the premise that the benefits from the proliferation of private labels are sustainable and are not likely to be outweighed by any anti-competitive effects.

Some empirical studies suggest that the growth of private labels has reached its optimum point and will remain largely unchanged in the future.\(^{34}\) Accordingly, one can argue that the present benefits are not likely to fade out by a significant surge in private label dominance.

In *Kimberley Clark/Scott*\(^{35}\) the European Commission noted in this respect that:

> ‘It would seem mistaken to assume that private-label growth will continue to grow indefinitely and ultimately eliminate all branded products. On the one hand, there is some evidence to suggest that private-label growth is linked to the general economic climate and that in more prosperous times consumers show a greater propensity to purchase branded products. On the other hand, there is considerable evidence

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32 A Ezrachi & J Reynolds (n 24).
35 Kimberley Clark/Scott (n 54) where the merger was cleared subject to conditions.
indicating that the major retailers sell private-label products against branded products, so that the latter fulfil an important function in providing a price/quality reference point for the sale of store brands. However, in any event, in the time period relevant for assessment of merger cases, there can be no doubt that branded products will continue to play an important market role, as described below.  

It has also been suggested that leading brands have been successful in reacting to private labels, sometimes increasing their shares in some categories. Dobson and Chakraborty draw attention to the fact that in many cases, brand producers were able to reduce the price gap between brands and private labels and were able to capture an increase in the available shelf space which flows from the expansion of hypermarkets at the expense of smaller supermarkets. Dobson also notes that retail consolidation and economies of scale have enabled supermarkets and private label producers to create efficiencies and invest in product innovation. Such innovation from the private label sector stimulates brand innovation to the benefit of consumers. In addition, it is often argued that the relationship between private labels and brands necessitates coexistence. The retailers would thus self-police their use of private labels to ensure the viability of the brands. In other words, they will not kill the goose that lays the golden eggs (although they may, at times, come close to throttling her).  

In line with the above, the UK Competition Commission 2008 Grocery Market Report suggested that the sale of private labels does not provide retailers with a decisive advantage over branded products’ manufacturers. The Report provided a bird’s eye view of the effects of private labels. Although it acknowledged some of the concerns raised by the penetration of private labels in the UK, it did not consider these as necessitating intervention.  

The case for intervention - Challenge the unchallenged  

The case in favour of intervention is based on the assumption that the possible mid and long term negative effects stemming from the proliferation of private labels outweigh the short term benefits. It echoes some predictions as to the future of brand competition and the belief, held by some industry experts, that in the future supermarkets will make ‘only two offerings per category on the shelf – the national brand leader and the store brand. There will be no space for the second or third brand player in the category.’ These predictions stem from common practices deployed by retailers. A snapshot of these practices may be found in the European Commission Rewe/Meinl decision, where it noted that in various product categories the retailer ‘has selectively delisted secondary brands or weaker producer’s brands … and replaced them with own brands. Although must-carry products are as a rule not delisted, as they continue to be needed on the shelves as eye-catchers, their share is reduced to the extent

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36 Ibid. para 113.
39 Note however that even if such self-policing does exist, the question remains whether it implies a lack of anticompetitive activity or effect. The threshold for intervention due to competitive harm may well be lower than the (self-imposed) self-policing threshold of the retailer. In other words, self-policing does not exclude anticompetitive actions and foreclosure. This may be particularly the case when considering the possible effects private labels have on secondary and tertiary brands.
40 Grocery Markets Final Report Own Label Appendix (n 4) para 37.
necessary for them to perform their eye-catching function, for example by limiting the range. By the same token, the own-brand share can be considerably increased.'

Accordingly, private labels will gain greater market dominance and the supermarket’s offering will be limited to the private label range and the leading brand. The limited interbrand competition within the supermarket is likely to affect the competitive pressure on both the leading brand and the label and may result in higher retail prices. Supermarket control over stock, shelving, promotion and pricing and its increased role as the main distribution channel are likely to hamper the leading brands’ sales and profit margins. At the same time, in a private-label-dominated-environment, price competition between supermarkets, price transparency and intrabrand competition are likely to suffer, resulting in an increase in the power of supermarkets.

The dependence of the producer on the supermarket as a gatekeeper should not be underestimated. It is generally accepted that switching between distribution channels is difficult, costly and generally impossible in the short term. In an attempt to quantify this, it has been suggested, on this point, that a loss of 22 per cent of turnover is the figure ‘above which a customer can be replaced only at the cost of very heavy financial losses, if at all.’ Another prediction suggests detrimental outcomes with a loss of even lower shares, in the region of 10 per cent of sales. Either way, in a market with a small number of leading supermarkets, a loss of one main distribution channel is likely to herald the end for the brand and lead to its exit. This dependency is amplified in instances in which customers’ loyalty to the mega-store-shopping-experience overrides their brand loyalty. Arguably these days it is the ‘private label offering’ which becomes one of the main variables in the choice of outlet. Accordingly, the retailer would push out branded goods as long as this does not undermine the volume of sales in the outlet. In the long term, high levels of concentration in both upstream and downstream markets will exist, to the detriment of consumers.

Not surprisingly, undertakings operating at the upstream level and subjected to the supermarket buyer power have been vocal on this issue and called for intervention. Worthy of note are calls by the Confederation of the Food and Drink Industries of the EU (CIAA) to the European Commission for greater focus on the functioning of the food supply chain. According to the CIAA submission ‘retailers may derive unfair advantages from being both the customer and the competitor. This specific position in which retailers find themselves -- from a competition law standpoint -- by virtue of the fact that they own the private label and have a very thorough knowledge of price structures, needs to be taken into account. At the same time they continually negotiate with all major suppliers and have detailed knowledge of their commercial terms and plans to introduce new products.’

**IV. European Competition Law**

Without questioning the views expressed above about the competitive effect of private labels and the merit in intervention, it is interesting to explore when ex-post enforcement would be

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42 *Rewe/Meinl* (n 26) para 114.
43 Ibid. paras 97, 102.
44 Ibid. para 101.
triggered under European Competition law. Two competition law provisions, namely Article 81 EC and 82 EC, may be applied ex-post to ongoing activities.\footnote{Article 81 EC applies to agreements and concerted practices between undertakings which have the object or the effect of restricting competition. By its nature it can only be applied to instances where several retailers join forces. It could thus be used when dealing with buying alliances (horizontal) or when dealing parallel networks (vertical). These forms of agreements may indeed involve private labels but are not characterized by their presence. Article 81 EC is thus not directly relevant to the consideration of market power.} Out of the two, Article 82 seems most suitable to address concerns over market power and the (unilateral) use of private labels by supermarkets. Nonetheless, as will be illustrated below, its application is not likely to be triggered in cases involving private labels.

Article 82 EC prohibits the abuse of a dominant position which affects trade within the Common Market. It serves as the main legal instrument which may be applicable, ex ante, to instances involving market power and private labels. The Article requires proof of dominance or collective dominance and the abuse of such a position.

Dominance is generally defined as a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave, to an appreciable extent, independently of its competitors, customers and its consumers.\footnote{Case 27/76 United Brands v Commission ECJ [1978] ECR 207, [1978] 1 CMLR 429; Case 85/76 Hoffmann-La Roche & Co. v Commission ECJ [1979] ECR 461, [1979] 3 CMLR 211; Case C-62/86 AKZO Chemie BV v Commission ECJ [1991] ECR I-3359, [1993] 5 CMLR 215.} The finding of dominance serves as a threshold which triggers the application of the Article. Subsequently, in the context of private labels, it will only apply when a retailer is found to occupy such a dominant position. Although the discussion in section II above identified the existence of market power in the relationship between the retailer and the producer, such market power will not necessarily imply a position of dominance. In fact, in the majority of, if not all cases, the relevant market includes a number of distribution channels offered by competing supermarkets, none of which occupy a dominant position. The fierce competition between supermarkets has so far prevented the emergence of a dominant undertaking in this market.\footnote{Market shares as of 15th September 2009 are: Tesco: 30.9\%, Asda: 17.4\%, Sainsbury's: 15.8\%, Morrisons: 11.3\%, Somerfield: 2.7\%, Waitrose: 3.9\%, Iceland: 1.7\%, TNS Worldpanel Data <http://www.tnsglobal.com/news/news-A4FADF3EFD394F25B1B57DB1482D5CEF.aspx> accessed 13 October 2009.} Subsequently, under traditional analysis, the market power exercised by a retailer would not amount to a dominant position.\footnote{Under current market conditions, the finding of dominance may only be possible if one treats the supermarket’s outlet as the relevant market in which the producers and the retailer’s private label compete over shelf space.}

In fact, the use of private labels emerges from fierce competition between retailers. The development and sale of private labels by each of the supermarkets is thus, by its nature, a unilateral activity. In other words, despite giving rise to a collective foreclosure effect, when deployed by various retailers unilaterally, these measures do not represent collective action.

To illustrate, note that in the UK the four large supermarkets attract around 75% of total grocery sales and that around 40% of products sold in these supermarkets are private label.52 Although they do not act as a collective entity, in as much as they do not coordinate their policies on private labels, they do generate a significant cumulative effect. Accordingly, the lack of illegality under current competition law does not necessarily serve to prove a lack of anti-competitive effect.

Subsequently, the market power from which supermarkets benefit in their dealing with brand producers is not likely to trigger a finding of dominance or collective dominance. Absent dominance or collective dominance, the question of possible abuse is not raised. Indeed, there are no reported cases which involve the abusive use of private labels by dominant undertakings. Arguably, even if a dominant position is established, the mixture of short and long term effects would make it difficult to establish such abuse especially as in the short term consumers seem to benefit from lower prices and quality goods and as large mega-stores allow the retailer to offer reasonable choice.53

The European Merger Regulation

The lack of enforcement under Article 82 EC does not imply that the European Commission has been complacent in its approach to private labels. Indeed, a bird’s eye view of merger decisions under the European Merger Regulation reveals a number of cases in which the possible effects of private labels were considered.54 These cases, however, involve ex-ante analysis and are less relevant for the scrutiny of ongoing unilateral use of private labels. Nonetheless, they showcase the range of effects which may accompany the use of private labels. For example, in Kesko/Tuko55 the European Commission noted how the new entity, with a market share of 55 per cent, may act as gatekeeper to shelf space. This strength, it was held, ’would be further increased by the combination of the successful Kesko and Tuko private label products, which could be used as a further negotiating tool vis-à-vis suppliers to achieve additional concessions on, inter alia, reduced prices or increased marketing support.’56 ‘This will act as a further disincentive for Kesko’s competitors to actively

52 Presentation by Philip Lowe, CCLP Symposium on Retail Competition (2007).
53 On the finding of dominance and abuse, one should note the 2005 consultation paper published by the European Commission entitled ‘An economic approach to Article 82’ in which the Economic Advisory Group for Competition Policy questioned the merits of the traditional formalistic approach to Article 82 EC cases. The paper advocated an effects-based approach focused on competitive harm. Although subsequent communications from the Commission, including the Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses’ and the most recent Guidance on its enforcement priorities, are more restrictive in nature, it is interesting to consider whether in future an effects based approach may capture the above effects.
55 Kesko/Tuko (n 12).
56 Ibid. para 133.
compete, in particular, on prices against Kesko. It will also make new entry on the market more difficult and, as such, act as a significant barrier to entry on the market. In SCA/Procter & Gamble the European Commission noted, with respect to the tissue market, that ‘the quality of private label products has increased and is now similar to branded products. Nevertheless, branded products are still sold with a price premium over private labels. As a result, private labels continue to gain market share in most countries.’ It adds that ‘the growth of private labels is also driven by both increasing shelf space being devoted by retailers to their own private label products at the expense of manufacturer branded products, and by the success of their comparable product offering at similar or lower prices. Retailers are increasingly promoting their own brands, with many retailers actively advertising their labels with marketing strategies similar to those of brand manufacturers.’

Overall, despite the fact that the ECMR has provided an opportunity to explore these effects, it has no role in the ex-post scrutiny of the retail market. As such, it cannot form part of the legal provisions applicable to existing retailers.

V. Gap in Enforcement?

The above discussion reveals that in an ex-post setting, European Competition law, and more specifically Article 82 EC, will rarely challenge the unilateral use of private labels by the supermarket, due to a lack of dominance.

If one believes that the competition law system is sufficiently exhaustive, failure to satisfy the conditions set by Article 82 EC indicates that intervention is not warranted. The rather formalistic argument on this point would be that in the absence of dominance or collective dominance the possible anticompetitive effects cannot and should not trigger intervention. In addition, from an ‘effects-based perspective’ one could add that the lack of clear anticompetitive effect questions the possible merit in an argument in favour of lowering the threshold for intervention. That indeed may be the case. Accordingly, arguing in favour of intervention would be superfluous, not to mention detrimental to consumer welfare and legal certainty.

Yet, it is possible to question the assertion that the legality under Article 82 EC implies a lack of anti-competitive effect. Such a proposition focuses on the cumulative effects generated by private labels. Accordingly, these effects, although not establishing a position of dominance or collective dominance under Article 82 EC, generate similar economic effects. This, one may argue, is particularly the case in the UK, where private label popularity is high and contributes in shifting consumer loyalty from the brand to the outlet.

These effects, one could argue, should be addressed by competition law, either within the framework of Article 82 EC or outside it. One could argue that the economic effects of

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57 Ibid, para 134.
58 SCA/Procter & Gamble (n 54) para 17.
59 Ibid, para 18.
60 The European tool box is not limited to the Treaty provisions. Note for example Directive 2000/35, 2000 OJ L 200 35, which deals with late payments. This Directive, however, is not aimed at confronting the competition concerned raised in this paper.
61 Note on this point comments by Dobson who highlights the fact that in the UK there is more consumer loyalty to a store than a brand, Dobson (n 38) 535-6.
62 The notion that traditional competition analysis fails to encompass the possible anti-competitive effects of private labels does not necessarily suggest that Article 82 EC should be applied without the presence of
private labels should not be examined by the traditional ‘analytical tool box’ but instead merit a fresh approach to vertical competition. This argument stems from the proposition that traditional competition analysis fails to encompass the real market power of supermarkets, the unique phenomenon of private labels, and the dependency of the producers. Accordingly, the mixture of horizontal and vertical effects and the presence of cumulative market power should not escape scrutiny.

On this point one should note the writing of Robert Steiner who draws attention to the failure of competition analysis to encompass the existence of ‘vertical competition’. As such, he has challenged the traditional view that the vertical relationship is complementary and has suggested that firms act as competitors when they can ‘take sales, margins and market shares from each other’. He criticizes the different economic tools used to analyse horizontal and vertical competition. Whereas the former is subjected to competition theory, the latter is viewed through bargaining theories which fail to encompass the full competitive effects.

Subsequently the distribution channels received little attention in the development of price and output theories and were treated as analytically neutral. This has affected the approach of competition agencies and courts which predominantly considered competition effects and market power to only exist at the horizontal level.

Subsequently, the analytical framework currently used to analyse the effects of private labels is lacking. It fails to encompass the cumulative effects and the vertical competition which may occur with no significant horizontal change. Take for example the supermarket landscape in the UK. There, vertical competition may intensify without any significant changes in market power and market shares between the main players: Tesco (30.9%), Asda (17.4%), Sainsbury’s (15.8%), Morrison’s (11.3%), Somerfield (2.7%), Waitrose (3.9%) and Iceland (1.7%). As each of these retailers unilaterally introduces and strengthens their private labels, they generate a cumulative effect upstream, which may have detrimental results in the long term on consumer welfare.

VI. Beyond European Competition Law

It is important to recall that the competition law system in Europe comprises a mixture of National and European enforcement provisions. Subsequently, one needs to look beyond European Community competition law, and consider whether national provisions may fill the alleged gap, discussed above.

In this respect, of significant relevance are the powers of the UK Competition Commission and its role in monitoring and examining the exercise of buyer power by supermarkets - from dominance. It may however support an effects-based approach which puts less emphasis on the traditional finding of dominance. EAGCP Report, ‘An Economic Approach to Article 82 EC’, July 2005 <http://ec.europa.eu/competition/publications/studies/eagcp_july_21_05.pdf> accessed 14 October 2009.

Robert L. Steiner (n 41).


‘In the development of price and output theory, economists have dealt primarily with manufacturing industries and have treated these as though manufacturers sold finished products to consumers, or alternatively, as if the distributive trades were ‘analytically neutral’’, Richard Heflebower, ‘Internal Trade’ in David Sils (ed.) International Encyclopedia of the Social Sciences (1968). Also cited in Robert L. Steiner (n 41).

Robert Steiner (n 64).

TNS Worldpanel Data (n 49).
its 2000 Monopoly Report, through the introduction of the Supermarket Code of Practice, and to the recent introduction of its successor, the Groceries Supply Code of Practice (GSCOP).

The GSCOP provides the most recent framework which addresses the relationship between retailers and suppliers and is backed by the introduction of an Ombudsman to arbitrate on disputes between retailers and suppliers and investigate complaints under the GSCOP. In the context of private labels, of major importance is the GSCOP’s Section 16 which imposes duties on supermarkets with respect to delisting. The Section stipulates that a retailer may only de-list a supplier for genuine commercial reasons. Prior to significantly reducing the volume of purchase from the supplier, the retailer will provide reasonable and detailed notice to the supplier, inform it of the right to have the decision reviewed and the right to discuss the decision with the retailer’s Code Compliance Officer.

The GSCOP may alleviate some of the difficulties discussed above and provide a vehicle which may be used by the brand producer when faced with the threat of de-listing. Note however its limitations - in practice it may be difficult to assess the nature of ‘significant reduction’ which triggers intervention. Additionally, such intervention even when triggered, will only address a limited aspect of the proliferation of private labels.

More generally, it is important to recall that the GSCOP aims to deal with wider aspects concerning the relationship between retailers and suppliers, as identified in the Competition Commission 2008 Report. It is not designed to deal with possible harmful effects of private labels, not least because the Competition Commission concluded in its 2008 Report that private labels do not provide retailers with a decisive advantage over branded products’ manufacturers. Its future use in the private label context is likely to be incidental.

If one believes that the UK Competition Commission was correct in its conclusions as to the effects of private labels, such secondary use seem satisfactory. If one believes, however, that the 2008 Report failed to appreciate the full impact of private labels, then a gap in enforcement may well exist, even when viewing the UK and European competition provisions as a whole.

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71 Delisting is defined in Part 1 of the 2009 Order as ceasing to purchase or significantly reducing the volume of purchase from a supplier. ‘Whether a reduction in the volume of purchase is ‘significant’ will be determined by reference to the amount of Groceries supplied by that Supplier to the Retailer, rather than the total volume of Groceries purchased by the retailer from all Suppliers’.
73 Grocery Markets Final Report Own Label Appendix (n 4) para 37.
VII. Conclusion

The nature of private labels and brand competition is one in which horizontal, vertical and market power issues are weaved into each other. The retailer acts as a distributor for the brand manufacturers. Yet, in addition to this vertical relationship, the retailer also competes horizontally with the brands through the offering of its private labels. These unique characteristics challenge the traditional distinction between vertical and horizontal effects. In addition, the retailer, being in control of the outlet and distribution channels, is able to exercise market power in its relationship with brand producers, thus improving the position and profitability of its own labels.

In the case of supermarkets, the rise and proliferation of private labels has been noticeable. As supermarkets serve as the main and most important distribution channel for consumer goods, the changing nature of horizontal and vertical competition raises questions as to whether competition law ought to intervene. Yet, the mixture of market power and horizontal and vertical effects raises challenges to traditional competition law analysis. The mixture of short and long term effects, being pro- and anti-competitive, makes the question of intervention a difficult one. This is the case, in particular, in light of the uncertainty surrounding some of the anti-competitive long term effects and the certainty surrounding some of the pro-competitive short term effects.

The application of European competition law to the area of private labels is interesting and raises challenges at two distinct levels. First, there is controversy as to the long term effects generated by private labels. Second, even if one believes that these are indeed harmful effects, the current application of EC Competition law is not likely to capture these effects.

At the UK level the Groceries Supply Code of Practice provides an additional and valuable enforcement tool which can also be used to confront de-listing of brands. The effectiveness of this tool to deal with issues raised by the proliferation of private labels is yet unknown and may be questioned, especially as private labels were not part of the problem it was designed to address.

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