

Buyer Power in the Context of Private Label in the EU: Accompanied with a Special Reference to the UK's Approach

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In the last few decades the retail sector in the European Union has become highly concentrated, with large retailers having significant market power that gives them an advantageous position against suppliers. These retailers have recently started to offer their own label products. As a result, the introduction of those private labels has added a horizontal dimension to the relationship between retailers and branded-product suppliers which traditionally had only a vertical character. This two-dimensional relationship makes it difficult to adopt a competition law approach to the exercise of buyer power by retailers, which can lead to positive effects, but can, at the same time, create serious competition concerns as well. This article seeks to explore to what extent those competition concerns associated with buyer power and private label can be addressed under articles 101 and 102 TFEU in the EU. In that regard, it particularly discusses barriers to the effective application of those rules at EU level. Furthermore, given the high private label penetration in the UK and the broad awareness of its anticompetitive outcomes, the UK competition law tools are specially presented as an example of efforts at the national level to address anticompetitive effects resulting from buyer power in the private label context.

I. Introduction

Retail competition has lately received considerable attention from competition authorities as well as commentators. Given the concentrated nature of the retail sector across the European Union (EU), large retailers dominating the sector hold significant buyer power that gives them a great advantage in bargaining with their suppliers. The introduction of private label products has brought along a new dimension to the relationship

between retailers and branded product suppliers. The European Commission and national competition authorities (NCAs) in various member states have started to focus on how to handle the balance between positive and negative outcomes resulting from these developments at both retail and supply level. The United Kingdom (UK) stands out from other member states due to its extensive experience and concrete efforts in that respect. Therefore, this article seeks to analyse the competition tools used in the EU and the UK to address anticompetitive concerns stemming from buyer power particularly in the context of private label. It should be noted that, besides competition rules, there may also be other possible tools and solutions provided under other legal rules regulating unfair practices, intellectual property rights and misleading advertising, which are directed at overcoming those concerns associated to buyer power and private labels. However, this article aims to analyse the relevant issues only from a competition law perspective and thus, it does not touch on those tools and solutions discussed in the context of other areas of law.

This article consists of three substantive parts. To set the scene for the discussion, the first part explains fundamental concepts including the economic nature of the retail sector, buyer power and private label. The second part assesses how articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) address competition problems associated with buyer power in the context of private label. Since this article focuses on the applicable *ex post* tools, the assessment of mergers between retailers is mentioned only to the extent that it relates to the applicability of articles 101 and 102 TFEU. Finally, the last part describes the path followed by the UK competition authorities to eliminate competition concerns arising from the abuse of buyer power in relation to private labels.

II. Retailing Sector and Private Labels

1. Grocery Retailing

Retailing constitutes the final link between the manufacturing of a product and the end-consumer.¹ Retailers serve a significant function for end-

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consumers in many aspects. These generally include the selection, collection, and storage of goods on behalf of the consumer.² Retailers also assist end-consumers in making their choices through the provision of product information and after-sales services.³ Given its intermediary nature, retailing has a key role both in the formation of the product prices in a supply chain and for the supplier's access to the end-consumer.⁴ In addition to its intermediary function in supply chains, retailing has a vital role in the general economy as well.⁵ The retail sector is one of the three largest service sectors in Europe both in terms of value-added and employment.⁶ According to the Commission's data, retail services accounted for 4.2 % of the total gross value added in the EU and for 8.4% of the total EU employment in 2007, a fact which indicates the crucial role of this sector for the EU economy.⁷

Among different categories of retailing, grocery retailing has a prevailing position.⁸ Grocery sales represent around 50% of the EU's total retailing.⁹ The grocery sector has actually experienced a world-wide structural change within the last couple of decades. Large retailers offering a selection of fast moving consumer goods have increased their market shares, whereas traditional and small retailers have begun to shrink.¹⁰ Research conducted by *Euromonitor International* shows that in 2007, in 15 EU member states,

¹ London Economics, 'Competition in Retailing', OFT Research Paper 13 (1997) <http://oft.gov.uk/shared_oft/reports/comp_policy/oft195.pdf> accessed 31 December 2012 (Competition in Retailing Research Paper), summary sec 2.1.

² *ibid* sec 1.

³ European Commission, 'Staff Working Document on Retail Services in the Internal Market Accompanying document to the Report on Retail Market Monitoring: Towards more efficient and fairer retail services in the Internal Market for 2020' COM (2010) 355 final <http://ec.europa.eu/internal_market/retail/docs/working_document_en.pdf > accessed 31 December 2012 (Commission Staff Working Document) 6.

⁴ Paul W Dobson, 'Exploiting Buyer Power: Lessons from the British Grocery Trade' (2005) 2 *Antitrust Law Journal* 529, 537.

⁵ European Commission, 'Retail Market Monitoring Report - Towards more efficient and fairer retail services in the internal market for 2020', COM (2010) 355 final, <http://ec.europa.eu/internal_market/retail/docs/monitoring_report_en.pdf > accessed 31 December 2012, 2.

⁶ Commission Staff Working Document (n 3) 7.

⁷ *ibid*.

⁸ Paul Dobson, Roger Clarke, Stephen Davies and Michael Waterson, 'Buyer Power and its Impact on Competition in the Food Retail Distribution Sector of the European Union' (2000) <http://idei.fr/doc/conf/fpi/papers_2000/dobson.pdf> accessed 31 December 2012, 1.

⁹ Commission Staff Working Document (n 3) 8.

¹⁰ *ibid* 10.

the eight biggest companies controlled between 50% and 80% of the national grocery retail market.¹¹

This situation can be explained by various factors. First of all, compared to traditional retailers, large retailers have a greater ability to offer a variety of goods in a wide range of prices. Furthermore, the emergence of new store formats and significant investments in new technology and improved logistics have contributed to the strengthening of the large retailers' position in the sector.¹² Consumers are therefore attracted by the variety of choices and prices, the convenience of one-stop-shopping and the high quality of services.¹³

Besides these, the ability of large retailers to exercise buyer power over suppliers and the lack of such power on the side of small and traditional retailers is an important factor that puts the former ones in a better position than the latter as far as competing in the sector is concerned. This buyer power particularly enables large retailers to purchase products at lower prices than small retailers.¹⁴ To that end, the Commission emphasises the impact of the cost advantage of a centralised purchasing system enjoyed by large retailers over small retailers as follows:

The decline of the share of more traditional, small and independent retailers is nevertheless a common phenomenon across the EU and across all sectors of retailing. (...) A combination of factors can explain this trend, but a main explanation is that small independent non-specialised retailers that cannot benefit from the cost advantage of a centralised purchasing system will typically be driven out of the market by their larger more price competitive rivals that can do so.¹⁵

¹¹ *ibid* 9.

¹² Dobson and others (n 8) 1.

¹³ Dobson Consulting, 'Buyer Power and its Impact on Competition in the Food Retail Distribution Sector of the European Union', (1999) <http://ec.europa.eu/competition/publications/1999_study_buyer_power_en.pdf> accessed 31 December 2012.

¹⁴ Dobson (n 4) 556.

¹⁵ Commission Staff Working Document (n 3) 10.

2. The Concept of Buyer Power

Buyer power essentially refers to the ability of downstream firms to affect the terms of trade with upstream suppliers.¹⁶ Depending on its source and the effect of its exercise, buyer power may take two different forms which are closely linked to each other.¹⁷ The first form is monopsony power which arises where a firm's share of purchases in an upstream input (procurement) market is large enough to decrease the market price by purchasing less or increase it by purchasing more.¹⁸ Therefore, monopsony power is generally considered as the mirror image of 'monopoly' or 'dominant position' as called in the EU.¹⁹ The second form of buyer power, however, is bargaining power which refers to the bargaining strength of a firm with respect to its suppliers.²⁰ A firm is more likely to possess bargaining power if it has a significant market share in a concentrated procurement market. However, having monopsony power is not a prerequisite for the existence of bargaining power. In other words, a firm may have substantial bargaining power, even if it is not dominant in the relevant procurement market.²¹

The retail sector is generally characterised by the buyer power of large retailers which mostly appears in the form of bargaining power. Indeed, with the increasing concentration, buyer power has started to play a central

¹⁶ OECD, 'Monopsony and Buyer Power' DAF/COMP (2008) 38 <<http://www.oecd.org/daf/competition/44445750.pdf>> accessed 31 December 2012, 9.

¹⁷ *ibid.* See also Zhiqi Chen, 'Defining Buyer Power' (2008) 53 *Antitrust Bulletin* 241.

¹⁸ OECD (n 16) 9.

¹⁹ Roger N Doll, "'Buyer Power" and Economic Policy' (2005) 72 *Antitrust Law Journal* 589, 589; Chen (n 17) 243.

²⁰ OECD (n 16) 9. The Commission's definition of buyer power seems to stress on the bargaining aspect of buyer power. It defines buyer power as 'the ability of one or more buyers, based on their economic importance on the market in question, to obtain favourable purchasing terms from their suppliers.' European Commission, 'Glossary of Terms Used in EU Competition Policy Antitrust and Control of Concentrations', Directorate-General for Competition (2002) <http://ec.europa.eu/competition/publications/glossary_en.pdf> accessed 31 December 2012.

²¹ For more information about the relation between monopsony and bargaining power and buyer power in general, see John B Kirkwood, 'Buyer Power and Exclusionary Conduct: Should Brooke Group Set the Standards for Buyer-Induced Price Discrimination and Predatory Bidding?' (2005) 72 *Antitrust Law Journal* 625; OECD (n 16); Chen (n 17); Howard Smith and John Thanassoulis 'Bargaining Between Retailers and Their Suppliers' in Ariel Ezrahi and Ulf Bernitz (eds), *Private Labels, Brands and Competition Policy: The Changing Landscape of Retail Competition* (Oxford University Press 2009), 45, Maurice E Stucke, 'Looking at the Monopsony in the Mirror' (2012) University of Tennessee, College of Law, Legal Studies Research Paper Series 191 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2094553> accessed 31 December 2012.

role in this sector. Large retailers escalate the amount and frequency of orders from suppliers as their selling power at the retail level increases. This mainly enables them to successfully negotiate with suppliers for more favourable terms and conditions than it would be expected under normal competitive conditions.²² Thus, buyer power provides large retailers with an advantage not only over traditional and small retailers at the retail level, but also over suppliers operating at the upstream level.²³

The fact that retailers have significant buyer power, in many cases, results in pro-competitive effects. The exercise of this power may prevent powerful sellers from exploiting their position and may thereby force them to lower their prices.²⁴ This is regarded to lead to pro-competitive effects, only if lower prices are passed on to consumers.²⁵ However, whether the retailer will have the incentive to pass on such discounts to consumers by lowering its own prices depends on its position at the retail level and on other market characteristics.²⁶ In this context, the lower the market power the retailer enjoys in the downstream market, the more likely it will offer the products concerned on competitive prices that would benefit consumer.²⁷

On the other hand though, buyer power can also lead to anti-competitive effects on retail and supply competition.²⁸ In a setting where the supplier is weak and the buyer is powerful, the lack of balance between the parties' powers may be abused by the buyer at the expense of the supplier. Such a situation, however, may in the end distort both supply and retail level competition. Terms imposed by powerful retailers in this context may take different forms, such as listing charges, slotting allowances, retroactive discounts on products already sold and unjustified high contributions to promotional expenses.²⁹ Retailers may also force their suppliers not to sell

²² Dobson (n 4) 532; European Commission, 'The Impact of Private Labels on the Competitiveness of the European Food Supply Chain' (2011) <http://ec.europa.eu/enterprise/sectors/food/files/study_privlab04042011_en.pdf> accessed 31 December 2012 (Study on the Impact of Private Labels) 18.

²³ Robert L Steiner 'Market Power in Consumer Goods Industries' in Ariel Ezrachi and Ulf Bernitz (eds), *Private Labels, Brands and Competition Policy: The Changing Landscape of Retail Competition* (Oxford University Press 2009) 76.

²⁴ Dobson and others (n 8) 4. Stucke (n 21) 7.

²⁵ Dobson and others (n 8) 4.

²⁶ Dobson Consulting (n 13) 36.

²⁷ Dobson and others (n 8) 5.

²⁸ For the ability to exploit buyer power, see Competition in Retailing Research Paper (n 1) sec 5.1.2.4.

²⁹ Dobson and others (n 8) 3.

to other retailers at a lower price ('most favoured customer' condition) or not to supply any other retailer at all (exclusive supply condition).³⁰

Although these terms may grant a retailer the ability to buy and sell the products at lower prices in the short run, they may have detrimental effects on competition in the long run.³¹ For instance, they may diminish the incentive of brand suppliers to innovate and improve products.³² Similar concerns are also acknowledged in relation to joint purchasing agreements in the Guidelines on Horizontal Cooperation Agreements.³³ Therein, the Commission provides that if the purchasing parties have significant buying power, 'they may force suppliers to reduce the range or quality of products they produce, which may bring about restrictive effects on competition such as quality reductions, lessening of innovation efforts, or ultimately sub-optimal supply'.³⁴ In the long run, the exercise of buyer power may even lead to the exit of some brand manufacturers, particularly secondary brand owners. Therefore, it may thereby make the sector dominated by 'a small number of fully integrated retailers, offering private-label' and a few primary brand manufacturers.³⁵ This may in turn result in reduced choice and, depending on the nature of competition between these vertically integrated retailers, in possibly higher prices.³⁶

To conclude, any competition law approach adopted in relation to the exercise of buyer power in the retail sector should consider both its positive and negative effects. In this regard, a proper balance should be achieved between short-run benefits including lower prices and increased choice on the one hand, and long-term harms to manufacturer competition resulting

³⁰ *ibid.*

³¹ *ibid.* 4.

³² Stucke (n 21) 15.

³³ Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2010] OJ C11/1.

³⁴ *ibid.* para 202.

³⁵ Dobson and others (n 8) 4; Steiner (n 23) 93; Ariel Ezrachi, 'Unchallenged Market Power? The Tale of Supermarkets, Private Labels and Competition Law' (2010) 33 *World Competition* 257, 261-62. See also European Commission 'Green Paper on Vertical Restraints in EC Competition Policy' (1997) <http://europa.eu/documents/comm/green_papers/pdf/com96_721_en.pdf> accessed 31 December 2012, para 234.

³⁶ Dobson and others (n 8) 5.

from prevailing own-label penetration and the distortion of retail competition in favour of large retailers, on the other hand.³⁷

3. Private Label as a Competition Phenomenon

With the grocery retail market becoming increasingly saturated,³⁸ many retailers have realised the benefits of vertical integration and of diversifying from each other.³⁹ In this context, by using as an advantage their ability to instantly respond to consumers' changing demands, they have started developing their own brands.⁴⁰ Given their impact on the formation of retail and supply level prices, on the suppliers' incentive to innovate, and the viability of competing retailers,⁴¹ these private labels have become an important phenomenon in the retail sector.

Although the launch of private labels dates back to 1970s, their importance has gradually increased in recent decades, and private labels currently represent one of the dominant features of the EU retail market.⁴² In the EU, private labels have a share of around 25% of the grocery market with an average growth rate of 4% per year.⁴³ This growth of private labels can be attributed to various factors. First, due to their ability to cut down the costs associated with brand development, marketing and advertisement, the retailers' cost to produce and sell a private label product is often less than the cost for brand manufacturers.⁴⁴ Furthermore, by taking advantage of the growing size of their stores in order to stock more products than they previously did, retailers have become able to increase the number and range of private labels they offer to customers. Customers are therefore attracted by a variety of products at comparably cheaper prices. These advantages

³⁷ *ibid* 4-5.

³⁸ See II/2 above. See also Commission Staff Working Document (n 3) 8-9.

³⁹ Commission Staff Working Document (n 3) 13; Richard Herbert 'Private Labels – What Drives Them Forward' in Ariel Ezrachi and Ulf Bernitz (eds), *Private Labels, Brands and Competition Policy: The Changing Landscape of Retail Competition* (Oxford University Press 2009) 4.

⁴⁰ Commission Staff Working Document (n 3) 12; AC Nielsen Global Services, 'The Power of Private Label 2005: A Review of Growth Trends Around the World' (2005) <http://at.nielsen.com/pubs/documents/PrivateLabel_RMS.pdf> accessed 31 December 2012 (Nielsen's Review of Growth Trends).

⁴¹ Study on the Impact of Private Labels (n 22) 44.

⁴² Commission Staff Working Document (n 3) 11.

⁴³ Study on the Impact of Private Labels, (n 22) 11.

⁴⁴ *ibid* 44. Research conducted by Nielsen shows that private label products are three times lower than manufacturer brands. Nielsen's Review of Growth Trends (n 40).

have made private labels super-profitable to retailers. To this end, the increasing number of discount retail stores focusing on private labels has also contributed to the growth of private labels in the retail sector.

Moreover, private labels have been further developed in line with consumer demands to cover a range of innovation-oriented and differentiated products.⁴⁵ While previously being generic items, private labels have lately become more sophisticated.⁴⁶ Currently, private labels are considered to be significant brands themselves. As a result, retailers have moved from being merely intermediaries in distributing manufacturers' branded items to being a key player of the supply chain which controls product development and marketing process.⁴⁷ In this regard, retailers, which were previously only a customer to brand manufacturers, have now transformed into powerful competitors. This development has brought up many discussions about the competitive impact of private labels on supply and retail competition.

3.1. Possible Positive Effects

The development of private labels generates various advantages for consumers. As argued by *Dobson and Chakraborty*, by offering an increased variety of goods at substantially cheaper prices compared to branded products, private labels can bring about significant benefits to consumers.⁴⁸ Cost advantages enjoyed in relation to private label products grant retailers the ability to canalize more resources to research and innovation.⁴⁹ In addition, based on their ability to monitor consumer preferences, most retailers now develop specific product lines focusing on different aspects including health, environment and social values, to instantly respond to the needs of consumers.⁵⁰ In this respect, private labels appear to have a role in countervailing the strong position of branded

⁴⁵ Commission Staff Working Document (n 3) 11.

⁴⁶ Paul W Dobson and Ratula Chakraborty 'Private Labels and Branded Goods: Consumers' "Horrors" and "Heroes"' in Ariel Ezrachi and Ulf Bernitz (eds), *Private Labels, Brands and Competition Policy: The Changing Landscape of Retail Competition* (Oxford University Press 2009) 109.

⁴⁷ *ibid* 110.

⁴⁸ *ibid* 112-16.

⁴⁹ *ibid* 112-16; Study on the Impact of Private Labels (n 22) 37-45.

⁵⁰ Dobson and Chakraborty (n 6046) 109.

products by providing cheaper alternatives for consumers as well as by creating an opportunity to open up new product areas.⁵¹

3.2. Possible Negative Effects

Nonetheless, private labels can also lead to certain anti-competitive effects, where retailers abuse their double-agent position and free ride on the efforts of branded manufacturers.⁵² Free riding on the brand manufacturer's marketing, formulation or packaging may mislead the consumer and it ultimately prevents this manufacturer from recouping its investment and from generating the expected profit. This may also damage the product image that the brand manufacturer has built up through careful and continuing investment.⁵³ In turn, this situation may decrease the branded manufacturer's incentive to invest in innovation and in improving product quality. Although free riding and copycatting significantly affect the competitive structure of the retail and procurement markets, this issue mostly remains to be solved within the scope of intellectual property law.⁵⁴

However, there are other possible negative scenarios associated with private labels, which may require the application of the competition rules. Such scenarios mainly result from the new two-dimensional relationship which provides the retailer with the capability to 'exploit its role of double agent'.⁵⁵ By the nature of their function, retailers set the prices of all products offered in the store.⁵⁶ On the basis of this power, retailers may have an incentive to promote their private labels at the expense of branded products by limiting choice and by changing category price structures in a way to benefit their private labels.⁵⁷ This can create significant barriers to

⁵¹ *ibid* 114-15.

⁵² *ibid* 112. See also Pieter Kuipers 'Retailer and Private Labels: Asymmetry of Information, In-store Competition and the Control of Shelf Space' in Ariel Ezrachi and Ulf Bernitz (eds), *Private Labels, Brands and Competition Policy: The Changing Landscape of Retail Competition* (Oxford University Press 2009) 189.

⁵³ There even exist instances where retailers go beyond using similarities with the branded product and totally copycat the product itself. This behaviour does not only reduce incentive of the branded manufacturer to innovate, but also results in the loss of sales and the necessity to make expense for making changes on the packaging or appearance of the good to keep it different from the private label copycat. See Dobson and Chakraborty (n 46) 112-15.

⁵⁴ Study on the Impact of Private Labels (n 22) 124.

⁵⁵ *ibid* 40 and 47.

⁵⁶ Kuipers (n 52) 211.

⁵⁷ *ibid*; Study on the Impact of Private Labels (n 22) 44.

access to large retailers' shelf space, especially for secondary brands which do not enjoy a strong brand image and financial position to meet the conditions requested by retailers.⁵⁸

Hence, retailers may seek to encourage consumers to switch to and keep buying its private label by undermining brands with poor shelf positioning, artificial price differentials, deliberate stock-outs and value destroying promotions.⁵⁹ Restraints imposed on manufacturers by retailers for that purpose may include exclusive supply, refusal to stock or delisting, minimum supply levels, minimum advertising requirements and finally, sunk facility requirements.⁶⁰ The following sections of this article deal with the question how these restraints are addressed under EU and UK competition law.

III. Competition Assessment In Respect of Private Labels under Article 101 TFEU

Article 101(1) TFEU prohibits 'agreements between undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market'. Such restrictive agreements may, however, be exempted from this prohibition if they satisfy the four cumulative conditions set out in article 101(3) TFEU.⁶¹

With respect to the applicability of article 101 TFEU to the abuse of buyer power in the context of private labels, the main discussion point is whether the relevant competition concern results from an agreement in the meaning of article 101(1) or from unilateral conduct. Indeed, the existence of an agreement may be controversial in the case of application of unilateral

⁵⁸ Dobson and Chakraborty (n 46) 112-14; Dobson Consulting (n 13) 122.

⁵⁹ Dobson and Chakraborty (n 46) 114.

⁶⁰ Competition in Retailing Research Paper (n 1) Section 2.4.1.

⁶¹ For more information on the application of Article 101 TFEU see Maher M. Dabbah, *EC and UK Competition Law: Commentary, Cases and Materials* (Cambridge University Press 2006) 55-128; Okeoghene Odudu, *The Boundaries of EC Competition Law: The Scope of Article 101* (Oxford University Press 2006); Jonathan Faull and Ali Nikpay, *The EC Law of Competition* (7th edn, Oxford University Press 2007) paras 3.01-3.460; Valentine Korah, *An Introductory Guide to EC Competition Law and Practice* (9th edn, Hart Publishing 2007) 43-100; Ivo Van Bael and Jean-Francois Bellis, *Competition Law of the European Community* (5th edn, Wolters Kluwer 2010) 15-98; Richard Whish and David Bailey *Competition Law* (7th edn, Oxford University Press 2012) 82-168.

measures. In *AEG-Telefunken v Commission*,⁶² the Court of Justice of the European Union (CJEU) decided that AEG's refusal to supply to retail outlets outside its selective distribution system was an agreement between AEG and its distributors within the selective distribution system. In various other decisions, the EU courts confirmed this position.⁶³ In *ADALAT*,⁶⁴ however, the General Court of the European Union (General Court) and the CJEU appear to use a narrower definition for the term 'agreement' under article 101. The General Court therein makes a distinction between 'cases in which an undertaking has adopted a genuinely unilateral measure, and thus without the express or implied participation of another undertaking' and 'those in which the unilateral character of the measure is merely apparent'.⁶⁵ The General Court explains that the first case does not indicate a concurrence of wills between the parties and, therefore, does not form an agreement in the sense of article 101 because there is not an express or implied acquiescence by other parties.⁶⁶ The CJEU approved this approach of the General Court.⁶⁷

Although in many cases the commercial relationship between the retailer and the supplier is based on an agreement, many competition concerns related to private label may escape the scope of article 101 TFEU, because the conduct of the retailer concerned constitutes a genuinely unilateral measure falling outside the definition of 'agreement'. In this respect, considering the current practices in relation to private labels that may amount to an agreement, the analysis under article 101 TFEU should particularly have as its subject the exchange of information, exclusive

⁶² Case 107/82 [1983] 3151.

⁶³ See e.g. Joined cases 32/78, 36/78 to 82/78 *BMW Belgium SA and others v Commission* [1979] ECR 2435 paras 29-30; Joined cases 25 and 26/84 *Ford - Werke AG and Ford of Europe Inc. v Commission* [1985] ECR 2725, para 21; Case 75/84 *Metro SB-Großmärkte GmbH & Co. KG v Commission* [1986] ECR 3021, paras 72-73.

⁶⁴ Case T-41/96 *Bayer AG v Commission* [2000] ECR II-3383; Cases C-2/01 and C-2/01 *Bundesverband der Arzneimittel-Importeure eV and Commission v Bayer AG* [2004] ECR I-23.

⁶⁵ *Bayer AG v Commission* (n 64) para 71.

⁶⁶ *ibid*, paras 66-72.

⁶⁷ For more information about the definition of agreement in the meaning of Article 101 TFEU, see Urs Wickihalder, 'The Distinction between an "Agreement" within the Meaning of Article 81(1) of the EC Treaty and Unilateral Conduct' (2006) 2 *European Competition Journal* 87; Whish and Bailey (n 61) 105-10.

supply conditions, upfront access payments and category management agreements.⁶⁸

To start with, information exchange is a natural outcome of the relationship between the supplier and the retailer. Given the fact that the retailer purchases products from the supplier and sells them at the retail level, it should be accepted as normal that the retailer is aware of the prices of these products. Having said that, any information exchange between a product supplier and a retailer offering competing private labels bears the characteristics of ‘exchange of information between competitors’.⁶⁹ Considering its ability to supply its private labels at a lower price due to the various economic advantages it enjoys,⁷⁰ the retailer may use information about price and output as a means to set/increase its competing private label’s price. Although it was a merger case, in *Procter&Gamble/Gillette*, the Commission explained that the retailer’s knowledge of the prices could grant it the ability to fix the prices for its own private label products in reaction to the producers of branded products.⁷¹ However, as exemplified above, because the exchange of information about the prices of brand products is an indispensable part of the vertical relationship between the retailer and the supplier, it is unlikely to be regarded as an infringement of article 101(1) TFEU.

In the context of the vertical relationship between the supplier and the retailer, usually information exchange also includes data regarding the marketing and quality of brand products. Indeed, it is common that retailers request from brand manufacturers details about the product, including formula specifications or marketing plans depending on the marketing strategy which is proposed to be pursued. This practice is claimed to be necessary for a better marketing of the product which will make it available to a larger scope of consumers.⁷² Under the pressure of the retailer’s power

⁶⁸ It should be noted that buyer power may raise competition concerns in relation to other agreements including joint purchasing agreements. However, since these agreements are usually not related to the abuse of buyer power by retailers in the context of private labels, this article does not intend to analyse them. For more information about the assessment of joint purchasing agreements, see Guidelines on Horizontal Cooperation Agreements (n 33) sec 5.

⁶⁹ For more information about assessment of information exchange under article 101 see *ibid*, paras 55-110.

⁷⁰ See II above.

⁷¹ *Procter & Gamble/Gillette* (Case COMP/M.3732) [2005] para 124.

⁷² Kuipers (n 52) 193-95.

and with the desire to better position the product, the manufacturer is left with no choice but to be part of such a practice.

Although under this scenario the objective of the parties is not in principle to set the prices in a common manner, which is the main concern about exchange of information between competitors, such practice is still worth examining in terms of its effects on competition in innovation and product quality. In this regard, competition concerns centralise on the retailer's use of information handed for the purpose of marketing for developing its own competing labels. It is common that by using that kind of information, the retailer introduces its private label copycat not much later than the manufacturer introduces its new product.⁷³ This free riding by the retailer may prevent the manufacturer from achieving the targeted sales and from recouping its investment. The ultimate impact is likely to reduce the incentive of the brand manufacturer to innovate and improve its existing products. Nevertheless, it would be problematic to argue that this information sharing infringes article 101 TFEU, because it is, at the same time, necessary for the better marketing of the products and it can thus be considered to lead to efficiencies as well.⁷⁴

Another type of practices which may fall under article 101 TFEU is exclusive supply obligations.⁷⁵ Here the supplier is forced not to provide the products concerned to any other retailer. Accordingly, the retailer becomes the only point where consumer can purchase the product. This obligation mainly affects retail level competition to the extent that other retailers may be foreclosed, if they fail to offer substitutes to those products. However, the possible impact on the manufacturer should not be underestimated either. Within this context, an anticompetitive scenario may arise where, having prevented the manufacturer from reaching the consumer via other retail channels, the retailer ends its relationship with that manufacturer. Under such circumstances, particularly small manufacturers may be forced to exit the market or become a sub-contractor manufacturer of its private labels.

⁷³ Dobson and Chakraborty (n 46) 113.

⁷⁴ The Guidelines on Horizontal Cooperation Agreements recognise that information exchange is not always considered to restrict competition since they may lead to significant efficiencies. See (n 33) sec II. Such information sharing about prices and other competitive parameters related to the products in question between the retailer and the supplier is most likely to be treated in this context.

⁷⁵ If this obligation is imposed by an undertaking enjoying dominance, it is likely to constitute an abuse of dominant position under Article 102 TFEU. For further information see IV below.

The Block Exemption Regulation on Vertical Restraints sets a safe harbour for agreements where the buyer holds a market share of less than 30% in the downstream sales market and in the upstream purchase market.⁷⁶ The current concentration levels in grocery retail and procurement markets indicate that in most cases, such restraints will fall within those safe harbours.

Upfront access payments, which are defined as fixed fees that suppliers pay to retailers for accessing its distribution network, constitute another practice that may fall within the scope of article 101 TFEU.⁷⁷ In the Guidelines on Vertical Restraints, the Commission provides that, exceptionally, the widespread use of these payments may increase barriers to entry for small suppliers and they may thus be treated as analogous to single branding obligations.⁷⁸ In light of this, practices, such as slotting allowances and pay-to-stay fees which may be used by the retailer to eliminate the competitors of its own labels, may be caught by article 101 TFEU. However, considering the dictum of *ADALAT* and the Commission's approach to analyse them by analogy to single brand obligations, the applicability of article 101 TFEU to those concerns associated with private label may be the case, only if there is an express or implied acquiescence to these practices by suppliers which are not party to the agreement in question. Therefore, where the retailer follows this practice only in order to favour its private labels, the practice is unlikely to amount to an agreement in the meaning of article 101 TFEU. In any case, the Block Exemption Regulation on Vertical Restraints exempts these payments, if both the supplier's and buyer's market share does not exceed 30%.⁷⁹

Finally, it should be discussed whether competition concerns related to private labels may be addressed in the context of category management agreements under article 101 TFEU. Category management agreements refer to those by which, within a distribution agreement, the distributor entrusts a supplier called the 'category captain' with the marketing of a category of products including in general not only the supplier's products,

⁷⁶ Commission Regulation No 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L 102/1, art 3(1).

⁷⁷ Commission Guidelines on Vertical Restraints [2010] OJ C130/1, para 203.

⁷⁸ *ibid* para 205.

⁷⁹ *ibid* para 203. The Commission posits that upfront access payments in many cases lead to procompetitive effects. *ibid* paras 207-08.

but also the products of its competitors.⁸⁰ These agreements may raise competition concerns, if the category captain supplier is able to limit or disadvantage the distribution of products of competing suppliers.⁸¹ The Commission explains that although the distributor may not usually have an interest in limiting its choice of products, the fact that the distributor also sells competing products under its private labels may increase its incentive to exclude certain suppliers, in particular of intermediate range products.⁸² On the other hand, in many cases the retailer unilaterally limits or disadvantages the products of certain suppliers without appointing a category captain under a category management agreement. These situations also seem to fall outside article 101 TFEU.⁸³

To sum up, article 101 TFEU does not appear to be an efficient way to address anti-competitive retailer behaviours associated with buyer power and private label. The main reason is that, although some practices, such as information exchange, exclusive supply obligations, upfront access payments and category management agreements may be based on an agreement in the sense of article 101(1), in most cases the behaviour concerned constitutes a unilateral conduct that falls outside the scope of the provision. In this regard, article 101 does not seem, in principle, to catch the majority of anticompetitive concerns, such as delisting and the disadvantageous positioning of products, resulting from the use of buyer power by retailers in their relationship with suppliers.

IV. Assessment under Article 102 TFEU

Article 102 TFEU prohibits abuse of a dominant position that may affect trade between Member States. For article 102 TFEU to be infringed, an abuse must be committed by a firm enjoying a dominant position in a given market.⁸⁴ In this context, this section firstly analyses the existence of a dominant position in relation to the retail sector and then discusses certain

⁸⁰ *ibid* para 209.

⁸¹ *ibid* para 210.

⁸² *ibid*.

⁸³ Similar to upfront access payments, category management agreements fall within the safe harbour under Vertical Restraints Block Exemption Regulation if both the supplier's and buyer's market shares do not exceed 30%. *ibid* para 209.

⁸⁴ For more information on the application of Article 102 TFEU, see Robert O'Donoghue, A Jorge Padilla, *The Law and Economics of Article 82 EC* (Hart Publishing 2006); Alison Jones and Brenda Sufirin, *EU Competition Law Texts, Cases and Materials* (4th edn, Oxford University Press 2011)283-560; Whish and Bailey (n 61) 173-214.

conducts of retailers that may form an abuse in the meaning of article 102 TFEU.

1. Dominant Position

Under EU competition law, the concept of dominance has been defined as a position of economic strength that grant an undertaking the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers.⁸⁵ Dominance is therefore concerned with market power. For the assessment of market power, however, the first step is to determine the relevant market.⁸⁶ The relevant market has two dimensions: the relevant product market and the relevant geographic market.

The relevant product market comprises products that are deemed as interchangeable or substitutable from both supply and demand side.⁸⁷ The *Kesko/Tuko* decision concerning the acquisition of *Tuko Oy* by *Kesko Oy*, both active in the Finnish retail sector, gives guidance on how the Commission may define the relevant product market with respect to the retail sector.⁸⁸ Therein, the Commission provided that the relevant product markets could be defined as ‘the retail market for daily consumer goods’ and ‘the markets for procurement of daily consumer goods’.⁸⁹ As regards the retail market for daily consumer goods, the Commission made a distinction between supermarkets and other stores, such as specialised stores and petrol stations. This classification was based on the retailers’ ability to offer a wide selection of products, to provide consumers with the opportunity to purchase most of household necessities in a ‘one-stop shop’, and to have the facilities making the shopping experience convenient. Therefore, the Commission found that the relevant product market consisted

⁸⁵ Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission* [1978] ECR 207, para 65. See also Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/7, para 10.

⁸⁶ Case 6-72 *Europemballage Corporation and Continental Can Company Inc. v Commission* [1973] para 34.

⁸⁷ Commission Notice on the definition of relevant market for the purposes of Community competition law [1997] OJ C372/5, para 7.

⁸⁸ Case IV/M.784 Commission Decision 97/277/EC [1997] OJ L 110/53.

⁸⁹ *ibid* paras 18-20 and 33. The other product market defined in the relevant decision was the market for cash-and-carry sales of daily consumer goods. However, since most of the retailers are not active in the cash-carry, it is preferred to emphasis on those two product markets mentioned above.

of the provision of a basket of fresh and dry food-stuffs and non-food household consumables sold in a supermarket environment.⁹⁰

Coming now to the possible geographic market, although the Commission considered it as being an area where the supermarket could be reached in no more than 20 minutes driving time, a final decision about the exact scope of the relevant geographic market was not necessary to be made.⁹¹ According to the Commission, the market for procurement of daily consumer goods involves the purchase of daily consumer goods by customers, such as wholesalers, retailers, and other enterprises. However, as long as they are not substitutable with each other, each product purchased by the retailer constitutes an individual product market within the procurement market framework.⁹² With respect to this market, the relevant geographic market seems to be identified with particular reference to the ability of suppliers to switch their means of channelling goods to final consumers.⁹³

The abuse of buyer power by retailers against brand product manufacturers normally takes place in the market for the procurement of daily consumer goods. Therefore, it should be firstly analysed whether the retailer concerned has dominance with respect to this procurement market. However, it should be noted that the dominance and the abusive behaviour should not necessarily exist in same market.⁹⁴ If an undertaking enjoying dominance in one market engages in an abusive behaviour in another market, particularly a market neighbouring or downstream or upstream to the one where its dominance exists, such behaviour would also fall within the scope of prohibition of article 102 TFEU.⁹⁵ In this context, it may be necessary to assess whether the retailer enjoys a dominant position in respect of the retail market for daily consumer goods.⁹⁶

⁹⁰ *ibid* paras 18-20.

⁹¹ *ibid* paras 21-23.

⁹² Having said that, the Commission concluded that because in Finland the pattern of demand for each of the product groups was generally similar and concentrated, there was no need to make an assessment about the impact of the merger on each individual product or group of products. *ibid* para 34.

⁹³ *ibid* para 37.

⁹⁴ Whish and Bailey (n 61) 205-08.

⁹⁵ Case C-310/93P *British Gypsum v Commission* ECR I-865; Case C-333/94P *Tetra Pak II* [1996] ECR I-5951, para 27; Case C 52-/09 *Konkurrensverket v TeliaSonera Sverige AB* ECR I-000, paras 84-89.

⁹⁶ 'In the retail trade there is a close interdependence between the distribution market and the procurement market. Retailers' shares of the distribution market determine their

In general, market shares are the first indicator for the existence of dominance. The *AKZO* decision envisages that a market share of 50% would lead to a presumption of substantial market power and thereby, a presumption of dominance.⁹⁷ Moreover, the Guidance on the application of article 102 TFEU sets out a safe harbour for undertakings having a market share below 40%.⁹⁸ In addition to the market share of the undertaking concerned, there are other indicators of dominance as well, such as superior technology,⁹⁹ investment and financial resources,¹⁰⁰ ownership of intellectual property rights,¹⁰¹ brand image and advertising campaigns,¹⁰² economies of scale,¹⁰³ vertical integration and distribution systems¹⁰⁴ and the market position of competitors,¹⁰⁵ and entry barriers and countervailing buyer power.¹⁰⁶

The analysis of dominant position does not show any difference in respect to the retail market. Hence, based on the factors mentioned above, it is examined whether the undertaking concerned has the capability to profitably increase prices above the competitive level for a significant period of time without facing sufficiently effective competitive constraints.¹⁰⁷ Nevertheless, the assessment of dominance in relation to procurement markets may differ from this analysis, given the fact that it concerns the buyer power of the retailer, which corresponds to monopsony power as explained above.¹⁰⁸ As regards this market, it is rather asked whether the

procurement volume: the bigger the retailer's share of the distribution market, the larger the procurement volume.' *Rewe/Meinl* (Case IV/M.1221) [1999] para 72.

⁹⁷ Case C-62/86 *Akzo Chemie BV v Commission* [1991] ECR I-3359, para 60. See also Case T-102/96 *Gencor v Commission* [1999] ECR II-753, para 205; Case T-221/95 *Endemol v Commission* [1999] ECR II-1299, para 134; Case T-210/01 *General Electric v Commission* [2005] ECR II-5575, para 115; Case T-177/04 *easyJet v Commission* [2006] ECR II-1931, para 174.

⁹⁸ Guidance on the Application of Article 102 (n 85) para 14.

⁹⁹ *United Brands* (n 85) paras 82-84.

¹⁰⁰ *ibid* paras 122-124.

¹⁰¹ Case C-53/92 P. *Hilti AG v Commission* [1994] ECR I-00667 para 93, Joined cases C-241/91P and C-242-91P *Radio Telefis Eireann and Independent Television Publications Ltd v Commission* [1995] ECR I-734, paras 46-47.

¹⁰² *United Brands* (n 85), paras 91-94

¹⁰³ Case T- 65/89 *BPB Industries Plc and British Gypsum Ltd v Commission* [1993] ECR II-389 para 116.

¹⁰⁴ *United Brands* (n 85), paras 69-81 and 85-90.

¹⁰⁵ Case 85/76 *Hoffman-La Roche & Co AG v. Commission* [1979] ECR 461, paras 36 and 48.

¹⁰⁶ See Guidance on the application of Article 102 (n 85) paras 13-18.

¹⁰⁷ *ibid* para 11.

¹⁰⁸ See II/2 above.

retailer has the ability to decrease or increase supply prices for a sufficiently long period by adjusting its purchases accordingly. Furthermore, the calculation of market shares is based on purchases rather than sales, and the power of suppliers is incorporated into the analysis as countervailing power.¹⁰⁹ It should be reminded that retailers may enjoy buyer power in the form of bargaining power, even if they do not have large market shares in the procurement market. However, such bargaining power on its own does not amount to a dominant position in the meaning of article 102 TFEU.¹¹⁰

There are not many article 102 decisions that include an assessment of dominance in the retail sector. On the other hand, merger cases in which the Commission analysed whether the merger would lead to a dominant position in the retail sector may provide guidance as to the assessment of dominance under article 102 TFEU.

In *Kesko/Tuko*, for example, the Commission decided that the merger, resulting in a combined market share of 55%, would lead to a presumption of dominance on the Finnish market for retail of daily consumer goods. Besides this high combined market share, the parties' control over the premises suited for retail outlets, the customer loyalty schemes, the private label products¹¹¹ and the distribution systems was considered as a factor that contributed to such presumption of dominance.¹¹² More importantly, the parties' increased buyer power was emphasised because of its significant contribution to barriers to entry to the relevant market of daily consumer goods retailing. In light of this, it would enable the merged entity to act, to a significant extent, independently of its competitors on the retail market.¹¹³

In *Rewe/Meinl*,¹¹⁴ the proposed merger was concluded to lead to a dominant position in the markets of food-retailing and procurement in Austria. The high post-merger market share of the merged entity in the retail market was

¹⁰⁹ Guidelines on Horizontal Cooperation Agreements (n 33) 208-12.

¹¹⁰ See Alberto Pera and Valentina Bonfitto 'Buyer Power in Anti-Trust Investigations: a Review' (2011) 32 European Competition Law Review 414, 423-24.

¹¹¹ The producers of brand products claimed that the private label products of Kesko and Tuko were used as a tool in their negotiation with suppliers. *Kesko/Tuko* (n 88) para 129.

¹¹² *ibid* paras 106.

¹¹³ *ibid* paras 133-135

¹¹⁴ *Rewe/Meinl* (n 96). A similar approach was adopted by Bundeskartellamt in EDEKA/Tengelmann. See

<http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2008/2008_07_01.php> accessed 31 December 2012.

regarded to indicate a possible dominance in the market for food retailing.¹¹⁵ Considering the strong interdependence between the retail and procurement markets, the Commission came to the conclusion that the merger would lead to dominance in the procurement market as well.¹¹⁶ This conclusion was further supported by the fact that producers would be more dependent on the merged entity, given the latter's ability to secure further improvements in its buying conditions.¹¹⁷ Moreover, in relation to its private labels, it was observed that, prior to the merger, the parties used to delist secondary brands, which supported its assumed independence from suppliers. This merger, resulting in a risk of dominance in the relevant markets, was therefore cleared subject to remedies ensuring the reduction of the undertaking's buyer power.¹¹⁸

The *Rewe/Meinl* decision also sheds some light on the concept of dependence between the retailer and the supplier. According to the research conducted in the scope of the evaluation, a supplier may undergo heavy financial losses to replace any customer from which it generates more than 22% of its turnover.¹¹⁹ In this regard, when a major customer is lost, suppliers may not have many alternatives since way outs, such as switching to other sales channels or to exports, were generally not feasible in the short term. This meant that if a retailer ceased to make purchases, the supplier was likely to be severely affected and, ultimately, to exit the market.¹²⁰ This economic dependence of the supplier on the retailer indicates the bargaining power of the latter. Notwithstanding that such bargaining power may also enable the retailer to enjoy some degree of economic independence, as described above, it is not sufficient to establish dominance under article 102 TFEU. Therefore, such power can only be considered as one of the factors that contribute to the existence of dominance.

Although appearing highly concentrated in most of the EU Member States¹²¹, due to the fierce competition between supermarkets, retail markets

¹¹⁵ As a result of the operation, the combined market share of the parties would exceed 45% with respect to the region of Vienna. *Rewe/Meinl* (n 96) paras 31-36.

¹¹⁶ *ibid* paras 71-115.

¹¹⁷ *ibid* para 115.

¹¹⁸ *ibid* paras 118-129.

¹¹⁹ *ibid* para 101. In *Carrefour/Promodes*, the Commission refers to the same percentage and qualifies it as a threshold indicating the existence of economic dependence. *Carrefour/Promodes* (COMP/M.1684) [2000].

¹²⁰ *Rewe/Meinl* (n 96) para 102.

¹²¹ Study on the Impact of Private Labels (n 22) 136.

are mostly characterised by ‘a number of distribution channels offered by competing supermarkets, none of which occupy a dominant position’.¹²² Therefore, in the vast majority of cases, the retailer abusing its buyer power in relation to its private labels does not form a dominant undertaking under article 102 TFEU. That being said, it should be noted that in the meaning of article 102 TFEU, dominant position can be held not only by one firm, but also collectively by several firms.¹²³ Thus, whether retailers can be considered to have a collective dominance position in the retail sector needs to be discussed.

For the existence of collective dominance, the nature of the market must allow firms to behave in a parallel manner, thereby appearing in the market as a collective entity.¹²⁴ This may be the case only if the market structure is oligopolistic, ie the market consists of ‘few sellers, realising their interdependence in taking strategic decisions such as on price, output or quality’.¹²⁵ In *Airtours v Commission*, the General Court sets forth three cumulative conditions for the firms in question to be viewed as collectively dominant.¹²⁶ The first one is the presence of transparent market structure which enables firms to monitor any deviations from the terms of coordination. The second condition requires the presence of deterrent mechanisms in the event of any deviation. Finally, the third condition is that the reactions of outsiders should not jeopardise the success of the coordination.¹²⁷

As explained above, a prevailing feature of retail markets across the EU is that they are controlled by few large retailers and are henceforth highly concentrated. This characteristic may be regarded as indicating the existence

¹²² Ezrachi (n 35) 268.

¹²³ Joined cases T-68, 77, 78/89 *Societa Italiana Vetro SpA and others v Commission* [1992] ECR II-1403 para 360.

¹²⁴ Case C-395/96 *Compagnie Maritime Belge Transports v Commission* [2000] ECR I-1365 para 36.

¹²⁵ European Commission Glossary of Terms (n 20). In an oligopoly, each firm is aware that its market behaviour will affect the other sellers’ market behaviour. As a result, each firm will take possible reactions from the other players into account.

¹²⁶ Case T-342/99 *Airtours plc v Commission* [2002] ECR II-2585 para 62.

¹²⁷ These conditions were also approved by the ECJ. See Case C-413/06 P *Bertelsmann AG and Sony Corporation of America v IMPALA* [2008] ECR I-4951.

of an oligopolistic market structure.¹²⁸ Having said this, agreements between the retailer and the supplier are usually not accessible by third parties, namely competing retailers. Accordingly, retailers are, in principle, not able to know under which conditions their competitors procure the products concerned. In addition, the retail and procurement markets are governed by a complex and speedily evolving economic environment. This environment is further blurred by the fact that the products are complex and differentiated from each other rather than homogeneous. This general overview demonstrates that the nature and current dynamics render the procurement market in the retail sector non-transparent, hence making it difficult for the retailers to predict and monitor competitors' behaviours in their procurements.¹²⁹

Accordingly, although the existence of a retaliation mechanism¹³⁰ and the absence of the counter reaction of outsiders¹³¹ may be successfully argued, it is hardly likely that the market is found to be conducive to reaching the terms of coordination in the first place and to monitoring any deviations. Given the fact that those conditions are cumulative, procurement markets currently do not seem suitable for the existence of a collective dominance.

¹²⁸ See Competition Commission, 'The Supply of Groceries in the UK Market Investigation' (2008) <http://www.competitioncommission.org.uk/assets/competitioncommission/docs/pdf/non-inquiry/rep_pub/reports/2008/fulltext/538.pdf> accessed 31 December 2012, paras 8.21-23.

¹²⁹ Ezrachi (n 35) 268-69; Pera and Bonfitto (n 110) 415.

¹³⁰ With respect to this condition, it is not necessary to 'prove that there is a specific retaliation mechanism involving a degree of severity'. See Airtours (n 126) para 195. Once deviating is not beneficial, the sustainability of collective dominance is deemed to be ensured. Besides the possibility to be involved in a price war using the methods of campaigns, loyalty schemes and private labels, retailers may react to a deviation by the ending on-going business relationships. This may be an issue where retailers cooperate in relation to several aspects of the business such as distribution or storage. In addition, retailers may also belong to the same purchasing group. These types of relations may provide a retaliation tool to make deviation unprofitable to the retailers. See Marc Ivaldi, Bruno Jullien, Patrick Rey, Paul Seabright and Jean Tirole 'The Economics of Tacit Collusion - Final Report for DG Competition, European Commission' (2003) <http://ec.europa.eu/competition/mergers/studies_reports/the_economics_of_tacit_collusion_en.pdf> accessed 31 December 2012, 53-54.

¹³¹ The assessment of the reaction of outsiders should include any constraints from non-coordinating actual or potential competitors and the countervailing power of suppliers. Barriers to entry to the retail market, hence to the procurement market, can be considered high given the sunk costs and the necessity of huge investments involved in this market. Furthermore, although there are strong suppliers, it does not seem very likely that they would end their procurements since retailing constitutes the sole way for their product to reach a wider consumer group.

2. Abuse

Under article 102 TFEU, once dominance is established, it must be examined whether the dominant undertaking abuses its position. The list of practices which can amount to an abuse in the meaning of article 102 is not exhaustive.¹³² Although the analysis in the previous section indicates that it is very seldom that the buyer power of retailers results from a dominant position, it should be theoretically discussed which behaviours of retailers in relation to private labels may form an abuse in the sense of article 102 TFEU. As pointed out in the *Competition in Retailing Research Paper*, retailer behaviours requiring special consideration in that regard are exclusive supply obligations, refusal to stock or delisting, minimum supply levels, minimum advertising requirements and sunk facility requirements.¹³³

As explained above, exclusive supply obligations require the manufacturer not to supply the products concerned to competing retailers. Through their impact on retail competition, these obligations may substantially affect supply level competition. Indeed, taking especially into consideration the profit margin of private labels and of primary eye-catching brands, there may be no economic incentive for the retailer to promote secondary brands. Thus, it may even delist them. This may lead though to severe economic consequences for these brand suppliers, if they are not able to immediately find another channel to reach consumers.¹³⁴

A more dangerous type of retailer behaviour in relation to private labels that may constitute an abuse under article 102 TFEU is delisting or refusal to stock, which arises when a retailer refuses to give shelf space to a supplier or displays its products in a disadvantageous position within the shop. Those practices will be basically analysed by reference to the principles applicable to refusal to deal. For a refusal to deal to amount to an abuse, three conditions must be satisfied: (i) the refusal must be likely to eliminate all competition in the relevant market on the part of the party requesting the service; (ii) the facility in question must be indispensable to the operation of that party, ie there must not be economically viable alternatives for the party to operate in the market; and (iii) such refusal cannot be objectively

¹³² *Continental Can* (n 86) para 26.

¹³³ *Competition in Retailing Research Paper* (n 1) section 2.4.1.

¹³⁴ Kuipers (n 52) 195-96.

justified.¹³⁵ Although on some occasions the existence of those requirements may be disputed, the first two conditions could be considered to be met in most cases, considering the strong economic dependence of suppliers on retailers, as discussed above.¹³⁶ The analysis of the third condition may be more problematic in relation to delisting by the retailer. Indeed, with the emergence of private labels and given the limited nature of shelf space, it may not be economically viable for retailers to allocate shelf and retail space for each branded good. Accordingly, it may be very difficult, particularly for the delisted secondary brand owners, to prove that the delisting cannot be objectively justified. However, this burden of proof may be more easily handled, where the delisting is used by retailers as a threat to discourage primary product manufacturers to utilise their intellectual property rights against the retailer's practice to offer copy-cat private labels. In *Rewe/Meinl*, the Commission considered this practice as a possible harm to competition that would result from the merger leading to a dominant position in the retail and procurement markets.¹³⁷

Moreover, an abuse of dominant position by retailers may take place through requests from suppliers for payments -called under various names- for the marketing and the best positioning of their product. These payments particularly encompass advertising requirements, listing charges, slotting allowances and contribution to promotional expenses.¹³⁸ These practices can be argued to lead to efficiencies, such as distributing the risks of failed products between the retailer and the supplier, or providing equilibrium between the numbers of new products that suppliers bring to market and

¹³⁵ See Joined Cases C-6 and 7/73 *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission* [1974] ECR 223; Joined cases C-241/91 P and C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission* [1995] ECR I-743; Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs* [1998] ECR I-7791. See also Sebastien J Evrard, 'Essential Facilities in the European Union: Bronner and Beyond' (2004) 10 *Columbia Journal of European Law* 491; Angelo Castaldo and Antonio Nicita, 'Essential Facility Access in Europe: Building a Test for Antitrust Policy' (2007) 3 *Review of Law & Economics* 83. For the existence of such abuse, the Commission seems to additionally require the likelihood of harm to consumers. See also Guidance on the application of 102 (n 85) paras 86-90.

¹³⁶ See Jean-Paul Tran Thiet 'The Regulation of Networks and Relations between Industry and Trade: A French perspective' (1998) 19 *European Competition Law Review* 473, 476-77.

¹³⁷ *Rewe/Meinl* (n 96) paras 110-14.

¹³⁸ *Dobson and others* (n 8) 3.

those demanded by consumers.¹³⁹ However, retailers may also use those payments in order to limit the competition constraints that their private labels face. In fact, unjustifiably high access fees and contribution may force particularly secondary brands to exit the market. In these cases, such payments may be treated by analogy to delisting under article 102 TFEU. These payments may also decrease the competitiveness of primary brands by widening the price gap between those products and the private labels of the retailer.¹⁴⁰ In such cases, however, these practices may be regarded the same as margin squeeze cases, which are subject to substantive rules quite similar to those applicable to refusals to deal.¹⁴¹

Finally, retailers may, engage in predatory pricing in relation to its private labels in order to eliminate its competitor brands.¹⁴² However, considering the more profitable tools discussed above to achieve the same objective, retailers may often not prefer to pursue a predatory pricing strategy.

To conclude, article 102 TFEU does not seem to be an effective means to address the abusive behaviours of retailers in the context of private label either. The main reason is the fact that there is usually no collective or single dominance which is a prerequisite for the application of the provision. However, if dominance can be established in exceptional situations, certain behaviours of retailers, such as delisting, may be deemed to form an abuse in the meaning of article 102 TFEU.

V. Competition Tools Addressing Retailer's Buyer Power in the UK

Despite the awareness of competition problems with regard to private labels at the EU level, as explained above, the EU competition law instruments remain currently ineffective to tackle these problematic quasi-abusive behaviours by quasi-dominant retailers which do not always fall under

¹³⁹ Study on the Impact of Private Labels (n 22) 33-34. See also Guidelines on Vertical Restraints (n 77) paras 207-08.

¹⁴⁰ Kuipers (n 52) 211; Andres Font Galarza 'Private Labels and Article 82 EC' in Ariel Ezrachi and Ulf Bernitz (eds), *Private Labels, Brands and Competition Policy: The Changing Landscape of Retail Competition* (Oxford University Press 2009) 125-35.

¹⁴¹ See Guidance on the application of Article 102 (n 85) paras 75-90.

¹⁴² Competition Commission, 'Supermarkets: A Report on the Supply of Groceries from Multiple Stores in the United Kingdom' (2000) <http://webarchive.nationalarchives.gov.uk/+http://www.competition-commission.org.uk/rep_pub/reports/2000/446super.htm#full> accessed 31 December 2012; Commission Staff Working Document (n 3) 32.

articles 101 and 102 TEFU.¹⁴³ Having said that, several Member States, including the UK, France, Germany, Czech Republic, Hungary, Romania and Latvia, have conducted various investigations and they endeavour to overcome those concerns. In this regard, the UK regime deserves special consideration, given the experience of the UK competition authorities in dealing with competition concerns in relation to the retail market which is characterised by high concentration levels¹⁴⁴ and the high proportion of private labels.¹⁴⁵

It has been a long time, since when competition problems associated with buyer power and private labels were recognised in the UK. There are several reasons why the UK stands out as one of the Member States with a useful 'toolkit' for the treatment of such competition concerns. For one thing, the characteristics of the British market strengthen the position of retailers against suppliers. As pointed out by Dobson, 'in Britain consumers have an exceptional degree of loyalty towards their favoured retailer and tend not to shop around for grocery products, but instead consistently rely on one store for most or all of their needs'.¹⁴⁶ In addition to this, a high degree of dependency of suppliers on retailers is observed.

In order to address the competition concerns in the retail sector, the first sector investigation was initiated in 1999. This work revealed various anti-competitive practices conducted by retailers in relation to their private labels, including the practice of persistent below-cost selling of some frequently purchased products.¹⁴⁷ To address these practices, the report envisaged the adoption of a code of practice to be applicable to retailers enjoying more than 8% market share in the procurement market. After its entering into force in 2002, the Supermarkets Code of Practice (SCOP

¹⁴³ Kolstad Olav, 'Unfair practices in the grocery supply chain: Analysis and Remedies across Europe' in Report on the Eight Annual Symposium on Retail Competition, 'Trends in Retail Competition: Private Labels, Brands and Competition Policy' (25 May 2012).

¹⁴⁴ The respective market shares of supermarkets in UK (for the 12 weeks to 25 November 2012) had been as follows: Tesco: 30.7%, Asda: 17.3%, Sainsbury's: 16.9%, Morrisons: 11.7%, Waitrose: 4.5%, Aldi: 3.0%, Lidl: 2.8%, Iceland: 2.0%. See Kantar Worldpanel Data <<http://www.kantarworldpanel.com/global/News/Grocery-Market-Share-UK-ALDI-10-more-shoppers>> accessed 31 December 2012.

¹⁴⁵ Nielsen's Review of Growth Trends indicates that in 2005, the share of private labels in the UK retail sector accounted for 28%, and 82% of customer shopping trips included private label products. Nielsen's Review of Growth Trends (n 40).

¹⁴⁶ Dobson (n 4) 535.

¹⁴⁷ Competition Commission, 'The Supply of Groceries in the UK Market Investigation' (n 142).

2002) was criticised on the ground that it was not sufficiently effective to prevent retailers from requesting suppliers to make certain payments and contributions. Subsequently, in 2006, based on evidence on the widening power gap between retailers and suppliers, the Competition Commission once more placed the sector under investigation upon the OFT's referral.¹⁴⁸

The final report introduced various measures to improve competition in local areas, such as removal of administrative barriers and elimination of the contractual conditions obstructing market entry. More importantly, concerns with regard to the relationship between retailers and suppliers were contemplated to be addressed by a 'new strengthened and extended' code of practice.¹⁴⁹ The Groceries (Supply Chain Practices) Market Investigation Order 2009 entered into force in 2010 and introduced the Groceries Supply Code of Practice (GSCOP) to be applicable to any retailer exceeding a turnover of £1 billion with respect to the retail supply of the groceries.¹⁵⁰ The Order aims to build fairness in retailer-supplier relations and to establish a framework concerning variations in agreement conditions, pricing and payments, promotions and other duties in relation to the resolution of consumer complaints and the delisting of products.

In order to ensure its implementation, it has been made compulsory for retailers to incorporate the GSCOP in their supply agreements.¹⁵¹ The record-keeping of practices is provided by the obligation to conclude written contracts with suppliers. The mechanism was further supported by the retailer's employment of an in-house compliance officer, who is to be independent from the buying team. Moreover, the GSCOP also imposes on retailers an obligation not to request or require suppliers to give their consent on the retrospective variations of any supply agreement.¹⁵² Accordingly, unless otherwise provided in the agreement, the retailer must

¹⁴⁸ Alastair Gorrie 'Retail Competition: The Use Ex-Ante and Ex-Post Remedies' in Ariel Ezrachi and Ulf Bernitz (eds), *Private Labels, Brands and Competition Policy: The Changing Landscape of Retail Competition* (Oxford University Press 2009) 308.

¹⁴⁹ Competition Commission, 'The Supply of Groceries in the UK Market Investigation' (n 142).

¹⁵⁰ Competition Commission, 'The Groceries Market Investigation Order' (2009) Part 4(1).

¹⁵¹ *ibid* Part 5.

¹⁵² A retailer may make an adjustment to the terms of supply which has retroactive effect where the relevant supply agreement sets out clearly and unambiguously: (a) any specific change of circumstances (such circumstances being outside the retailer's control) that will allow for such adjustments to be made; and (b) detailed rules that will be used as the basis for calculating the adjustment to the terms of supply. *ibid.* GSCOP annexed to 2009 Investigation Order (n 150) sec 3.

not require the supplier to make any payment for its costs, such as consumer or market researches or refurbishment of a store.¹⁵³ The circumstances under which the retailer could request payment are limited to promotions and the sharing of risks related to stocking, displaying or listing new grocery products. The concept of promotion is defined 'as offer for sale at an introductory or a reduced retail price, intended to subsist only for a specified period'.¹⁵⁴

With regard to payment requests for marketing costs, it is made clear that, unless it is about a promotion, the retailer must not require a supplier to share such costs.¹⁵⁵ The same principle applies to any payment for the better positioning of, or the allocation of larger shelf spaces to the product concerned. On the other hand, the retailer is under the duty not to require a supplier to predominantly fund the costs associated with promotion.¹⁵⁶ These obligations prevent the retailer from using its power for requesting payments under different marketing plans.

Delisting practices are also covered under the GSCOP. In this regard, a retailer can only delist a supplier based on genuine commercial reasons, and it must, prior the delisting, give the supplier a notice which includes the relevant reasons. In such case, the supplier has the right to ask the senior buyer of the retailer to review the decision, as well as the right to discuss it with the retailer's officer, who is responsible for compliance with the GSCOP.

Notwithstanding the above, the fact that the GSCOP essentially provides for self-regulation has raised doubts as to its effective enforcement. Although the UK has a history of self-regulation culture, which is more ubiquitous in comparison to other parts of the world, this feature of the GSCOP is seen as a factor that hinders its healthy application. In this respect, the lack of effective enforcement of the GSCOP gives rise to a situation whereby the expected outcomes have not been fully achieved. For example, the entry into force of GSCOP did not change the retailers' practice to expect from brand suppliers to provide extensive in-store promotional support for their products through promotion support payments and by participating in the

¹⁵³ *ibid* sec 6.

¹⁵⁴ *ibid* sec 1.

¹⁵⁵ *ibid* sec 9.

¹⁵⁶ *ibid* sec 13.

cost of price promotions.¹⁵⁷ Furthermore, following the entry into force of the GSCOP, the Competition Commission failed to receive from retailers a sufficient number of agreements to monitor the voluntary enforcement of the GSCOP.

In this regard, the UK government has started to discuss the creation of an adjudicator position. The role of the adjudicator will be to act as a referee and police the rules of the GSCOP.¹⁵⁸ In this regard, the Groceries Code Adjudicator Bill (GCA Bill) has been introduced and is currently before the Parliament.¹⁵⁹ The Bill intends to ensure the effectiveness of the GSCOP by granting the adjudicator the power to enforce it by investigating suspected breaches and imposing financial penalties. It can be argued that the overarching aim of the GCA Bill is to maintain and secure fair dealing in the sector. However, while the prevention of anti-competitive practices in the sector falls under this overarching aim, it is only one of the priorities of the GCA Bill, besides its other objectives. In this respect, the Bill also takes it upon itself to protect vulnerable suppliers from unfair commercial terms imposed upon them by retailers.

There are two important enforcement powers of the adjudicator in the event of breaches of the Code: (i) requiring retailers to publish statements about their breaches (public disclosure) and (ii) imposing financial penalties on retailers. The public disclosure clause renders the mechanism more effective by decreasing the incentive of the retailer to engage in any breach given its possible damage to the reputation of the company.¹⁶⁰ This is considered as the primary enforcement power of the adjudicator, whereas imposition of financial penalties will be the case where public disclosure alone proves to be an insufficient remedy due to the specific characteristics of the case in question. These mechanisms of the GCA Bill are regarded as positive steps

¹⁵⁷ Study on the Impact of Private Labels (n 22) 110.

¹⁵⁸ Department for Business Innovation & Skills, 'Taking Forward the Establishment of a Body to Monitor and Enforce Compliance with the Groceries Supply Code of Practice (GSCOP): The Groceries Code Adjudicator; the Government's policy for a Groceries Code Adjudicator' (31 May 2011) <<http://www.bis.gov.uk/assets/biscore/businesslaw/docs/g/11-920-government-policy-groceries-code-adjudicator.pdf>> accessed 31 December 2012.

¹⁵⁹ The Bill is due to have its report stage and third reading before the House of Lords on a date yet to be announced. Final amendments were made to the Bill during the third reading on 24 July. For more information, see <<http://services.parliament.uk/bills/2012-13/groceriescodeadjudicator.html>> accessed 31 December 2012.

¹⁶⁰ UK Government, Groceries Code Adjudicator Bill [HL] 2012-13 <<http://www.publications.parliament.uk/pa/bills/cbill/2012-2013/0062/20130062.pdf>> accessed 31 December 2012.

towards mitigating concerns expressed by the Competition Commission that many retailers may have been in breach of the GSCOP.¹⁶¹

VI. Conclusion

In recent decades, the grocery retail sector has witnessed a trend of concentration and as a result, it has been increasingly dominated by large retailers with significant buyer power that enables them to impose their position when bargaining with suppliers. The fact that these retailers have begun to offer private label products competing with brand products has brought a different dimension to this imbalanced relationship between retailers and suppliers. Although the introduction of those own labels has resulted in reduced prices and more choices, on the other hand, it has also increased the large retailers' incentive to abuse their buyer power against brand product suppliers.

The main EU competition law rules, ie articles 101 and 102 TFEU, fall short of effectively addressing those behaviours of quasi-dominant retailers. The reason why article 101 TFEU is not an effective tool in tackling those concerns related to private labels is that the retailers' abusive behaviours usually arise from unilateral conduct falling outside the scope of the provision. However, article 102 TFEU is also unlikely to serve to address those concerns because it is very rare that retailers are found to be individually or collectively in dominant position.

Nevertheless, considering the abusive behaviours of retailers based on their bargaining power, which grants them an economic power similar to that of dominance, it seems necessary to utilise some other tools to eliminate those competition concerns. In this regard, the efforts of the UK competition authorities constitute a good example of how to regulate the relationship between retailers and suppliers. The GSCOP, namely the code of practice adopted by the Competition Commission, seeks to build a fair relationship between retailers and suppliers and requires retailers to comply with its rules as far as practices such as payment requirements and delisting are concerned. However, its voluntary enforcement does not appear sufficient to provide an effective implementation of the GSCOP. For this reason, the

¹⁶¹ Justine Stefanelli and Philip Marsden, 'Models of Enforcement in Europe for Relations in the Food Supply Chain' (2012) <http://www.biicl.org/research/european_law/b2b_enforcement_report/> accessed 31 December 2012, 13.

GCA Bill which has been introduced to the Parliament by the Government, in order to set up a Groceries Code Adjudicator with the role of enforcing the Code and encouraging compliance with it, may be considered as a step forward towards a more efficient and mandatory regulation.