



A response

Working paper on the competitive effects of own-label goods

1 INTRODUCTION

We are responding to the publication by the Competition Commission of its *Working paper on the competitive effects of own label*. This working paper developed themes that were in turn included in the supply chain practices working paper to which we have already responded, along with wider comments relating to the CC's *Emerging Thinking*.

- 2 In our earlier response we expressed – and reinforce now – our encouragement that the competitive effects of own label are being investigated. In summary, the key points we raised were:
- the difficulty consumers may have to price compare own label between stores;
 - the contribution to innovation from own label (relative to branded goods);
 - the impact of own label competition on potentially wasteful innovation;
 - the reluctance of brand manufacturers to enforce their Intellectual Property rights in relation to copycat packaging against those retailers with buyer power;
 - a possible error in para 67 where “exclusionary behaviour from grocery retailers” is listed as a pro-competitive effect, when we believe it to be anti-competitive.

We re-visit these points in this paper.

3 THE KEY POINTS

While the working paper covers important aspects of the competitive effects of own label, there are important omissions which we urge the Competition Commission to address. We believe it essential to understand (1) the commercially sensitive information to which the retailer (as product competitor) is privy, (2) the controls / marketing levers the retailer exercises in-store to influence shoppers' purchasing, (3) the ability of retailers with buyer power to extract concessions from a horizontal (product) competitor, (4) the incentives a retailer may have to foreclose in favour of own label goods and (5) the misconceptions of shoppers about the nature of own label goods and how these influence purchasing decisions, misconceptions that are exacerbated by (6) copycat packaging. Each of these areas is covered in more detail in the following paragraphs.

4 In its investigation, we urge the CC to base its analysis on original data rather than on syndicated research. Syndicated research may give some broad understanding of market trends and the broad relationship between brand and own label competition. However a true understanding of the competition effects can only be derived from specific, original data where the source is known, its shortcomings acknowledged and the reasons for historic research (ie. potential bias) understood.

5 **1. Access to information – Interplay of the Competition Act and the Current Investigation**

The **most significant** concern arising in connection with own label goods is the potential distortion of competitive conditions resulting from the necessary receipt by retailers, in the ordinary course of business, of commercially sensitive information from brand manufacturers, and the potential subsequent use by retailers of that information to develop own label products.

6 We urge that this concern is explored and addressed in this investigation. Its significance lies in likely distortions of competition between suppliers and the reduced period over which innovations are able to earn a return on their investment and risk before being replicated by an own label competitor. This has implications for consumer choice and access to new, improved products.

7 To the extent that the Competition Commission takes the view that the use of commercially sensitive information by retailers stems not from any agreement with brand manufacturers, but from their unilateral practices, such conduct may escape both the Chapter 1 and Chapter II prohibitions. In this circumstance, the appropriateness of addressing this issue through the current investigation is further reinforced. As noted by the OFT in its Guidelines on the making of market investigation references:

“[a]dverse effects on competition that do not involve either agreements between undertakings or abuses of dominance are beyond the reach of CA98. Market investigation references are therefore likely to focus on competition problems arising from uncoordinated parallel conduct by several firms or industry-wide features of a market in cases where the OFT does not have reasonable grounds to suspect the existence of anti-competitive agreements or dominance.” (para.2.4)

8 Indeed, the very purpose of a market investigation reference “is to determine whether the process of competition is working effectively in markets as a whole. They will provide a framework for identifying, analysing and, where appropriate, remedying industry-wide competition problems which there is no adequate basis for addressing under CA98.” (para 2.2)

9 We submit that the competitive distortions arising from the potential use by retailers of commercially sensitive information for purposes other than those for which it is routinely provided are precisely the kind of market features that the reference process is designed to address.

10 **2. Own label and buyer power**

In the *Working paper on buyer power* the supply of own label goods is listed as one of the factors that convey buyer power: “The increasing prominence of own-label products is also likely to have contributed to an increase in the buyer power of UK grocery retailers” (para 7). However in the working paper on own label this aspect of own label is not mentioned. The competitive effects of own label goods clearly cannot be fully investigated without an analysis of its impact on buyer power.

11 It is instructive to note the comments of a group of academics on this issue:

“In practice, the power of the retailer in buying comes from the sheer range and diversity of the products it stocks. Even a supplier that may have considerable market share (bringing it close to being classified as dominant on normal Article 82 principles) may not be in a position to resist a key retailer’s demands. For the supplier, the retailer may represent a significant proportion of its overall sales, say 15 per cent, but for the retailer that 15 per cent may represent say only one per cent or two per cent of turnover, and thus the real power may lie with the purchaser and not the supplier. The purchaser wants the leading brands in its outlets but would not suffer that much, if it had to switch. It could also de-list the supplier’s brands and put in its own brands. In some cases, it may be possible for the supplier to shift its supplies to other outlets in the event that it loses the customer, but often that is not true, which means that the supplier is, in practice, very much in the hands of the purchaser. Moreover, even losing one key retailer may mean that the supplier loses critical economies of scale, raising its average costs and placing it at a competitive disadvantage with other rival suppliers”

Buyer Power and Competition in European Food Retailing by Roger Clarke, Stephen Davies, Paul Dobson and Michael Waterson (Edward Elgar 2002).

12 Own label confers buyer power through two main mechanisms:

- (1) the retailer has bargaining strength because it knows it can always replace a branded product on its shelves with its competing own label equivalent. Conversely, the manufacturer knows that the retailer holds this ability to discipline it if it does not accede to the retailer’s demands; and
- (2) the retailer’s **control** of all the in-store marketing mechanisms enables it to deliver both the maximum return from each category and provides an effective means of punishment on any supplier that is not felt to be supporting the retailer’s business by comparison with its retail competitors. (The value of own label products and of their positioning is also discussed in some depth in “*The Strategic Positioning of Store Brands in Retailer- Manufacturer Negotiations*” by Fiona Scott Morton (Yale University) and Florian Zettelmeyer (University of California at Berkeley), a copy of which accompanies this Response.

13 **3. Abuses of buyer power on horizontal product competitors**

In the Supply chain practices working paper abuses against suppliers was raised:

“It was put to us that because retailers effectively competed with branded goods manufacturers via their own-label products, any abusive practice that was identified towards suppliers should also be seen as an abuse towards a competitor.” (para 62)

This aspect of competition between branded and own label goods is not raised in the working paper on own label goods, despite it being an important point.

- 14 Any extraction of money from brand manufacturers for which there is no corresponding benefit to the supplier and which is unilaterally imposed by the retailer through the application of buyer power (ie. the supplier has no choice but to comply if it is to maintain listings and other benefits associated with a positive relationship with the retailer), is money / resource lost to the brand manufacturer for innovation and brand building. Any reduced investment in these areas reduces the ability of branded goods to compete, reducing effective competition between suppliers and reducing consumer benefits in terms of choice and improved performance.

15 **4. The triple role of the retailer – Customer, competitor, supplier**

The working paper recognises the dual role of the grocery retailer as both customer and competitor (para 13(a)) but does not comment on the triple role, of customer, competitor **and supplier of shelf space**. This third dimension is important in understanding fully the customer / competitor tensions and the relative dependency that exists between brand manufacturers and major retailers. Practices such as listing fees, shelf placement preference fees, promotional allowances, in-store promotion charges and other charges demonstrate that shelf space is a separately priced product, comprising a separate product market. The retailer's total control over the shelf space in its stores means it performs a strong gatekeeper role, determining whether or not (and to what extent) branded products will be available to shoppers. This role is critical too to the introduction of new products, where access to strong weighted distribution is essential to achieve the necessary scale to recoup development and launch costs.

- 16 An analysis of the European Commission's "*Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings*" is instructive in understanding the retail environment for branded and own label products and the anti-competitive effects that may arise. While there is obviously no merger being considered here, the guidelines are nevertheless helpful in identifying where potential competition concerns may exist. The following are of particular relevance:

Clause 33: *Input foreclosure may raise competition problems only if it concerns an important input for the downstream product.*

Shelf space is a 'key input' for brand manufacturers (like 'access to infrastructure'). Without it their products cannot be effectively sold on the market.

- 17 Clause 32: *Foreclosure may also take more subtle forms, such as the degradation of the quality of input supplied.*

The ability for retailers to allocate less favourable shelf positions to branded goods should they wish to do so is a good example of degradation.

Positioning of products on "death row" or "slipped-disc row" have the impact on sales that the names suggest.

- 18 Clause 35: *The merged entity would only have the ability to foreclose downstream competitors if ...it could negatively affect the overall availability of inputs for the downstream market in terms of price or quality. This may be the case where the remaining upstream suppliers ...lack the ability to expand output*

An analogous situation exists in reverse in the grocery market where a branded supplier listed in all major supermarkets would be unable, were it to be de-listed from one major retailer, to source equivalent shelf space elsewhere to compensate. Thus, for 'downstream' and 'upstream' in the Guidelines, read 'upstream' and 'downstream' respectively.

- 19 Clause 39 – 44: *Incentive to foreclose access to inputs*

Clause 39 states that the incentive to foreclose depends on the degree to which foreclosure would be profitable. If a retailer loses profit by removing a brand from the shelf it can replace that profit by putting its own (vertically integrated) product on the shelf instead. Also the retailer can use the removal of the brand to gain concessions from its supplier, further improving its operating profit. Moreover, there are times when profitability will be "self-engineered", eg. via "loss leading" or "sale at cost", to attract shoppers with the aim of earning more on other products, including own label products.

- 20 Clause 41 states that the incentive for the integrated firm to raise rivals' costs further depends on the extent to which downstream demand is likely to be diverted from foreclosed rivals, with a higher share potentially being captured where the rival's products are close substitutes. Here are close parallels with own label products which mimic brand innovations (Working paper, para 29), where consumers are encouraged to believe they come from brand manufacturers (eg. via copycat packaging), and where consumers are encouraged to believe they perform the same through such on-pack claims as "cleans as well as the leading brand". The more the own label product can be positioned as a 'close substitute', the higher the share of branded products' sales which can be diverted to own label. The draft vertical merger guidelines confirm that there is a natural incentive for retailers to mimic branded products, to persuade shoppers that own label and branded products are equivalents or that they come from the same source.

21 **5. Shoppers' perceptions of own label**

Exploring this last theme further, the perception of shoppers is touched on in the working paper but not explored in depth, yet this is important in assessing distortions in competition between branded and own label goods. Figure 2 in the paper lists why shoppers purchase own label products. The third most quoted reason, after price factors, is the belief that own label goods "are the same as branded" (25%). This belief is in most cases misguided.

- 22 There are some instances where brand manufacturers make own label goods, a decision often taken out of necessity to fill capacity in capital-intensive factories. In those cases where brand manufacturers do make own label, the product formulations are likely to vary from their brand offerings. In such cases shoppers would be mistaken in believing the own label products to be the same as the brand. (There are however some examples – the minority we believe – where product formulations are the same.)

23 **6. Copycat packaging**

While we are encouraged that the CC is looking into copycat packaging, we note that the analysis in the working paper does not consider all the competitive effects of the problem. The impact on consumer purchasing behaviour is referred to, as is the impact on sales of own label goods, but the impact on the brand manufacturer – and the consequent longer-term impact on consumers – is not addressed. The company whose familiar brand packaging is copied is faced with declining revenue, legal costs, dilution of its distinctive image (which is central to its competitiveness) and other costs as it seeks to rectify consumer confusion. There may also be damage to other competitors in the category (if suddenly shoppers believe they are getting brand-quality at a low price). All these factors need investigation in order to understand fully the anti-competitive effects of copycat packaging that distort competition between suppliers to the detriment of consumers.

24 **SPECIFIC COMMENTS**

We have some specific comments to make on the working paper itself:

25 **Paragraph 6** (Tertiary branded products)

There are two points that require further analysis, the role of own-label manufacturers' in-house brands and the functions these tertiary brands fulfil (and whether these are the same as own label):

An in-house branded product produced by an own label manufacturer for sale through wholesalers to convenience stores has more affinity to a branded than an own label product. The product does not carry the name of the retailer anywhere on the label (so the producer is providing the guarantee); there is less uncertainty over its source (unless it is in copycat packaging); it must compete for the retailer's shelf-space along with other products; the specification for the product has not been laid down in detail by the retailer; and the manufacturer does not have the same advantage of access to detailed, commercially privileged information from brand manufacturers. The nature of such products and, therefore, their competitive effects, differ markedly from own label products produced by a truly vertically integrated retailer.

The paper argues that tertiary brands fulfil "many of the same functions as an own label product" yet nowhere is there an explanation of what these "own label" functions are:

Is it an alternative to branded goods? Own label products are of course "branded" goods, carrying the retailer's name / brand, and therefore are not an alternative in the same way as a true commodity would be;

Is it an alternative to a product supported by marketing spend? A secondary brand (ie. not a KVI) may also be unsupported and therefore provide an alternative. Own label products of course benefit from the significant umbrella advertising and marketing undertaken by most retailers, so they are not unsupported;

Is it a choice of product that may be cheaper than the leading brand? In reality, many premium own label ranges are more expensive than the leading brand in the category. The idea that brands are high price and own label low price is now an inaccurate generalisation in the UK grocery market.

It would help to have an insight into the CC's thinking on the functions of own label to prompt a more informed debate on the relative competitive merits of branded and own label goods.

26 **Paragraph 11(e)** (Who makes own label?)

We have already discussed the important question of consumer understanding of who makes own label and how this may distort competition (when consumers assume wrongly that the own label is made by the brand manufacturer, enabling retailers to divert sales away from branded products). One of the findings of the study referred to in the working paper¹ is that own label sales are stimulated when consumers cannot tell an own label product from a branded product due to similarity in packaging and when consumers believe that own label products are produced by the manufacturer of the branded product. There is of course a correlation here with Figure 2 in the paper which shows 25% of consumers believing that own label products are the same as the brand. Consumers tend to understand that, in many instances, the own label product is not made by the retailer and therefore make the assumption that it is made by the brand, a misconception that it is in the commercial interests of retailers with own label ranges to perpetrate, mostly tacitly but sometimes actively by adopting copycat packaging. Encouraging these misconceptions prevents consumers making informed purchasing decisions and results in a diversion of sales from branded to own label products.

27 **Paragraph 13** (The competitive impact of own label products)

Breaking down the impact of own label into three areas oversimplifies the competitive impact, a point already made under KEY POINTS above. We encourage the CC to look also into:

- (d) the misconceptions amongst consumers over the nature of own label products (including who makes them);
- (e) the impact of own label on the application – and strength – of buyer power;
- (f) the impact of anti-competitive practices (especially the requirement to make payments for no corresponding benefit) being applied by one product competitor (the retailer with own label) on another (the brand manufacturer).

We also suggest that retailers' ability to exploit their position as both customer and competitor should be investigated in full as part of this investigation (paragraph 13 (a)).

28 **Paragraph 16(b)** (Use of advance, commercially sensitive information)

Possession of important commercial information about direct horizontal competitors allows the retailer for example to:

- determine whether and when to launch a competitive product, reducing risk in so doing;
- match the formulation, or adopt a different formulation, through foreknowledge of the brand manufacturer's plans and the consumer research it has undertaken (and presented to the retailer);

¹ J Steenkamp, I Geyskens, K Gielens and O Koll, *A global study into drivers of private label success*

- allocate shelf-space and ensure sufficient stocks are available for its own label goods to take advantage of a competitor's promotion, maximising returns in a way not available to other competitors.
- 29 The detailed information that brand manufacturers share with retailers on consumer needs and behaviour is an example of information that would never be shared with a horizontal competitor but is shared with retailers as customers. Access to this information allows the retailer to develop better own label products than might otherwise be the case.
- 30 **Paragraph 18** (Evidence on speed to market of own label)
- In listing the range of evidence that has been considered, we note that the speed to market of own label products relative to branded goods is not included. The extent to which the advance information to which retailers are privy enables own label products to be brought to market faster than might otherwise be the case is an important consideration.
- 31 We believe it would be a significant finding were a retailer able to bring a "me-too" own label product to market faster than a brand manufacturer were able to do as a result of advance information. This would not only be a potential indication of a mis-use of commercially privileged information; it would demonstrate (a) the shorter lead times that an innovative brand manufacturer has to earn a fair return on the millions of pounds of up-front investment it has made in researching, developing, distributing and promoting the new product, and (b) the fact that independent head-to-head brand competitors are at a competitive disadvantage in that they do not have the time advantage enjoyed by the retailer in bringing out a competitive product to the innovating brand . This would be an important indicator of whether the UK grocery market is conducive to competitive innovation and the launch of new products, with direct implications for consumer welfare.
- 32 The relative speed to market of branded and own label goods could be understood by investigating the sensitive information to which retailers are privy as customers, brand manufacturer's time frame for launching "me too" products and own label suppliers' time frame for the same process. Own label manufacturers should, we suggest, be asked for full details on the specification process by retailers for own label goods, the information that is given to them by the retailer (including market research data) with the original source of that information, and timings of the provision of such data in relation to a brand launch.
- 33 **Paragraphs 19 and 20** (Rise and fall of own label market shares)
- These two paragraphs look at the rise and fall of own label shares and suggests that, were retailers to have a commercial advantage, "we might expect to see a uniform trend towards an increasing share of sales for own label products". This is an over-simplified view. Presumably the focus should be on whether there are anti-competitive forces at play, irrespective of the market movements of either brands and own label. Are anti-competitive effects permissible as long as own label shares are not growing?
- 34 More importantly, looking for a uniform trend ignores significant differences between product categories. The retailer is keen to see the growth of the overall category, not necessarily the growth just of its own label range (though this may also be important). At issue in the competition analysis is the potential influence the retailer is able to exert on the fortunes of all the products in a category to yield the optimum return, some of which will be

its own label products. It may suit the retailer under certain circumstances to see a branded product succeed in a category relative to its own label products (where for example the brand brings consumer interest to a category). Similarly, it may be in the retailer's interests to reduce the margin (and consumer price) of an own label product in order to drive volumes of that product. Meaningful generalisations cannot be drawn across categories.

- 35 We contend that a major retailer controls powerful marketing levers in-store to allow it to influence significantly the fortunes of individual products in any category. These levers include:
- control over consumer prices of all products in the category, and their relationship to one another;
 - control over the number of facings a product has on shelf, which directly affects its rate of sale;
 - control over the position of a product on shelf (ie. eye level or floor level) and the position along the aisle, all of which influence the rate of sale;
 - control over communication on shelf;
 - control over type of promotions, timing of promotions and money-off vouchers.

We therefore believe it is overly simplistic to look at such a broad measure as whether own label shares are rising or falling if the influence of the retailer over the fortunes of its horizontal competitors is to be fully understood. If, as we believe may be the case, retailers are able to influence shopper purchasing by manipulation of in-store levers, this raises consumer welfare concerns.

- 36 We do not suggest that branded goods are completely at the mercy of own label goods. This is patently not the case and brands can have a significant effect on changing shares within a category, through successful innovation and brand promotion for example. The issue however in this analysis is whether the retailer, through its access to advance information and the control of all in-store marketing levers, is able to distort competition between competitors (notably between brand suppliers and themselves as own label owners) and manipulate consumer choice.
- 37 On a small point of accuracy, paragraph 19 includes conjecture over whether own label has reached its ceiling in the UK. There is no ceiling to own label share in any UK retailer. Marks & Spencer and Aldi for example stock close to 100% own label products.
- 38 **Paragraph 21** (The impact on secondary and tertiary brands)

We fully agree that the fortunes of secondary and tertiary brands is a good place to look for the impact of competitive effects as these products are the most likely to be replaced by own label products. The ideal sources of the information the CC requests in this paragraph are A C Nielsen, Taylor Nelson Sofres (TNS) and Information Resources (IRI) as they hold this information, by category, over time.

39 **Paragraph 22** (Does own label have decisive advantage?)

We have already commented above that the drivers of either own label or brand success do not in themselves indicate potential anti-competitive effects. To understand such effects, it is necessary to understand the extent to which retailers (as opposed to consumers) control the fortunes of products in their stores (through in-store marketing levers) and the access retailers have to commercially privileged information from which other horizontal product competitors are excluded by law. Similarly, whether or not own label has a decisive advantage over branded products is not necessarily an indicator of anti-competitive effects.

40 Furthermore, any analysis of the relative advantages that own label may give retailers over brand manufacturers is incomplete without assessing the impact of own label on buyer power and retailers' total control over the provision of shelf space on which brand manufacturers depend to reach their consumers. Neither of these issues is addressed in this analysis. Were they to be so, the conclusion over own label's decisive advantage would we believe be reversed.

41 **Paragraph 23** (Does own label depress incentives for brand investments and innovation?)

We suggest that broad measures of R&D expenditure and investments are not indicative of potential anti-competitive effects associated with own label. At issue is not whether investments are generally rising or falling but whether own label products receive an advantage over other competing products sufficient to influence such investments through (1) the provision of data from which other product competitors are precluded by law, (2) the provision of that data several months ahead of its manifestation in the marketplace and not just from one supplier but from all suppliers (allowing the retailer to identify overall trends more easily than any of its branded "competitors"), (3) the manipulation of the in-store marketing levers by the retailer to favour its own products and (4) the use of own label in exerting buyer power.

42 Retailers' access to confidential information occurs well in advance of a new branded product's launch and is highly likely to affect both the time over which the brand manufacturer is able to earn a return on its investment and the risk in that new product, reducing resources for future investments and inhibiting future innovations to the detriment of consumers. Access to such information may also occur well into a product's lifecycle, in that instance having the potential to be used to give preferential treatment to own label at the expense of the brand, again damaging future brand investments, distorting competition between suppliers and damaging consumers.

43 A more indicative analysis would be to look at all the commercially confidential information that a retailer receives as a retail customer that it can then use as a horizontal competitor, who within the retailer has access to that information (eg. the buyer and the specifier of own label), when that information is provided in the product lifecycle, how that information is used and what commercial advantage it may give. Such an analysis should be cross-checked with the instructions own label manufacturers receive from retailers on the specification, market positioning and packaging of that retailer's own label products. This, combined with an understanding of the retailer's control of the in-store marketing levers and the relationship between own label and buyer power referred to above, would give robust insight into the impact of own label on incentives to invest and innovate.

44 **Paragraph 29** (Speed to market)

We suggest that the important issue in competition analysis is not whether own label manufacturers are able to bring products to market faster than competing brand manufacturers. They may (or may not) be able to do so for perfectly legitimate reasons. The important issue is whether retailers are able to bring own label products faster to market **than would otherwise be the case** because of the advance information and insight they have gained from receiving detailed presentations on brand manufacturers' new product plans 6, 9 or more months ahead of launch and avoiding "any uncertainties in the market" (see OFT Guide 401). If they are able to do so, they are then able to reduce the period in which the innovator is able to earn a return on its innovation.

45 It may not be necessary to obtain empirical evidence on speed to market, a factor which will be specific to individual products and categories and on which generalisations may be misleading. If a retailer is privy to commercially significant information on a new branded product / variant well ahead of launch that is (1) unavailable to other product manufacturers and (2) accessible to both the retail buyer but also the specifier of the retailer's own label products, that is itself strong evidence that a retailer can fore-shorten the period over which a new product / variant is able to earn a full return without facing the full rigour of a normal competitive market. Furthermore if a retailer has such information from **all** brand manufacturers in a category, as we contend, then there is much greater asymmetry of information and greater competition effects.

46 As a small observation, it may be very difficult to compare the speed to market of an own-label "me-too" product with a branded "me-too" product in today's market. Most retailers would now not be prepared to list a "me-too" product produced by another branded manufacturer, seeing this market positioning as the preserve of own label. A new branded product would be expected to bring something new to a category in order to warrant listing.

47 **Paragraph 31** (Copycat packaging)

We are delighted that the problem of copycat packaging is being investigated. In assessing its impact on consumers, it is risky to predict what is happening in consumers' heads. Certainly we would agree with the three scenarios painted in this paragraph. In addition, we would add that the similar packaging makes it easier for shoppers to buy the wrong product (ie. a mistaken purchase) and, for some shoppers, the similarity of pack design may suggest that the product has the same **reputation** as the brand.

48 It is of course correct to look at the consumer impact of copycat packaging as an immediate indicator of its effect on competition. The net effect is to drive sales away from branded products in favour of own label products in a way that distorts competition between suppliers. It is also relevant to look in more detail at the impact on manufacturers. This would indicate how copycat packaging may further distort competition between suppliers by prompting wasteful expenditure on legal defence, marketing costs and re-packaging, thereby acting to the detriment of consumers by reducing the ability to invest and innovate.

49 **Paragraph 32** (Copycat packaging – who makes own label?)

It would be appropriate to cross-reference the data in this paragraph on consumers' belief over who makes the copycat with Figure 2 in the working paper which shows that 25% of consumers believe that own label and branded products are the same. We believe that the prevalence of this belief today is in part a direct legacy of the widespread copycat strategy adopted by the leading retailers in the 1990s (and is further reinforced by incidents today).

50 **Paragraph 33** (Evidence of confusion – inconclusive?)

This paragraph suggests significant weight is being given to the conclusions of Burt and Davis (*Follow my leader: Lookalike retailer brands in non-manufacturer-dominated product markets in the UK* 1999) that "the evidence for confusion [from look-alike retailer brands] is therefore inconclusive". Apart from begging the question "why is copycat packaging produced, then?", it should be noted that this paper only looked at academic research which was criticised for having small sample sizes. The two major research studies on this subject, undertaken in 1998 by the Consumers' Association and by ourselves (with sample sizes of 2,000 and 3,994 respectively) were not reviewed. Perhaps more importantly, the findings of the paper should be read in conjunction with the paper's stated purpose:

*"The aim of this paper is to consider the scope for potential confusion and origin of attribution between retailer brands **in product categories without dominant manufacturer brands**" [emphasis added].*

The paper then goes on to consider Marks & Spencer exclusively. While copycat packaging in such environments is an issue, there are particular competition (as opposed to IP) concerns where retailer own label copycats are displayed alongside manufacturer brands (thereby enabling the diversion of sales from brands to own label) and where retailers have buyer power (thereby inhibiting brand manufacturers from exerting their rights).

51 Should the CC share Burt and Davis scepticism on the evidence of confusion, we are sending you separately the original research reports we hold.

52 **Paragraph 34** (Packaging as a sustained basis of success)

We do not believe this paragraph addresses the potential anti-competitive effects of copycat packaging. Surely it is irrelevant what role packaging on its own may have in the sustained success of own label products? Irrespective of whether packaging plays a greater or lesser role in the success of own label, the fact remains that shoppers are being deliberately misled over the nature of products, sales are being diverted and some suppliers are incurring significant costs due to the anti-competitive behaviour of some of their competitors.

53 A more relevant question for the CC to consider may be the extent to which general misconceptions over who makes own label have been exacerbated by copycat packaging and to what extent these misconceptions have led to the success of own label.

54 **Paragraph 36** (Merger - Cott Beverages Ltd and Macaw (Holdings) Ltd)

We have noted that the CC sets much store on the merger decision involving Cott Beverages and Macaw, being mentioned in the letter to the main parties on supplier prices (15th March 2007) and also here. We consider that this merger is very specific, involving the overlap of two horizontal own label suppliers. In particular, the conclusion reached in Cott/Macaw that own labels do not compete with brands was not shared by the European Commission in Kimberly-Clark/Scott or in Procter & Gamble/Gillette, or in Kesko/Tuko, nor was it shared by the Competition Commission in Heinz/HP. Furthermore, it is worth noting that even in the specific product market of carbonated soft drinks, the conclusion reached in Cott/Macaw was at odds with earlier decisions by both the European Commission AND the Monopolies and Mergers Commission.

55 **Paragraph 38** (Comparing products readily across retailers)

We continue to maintain that it is unrealistic to believe that shoppers are **readily** able to compare the prices of own label products between retailers, as one retailer's own label product differs from another.

56 **Paragraph 39** (Price competition and KVIs in the cola market)

We have already commented on the specific nature of the Cott / Macaw merger decision. Cott in its submission makes an interesting, and counter-intuitive, implication that it is the own label product rather than the brand that is the KVI. An analysis by the CC of KVIs, split between branded and own label goods (where both are present in a category), would be a helpful indicator of which types of product are a greater consumer force in price competition between retailers.

57 **Paragraph 44** (Copycat packaging, trade marks and copyright)

Tesco is wrong in stating that copycat packaging is addressed by the law of trade marks and copyright. To illustrate the point, when United Biscuits took Asda to court over Asda's Puffin mimic of Penguin biscuits, it invoked its trade mark rights but lost. We are not aware of any copycat case that has been sufficiently close to even plead copyright.

58 A more relevant basis for legal action may be the law of Passing Off but the Gowers Review, reporting last December on the UK's intellectual property framework, concluded that "*the Review believes that passing off does not go far enough to protect many brands and designs from misappropriation*" (para 5.84). This confirms our view that the legislative framework in the UK is ineffective in tackling this particular problem.

59 However, Tesco raises an interesting question on whether intellectual property laws, however strong, would ever address copycat packaging produced by retailers who were both powerful customers as well as direct (product) competitors. There is a big difference between a brand manufacturer taking legal action against, say, another brand manufacturer for a copycat product and taking legal action against a major retailer. With a direct horizontal competitor who is not a customer, there are no distribution or wider commercial issues to balance. In the case of suing a major retail customer – apart from generally being a dubious commercial practice – the implications are huge and potentially commercially devastating. The dispute immediately escalates into one which strikes to the heart of the

trading relationship, with ramifications for that suppliers' entire product portfolio. We are not suggesting that a retailer would de-list a brand manufacturer's entire product range but do suggest that there are many ways it can disadvantage and therefore punish that supplier's products vis-à-vis its competitors over a significant period of time (eg. through using its in-store marketing levers or partial delistings).

- 60 We believe inhibitions that prevent brand manufacturers taking legal action against major retail customers / competitors over misleading copycat packaging has competition implications, in terms of distorting competition between suppliers and preventing consumers from making informed choices. Consumers do not complain about copycat packaging, partly because unit prices are low (would consumers be prepared to make a fuss over a relatively small purchase?) and partly because they are likely to remain unaware they have been duped (if they believe the similar packaging means the product has been made by the brand manufacturer, who is to disabuse them?). Similarly the OFT and Trading Standards have told us that this is not a priority for them (neither has ever brought a case), because consumers don't complain and the level of consumer detriment is, in their view, low as the price of the goods involved is small and is not individually on the same scale as food safety and product safety issues that absorb much of their energy and resources. It is only the brand manufacturer who is sufficiently motivated to prevent this consumer deception but is inhibited from doing so by the ineffectiveness of UK law and, in the case of look-alikes produced by major retailers, due to the importance of the customer relationship.

61 **FUTURE CONSIDERATIONS**

In taking forward the CC's investigation into the competitive effects of own label, there are a number of thoughts that occur to us:

62 **Access to information**

- Identifying all the product and marketing information that is relayed from all brand manufacturers in a category to a retailer as customer would indicate the retailer's advantage as product competitor over each of those individual brand manufacturers and the asymmetry of information that exists;
- An assessment of that information by a competition lawyer would indicate whether its receipt and subsequent use by retailers for the purpose of developing competing own label products might represent a breach of the Competition Act, or alternatively whether the resulting distortions of competition fall within a gap that is not covered by the Act and are therefore particularly appropriate for consideration and remedy in this investigation;
- An analysis of how many months ahead of launch a brand manufacturer gives commercial information to a retailer, combined with an understanding of the ability of the retail buyer to share that information with that retailer's own label specifier, would indicate the time advantage a "me-too" own label competitor would have over other product competitors. It would also indicate the reduction in time that the innovative branded product would have to earn a full return before competitors were launched against it.

- 63 **Consumer understanding over the relationship between brands and own label**
Consumer research into people's perceptions of who makes own label products, combined with input from brand manufacturers on whether they make own label products, would indicate whether the extent of consumer perceptions indicated in Figure 2 of the working paper is legitimate or whether consumers do not have sufficient information on the source of own label goods to make informed buying decisions and thus make the sort of choice that should be possible in a genuine competitive market.
- 64 **The fortunes of secondary and tertiary brands**
Primary data on the number of branded and own label products competing in a range of categories tracked year by year over the last, say, 10 years would indicate the relative fortunes of secondary and tertiary brands and own label. This data should be readily available from A C Nielsen, Taylor Nelson Sofres (TNS) or Information Resources (IRI).
- 65 **The climate for innovation**
Obtaining a clear picture of the climate for innovation in this market, and whether own label exerts a positive or negative force, is hard to quantify. Own label products may provide a spur to positive innovation but may also provide a spur to wasteful innovation (forcing brand manufacturers to continue to differentiate against an ever-encroaching "me-too" own label offer but not necessarily adding consumer value in the process).
- 66 An analysis that listed out all the innovations and new product introductions in a series of categories over, say, a 10 year period, with separate but comparable lists for branded goods and own label goods, with dates of introduction, would give some indication of the relative significance of brand and own label innovation and the extent to which own label products follow brands.
- 67 Were some categories selected for being predominantly branded (ie. branded products collectively holding >80% market share) and others selected for being predominantly own label, it may be possible to draw some further conclusions on the respective climate for innovation and where the most meaningful innovations take place. It should however be recognised that the nature of specific categories may influence the latent potential for innovation and that assessing whether an innovation is meaningful to consumers or not will always be subjective.
- 68 **The development of new own label products**
Requiring own label suppliers to divulge the product specifications, market positioning data and packaging design specifications they receive from their retail customers, corroborated in turn by asking retailers for the source of the data they pass on, would indicate the extent to which retailers currently use privileged commercial information from brand manufacturers in their specification for their own label products. It would be important to select own label suppliers to categories in which both branded and own label goods compete (ie. ready meals and fresh pasta would not be good examples as brand competition has been severely reduced in these categories). A list of UK own label manufacturers may be available from the Private Label Manufacturers Association (PLMA). No doubt retailers can supply you with names of overseas (as well as UK) own label manufacturers.

69 **Copycat packaging – the impact on suppliers**

An analysis of the impact on sales of all products in a category when a copycat is launched would indicate the sales effect of such packaging. This data is likely to be available from A C Nielsen, TNS or IRI.

70 **Copycat packaging and consumer redress**

While an analysis of the effectiveness of UK law in addressing copycats would be useful in gauging the strength of remedies against copycats produced by suppliers or smaller retailers, this may go beyond the scope of this market investigation and would not be relevant in addressing the potential anti-competitive effects of copycats produced by powerful retailers. Were an effective legal framework available in the UK, it would only work as a deterrent in the context of copycats produced by powerful retailers, in our view, and would not amount to a total remedy. Suppliers would be inhibited against taking legal action against powerful retail customers, with the result that in these instances consumers would be left unprotected.

71 Were brand manufacturers asked to make the assumption that legal remedies were in place and then asked whether they would be very likely, likely or highly unlikely to use those remedies actively against a competing supplier, a wholesaler, an independent retailer, a major supermarket, or the market's largest retailer, the CC would have an indication on where brand manufacturers may be relied on to take action to protect their own and consumers' interests, and the factors that deter them from taking action.