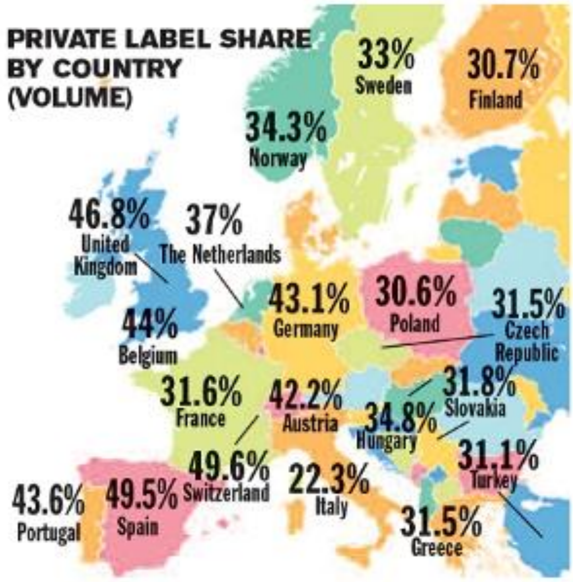
## RPM increases inter-brand competition against the reseller's brand

The Commission seeks examples where Retail Price Maintenance (RPM) may enhance competition and consumer welfare. The dual role of food retailers is a perfect example. Food retailers sell thousands of independent food and non-food brands alongside their own competing brands. Their control of access to the stores (as opposed to the open marketplace model used by online platforms) and in-store competition favours the growth of their own brands at the expense of competing third-party brands. According to Nielsen data supplied to the PLMA, the aggregated market share of retailer brands across all FMCG categories is higher than 30% in almost all member States and in many high traffic categories this market share exceeds 50%.




*Source: https://www.plmainternational.com/industry-news/private-label-today.*

The economic literature[1] and legal scholars[2] have warned that the dual role of food retailers may lead to unfair category management strategies, foreclosure of third-party brands and consumer harm, measured in terms of innovation, quality and price. Some authors have specifically assessed retailers' pricing control

[1] Bergès-Sennou, Bontems and Réquillart, "Economic impact of the development of private labels", 1st Biennal Conference of the Food System Research Group, University of Wisconsin, Madison, June, 26-27, 2003; Marie-Laure Allain, Claire Chambolle, and Patrick Rey, "Vertical Integration, Information and Foreclosure", TSE Working Paper, n. 11-237, March 2011, revised November 2011; Inderst, Roman & Jakubovic, Zlata & Jovanovic, Dragan, "Buyer Power and Functional Competition for Innovation" MPRA Paper 61214, University Library of Munich, 2015; and Caprice, Stéphane "Private Label Positioning and Product Line" TSE Working Papers 17-816, Toulouse School of Economics (TSE), 2017.

[2] Daskalova, V. I. (2012). Private labels (Own Brands) in the Grocery Sector: Competition Concerns and Treatment in EU Competition Law. (TILEC Discussion Paper; Vol. 2012-002), TILEC; S.Erzene, Buyer power in the Context of Private Label in the EU, Global Antitrust Review 106 (2012), 106-137; and H. Nevo and R. van den Bergh, 'Private Labels: Challenges for Competition Law and Economics' (2017) 40(2) World Competition, 271.

over third-party brands as one of the main levers of retailer brands' competitive advantage[3] and others have advocated the authorisation of RPM in order to preserve a level playing field between the third party brand and the retailer brand[4]. Absent RPM, the retailer can rely on a pricing strategy that promotes its own brand's interests at the expense of the third-party brand. Maximum Price Maintenance (MPM) is not sufficient to protect third-party brands because retailers' exclusionary pricing strategy is not only confined to creating an artificial price gap between the targeted third-party brands and their own brands. Retailers can also undermine a competing third-party brand by relying on extremely low or highly irregular pricing (e.g., described as "high-low" or "yo-yo" pricing by marketing economists) that confuses and disappoints consumers as to the real value proposition of the third-party brand and lures them to the competing regularly priced retailer brand[5].

In this scenario, the economic and legal literature have evidenced, with real-life examples, that retailers' pricing control of third-party brands may foreclose them in favour of retailers' own brands, raising unfair competition and consumer harm issues. Conversely, there is no evidence whatsoever that banning RPM in this scenario promotes inter-brand competition and consumer welfare. Therefore, there is no justification whatsoever for considering RPM as an objective restriction of competition when the retailer plays a dual role and competes with the supplier.

Therefore, it is in line with the legal and economic literature to conclude that when the supplier's market share is below the safe harbour threshold (30%), RPM promotes inter-brand competition when the buyer

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[3] Ratula Chakraborty, Paul W. Dobson, Jonathan S. Seaton, "Switch Marketing and the Retail Pricing of Brands and Private Label Products", Strategies in the Retailing Industry, INRA-IDEI Seminar, Toulouse, 16 May 2011, available at: http://idei.fr/sites/default/files/medias/doc/conf/inra/2011/dobson2%20table%20ronde.pdf; Ratula Chakraborty, "Do Retailers Manipulate Prices to Favour Private Label over Brands?", CCP Working Paper 18-2, Centre for Competition Policy, Norwich Business School, University of East Anglia. Excerpt from the conclusion: "*This study demonstrates that a change in the competitive environment can trigger a distinct change in the pricing applied to brands and private labels. Whether by deliberate design or an unintended outcome of competitive pricing, the treatment brands receive could adversely affect their immediate or longer-term market share and profitability. Hiking the brand premium (here by an average of 45%) will inevitably make private label goods appear to offer better value. Operating high frequency deep discount promotions will compensate by boosting brand sales in the short term but could undermine longer-term brand loyalty and lower consumers' reference prices, which may boost profits for retailers but not for brand producers (Ball 2009b). The options for brand producers in responding to strategic pricing by retailers look to be limited…Should switch marketing and retailer strategic pricing matter to consumers? Perhaps not if product choice is wide and prices represent good value. However, consumer detriment could arise. Firstly, using umbrella pricing with private label simply tracking brand prices and not following costs is likely to lead to poor value for consumers (Competition Commission 2000). Secondly, intentionally spreading the price gap to distort pricing architectures may mislead consumers (through their price-quality associations) as to the value actually on offer. Thirdly, the effect of incessant yo-yo pricing by repeatedly changing the brand price up and down may reduce its perceived value. Fourthly, pushing up brand prices to divert sales towards private label might end up resulting in brand withdrawal and so eventually reduced choice. Fifthly, product quality may decline over the longer term when the moral hazard problem from retailers exploiting their double agent position deters future brand investment by brand owners….The policy remedy could be to give brand producers greater control over the retail prices of their goods, such as being permitted to use maximum resale price maintenance as a way of constraining what retailers can charge for brands. Olbrich and Burr (2005) go further and argue for relaxing the prohibition on fixed resale price maintenance to allow brand owners to fix resale prices as a means to stop retailers using excessive and artificial high-low pricing on brands.*"

[4] R. Olbrich and C.-C. Buhr, "The impact of private labels on welfare and competition – how retailers take advantage of the prohibition of retail price maintenance in European competition law", Department of Business Administration and Economics, FernUniversität Hagen, Research Paper 1, 2004,
available at: https://www.fernuni-hagen.de/marketing/download/no1-web.pdf

[5] See note 4.

resells his own competing products/brands. In this scenario, the supplier may want to rely on RPM to fix a reselling price that best aligns the interests of the consumers and his own brand. In a safe-harbour scenario, inter-brand competition is intense and biased in favour of the reseller's brand (see par. 210 of the current VGL: "*While in most cases the distributor may not have an interest in limiting its choice of products, when the distributor also sells competing products under its own brand (private labels), the distributor may also have incentives to exclude certain suppliers, in particular intermediate range products*"). Therefore, RPM ceases to be an intra-brand restriction and becomes an inter-brand competition tool that offsets to some extent the in-store competition advantage enjoyed by the reseller brand

**Proposal 1**

Therefore, it is suggested that RPM below the safe-harbour threshold should always be white-listed when the buyer resells the suppliers' brand alongside its own competing brand (regardless of the latter's market-share).

Example:

A canned tuna supplier with a 15% market share supplies its product to the five food retailers operating in the modern distribution channel, of which 4 also resell their own competing brands with the following market shares: retailer 1 (30%), retailer 2 (20%), retailer 3 (10%), retailer 4 (5%), retailer 5 (0%).

Justification:

The market for canned tuna is driven by retailer brands and the independent supplier may consider that RPM is necessary to offset at least partially the competitive advantage enjoyed by retailers' brands (dual role of retailers). In this case, RPM vis-à-vis retailers 1, 2, 3 and 4 would be covered by the safe harbour, whereas RPM would not be white-listed vis-à-vis retailer 5.

**Proposal 2**

Alternatively, RMP should be white-listed when the resellers' own competing brands command collectively a higher combined market share in the relevant market than the supplier's brand.

Example:

A canned tuna supplier with a 15% market share supplies its product to the five food retailers operating in the modern distribution channel, of which 4 also resell their own competing brands with the following market shares: retailer 1 (30%), retailer 2 (20%), retailer 3 (10%), retailer 4 (5%), retailer 5 (0%).

Justification:

The market for canned tuna is driven by retailer brands and the independent supplier may consider that RPM is necessary to offset at least partially the competitive advantage enjoyed by retailers' brands (dual role of retailers). In this case, RPM vis-à-vis retailers 1, 2, 3, 4 and 5 would be covered by the safe harbour since their combined market share (65%) exceeds the supplier's market share (15%). Retailer 5 does not sell its own competing brand but the prominence of retailers' brands evidences that it could develop its own brand if needed be and can be considered to be a potential competitor in the canned tuna market.

Subsidiarily, the Commission could adopt a more restrictive test in example 1 such as allowing RPM only when the market share of the retailer's brand is higher (RPM would only be allowed vis-à-vis retailers 1 and 2) or in example 2 (RPM would only be allowed if the retailer brands' combined market share exceeds a certain threshold (e.g., 30% market share).

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