

# Private Labels and Relevant Markets

Dr. Hila Nevo

Tel-Hai Academic College and the University of Haifa, Israel



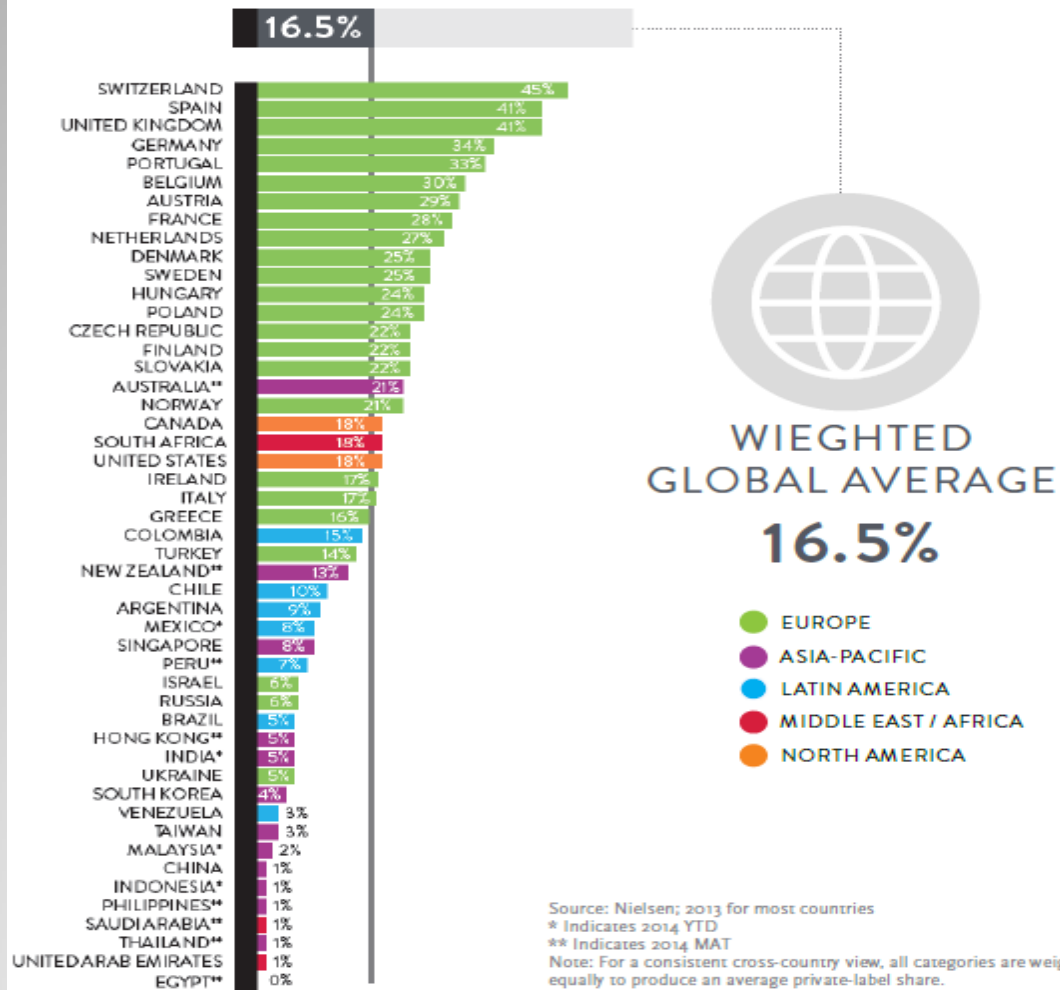
## Defining the Relevant Market in a Private Label Competitive Setting

The Pros and Cons of Market Definition, Stockholm, 3 November 2017

“...the meaning of “relevant market” today for purposes of merger intervention or non-intervention decisions - probably is not understood by more than 500 people on the planet. For most private practitioners, for most business personnel practicing self-help, for most new agency staffers, for most foreign enforcement agencies implementing new merger control regimes, “Market Definition and Measurement” remains a discrete step that begins the analysis. If they err at that step, all ensuing steps are apt to be wrong. And they err a lot”.

**W. Blumenthal, Why Bother? (Washington , February 17, 2004).**

## DOLLAR SHARE BY COUNTRY



# Private Label Statistics Worldwide

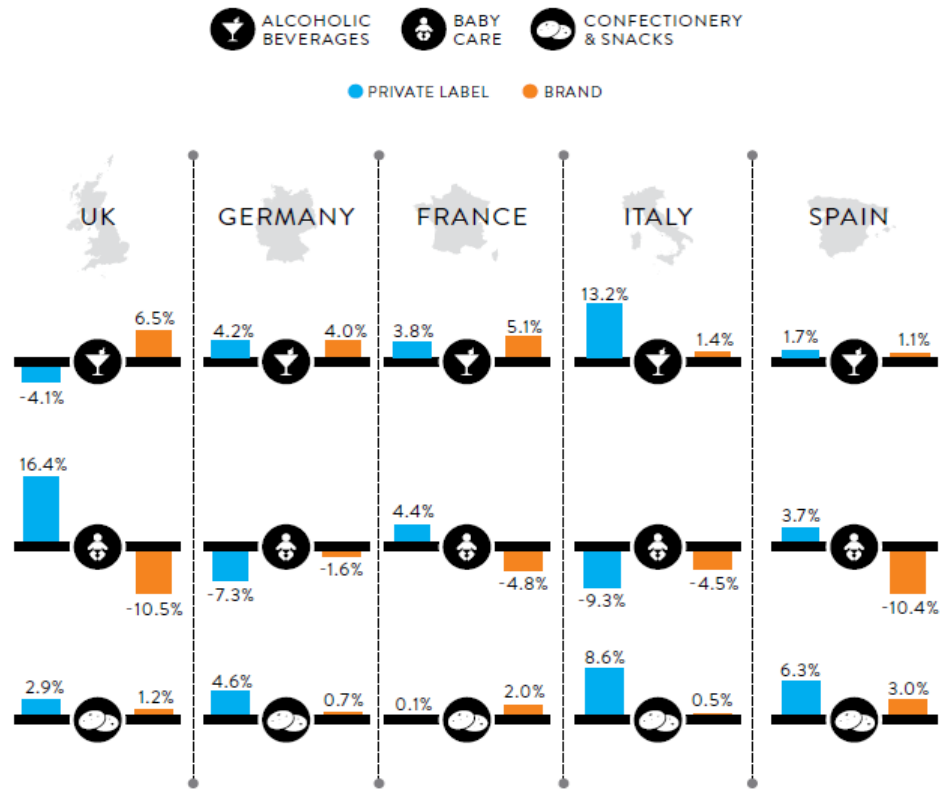
Table 1. Brands' market share (%) in the Italian pasta market

Brand	2008		2007		2006	
	Value	Quantity	Value	Quantity	Value	Quantity
Barilla	39.44	36.88	40.48	38.09	40.82	39.12
De Cecco	11.19	7.88	12.07	7.73	12.70	8.02
Divella	6.58	7.63	6.42	7.83	6.62	8.33
Garofalo	3.89	2.98	3.94	3.09	3.36	2.74
Colussi	3.25	2.91	3.45	2.86	3.88	3.04
Granoro	2.96	3.12	2.64	3.05	2.19	2.46
Amato	2.76	3.13	2.52	2.91	2.65	3.04
Del Verde	0.89	0.61	0.77	0.57	0.61	0.42
Rummo	0.88	0.92	0.80	0.77	0.58	0.45
Russo	0.73	0.81	1.06	1.24	1.45	1.74
La Molisana	0.64	0.53	0.77	0.62	0.65	0.46
Private Labels	15.24	20.88	13.08	19.09	11.77	16.98

Source: AGCM elaboration on Nielsen data.

Even in Traditional Sectors...

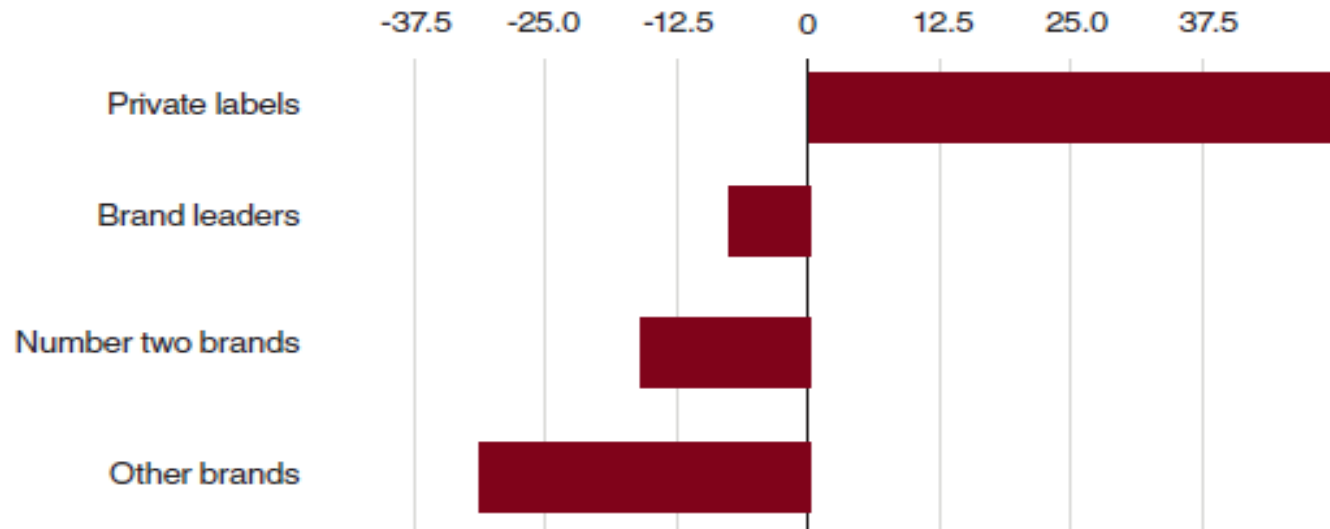
### YEAR-OVER-YEAR SALES CHANGE BY CATEGORY FOR SELECT EUROPEAN COUNTRIES



Source: Nielsen  
 Year-over-year sales change (August 2012 - July 2013 and August 2013 - July 2014)

**The Private Label – Brand Relationship: Win-Win Situation?**

### FMCG percentage points share change Germany, 1999-2005



Source: Keith Lincoln & Lars Thomassen; based on GfK

## Changing the competitive landscape

<b>Value-for-money/ budget/generic/copycat private labels</b>	<ul style="list-style-type: none"><li>➤ Lower quality</li><li>➤ Lower price</li><li>➤ Typical for ‘low emotion’ products (e.g. paper towels)</li></ul>
‘Just the same’ private label	<ul style="list-style-type: none"><li>➤ Similar quality (often same producer) but different packaging</li><li>➤ Lower price</li></ul>
Fine or premium private label	<ul style="list-style-type: none"><li>➤ Better quality compared to the leading brand</li><li>➤ Same or even higher price</li><li>➤ Typical for niche (e.g. organic) products</li></ul>

# Different categories of private labels



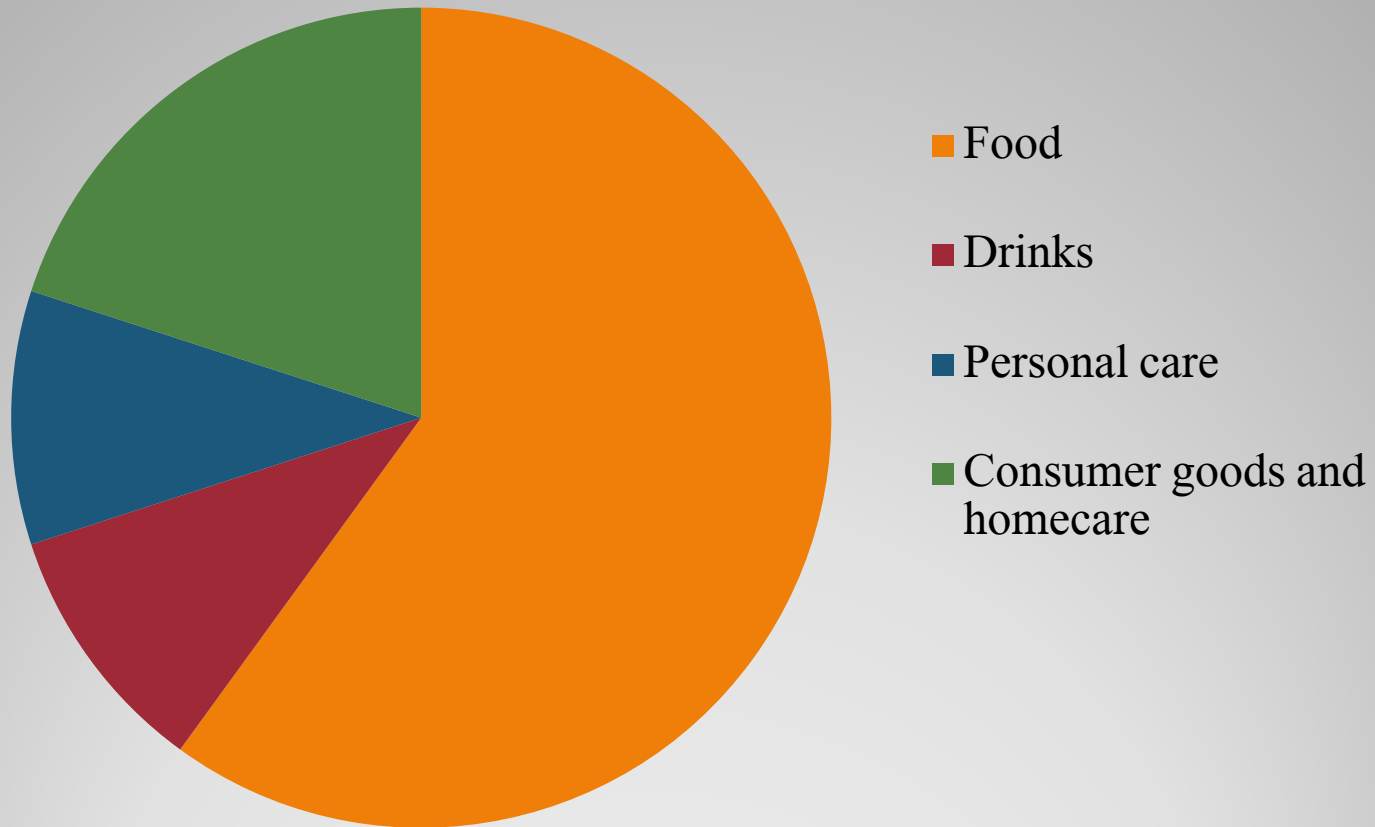
**Why do private labels attract retailers?**



- Specialized independent small and medium-sized manufacturers, attempting to penetrate the market;
- Dominant manufacturers of branded products, seeking to protect their own brand from cannibalization, or to utilize spare capacity;
- Vertically integrated manufacturer and retailer.

**Who produces the private label?**

# EU Analysis 2011-2014 by Sector



Source: Linklaters 2015

Sectors on focus

Refresco (NL)

Pride Foods (UK) (upstream)



Private label NCSDs



Branded NCSDs

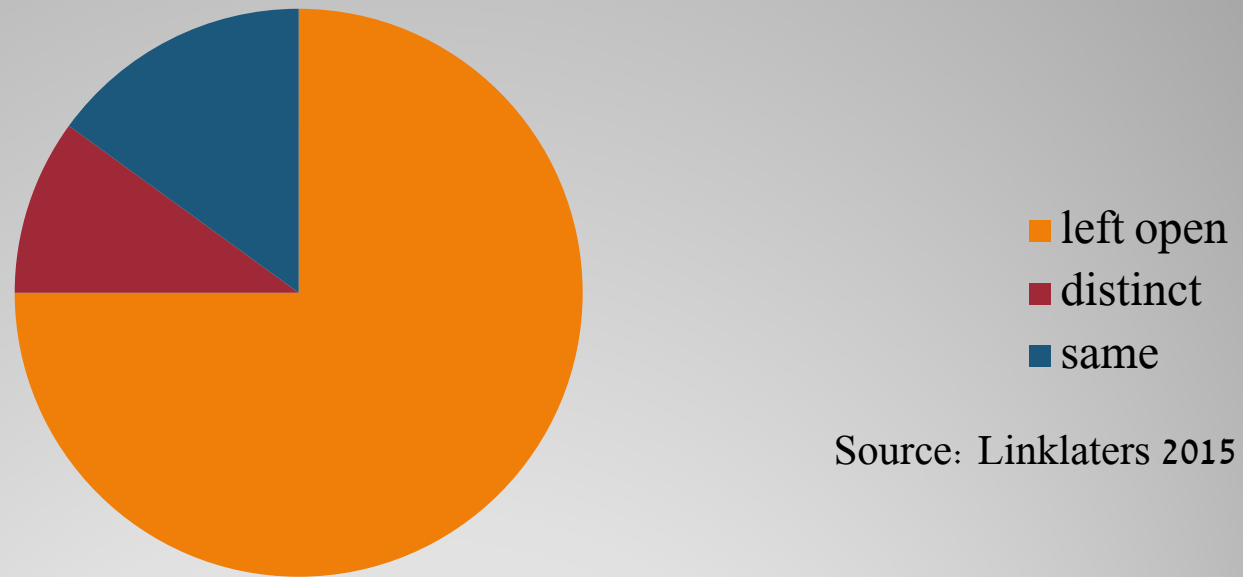


Retailers (downstream)



Horizontal and vertical dimensions of competition:  
Refresco/Pride Foods

# EU merger decisions 2011-2014



Source: Linklaters 2015

- Authorities often assess market definition on a worst-case basis;
- OFT (Princess/Premier Foods, 2011): “market definition is an analytical framework used to **begin** an assessment of the relative competitive pressures that different suppliers place on one another.”

**What is the role of market definition in these cases?**

- Competition between products;
- Competitive interaction takes place on the retailer's shelves;
- The **SSNIP** questions: Does the private label present a sufficiently strong alternative (i.e., constraint, not mere interaction) to induce consumer substitutability?
- Or... in different words: could branded goods suppliers introduce a SSNIP without losing sales to private label suppliers?

**The downstream market**

- Product characteristics: low-end or sophisticated?
- Consumer perceptions: 'Must-have' Coca-Cola?
- Type and category of private label: premium? mid-range? budget?
- Price trends
- Geographic preferences?

**Factors affecting market definition at the retail level**

**For example, princess/Premier Foods (OFT 2011):**

**Are branded and PL ambient pies in the same relevant market?**

Relevant considerations may include:

- A shift from own label to branded pies over time and heavy discounting on branded pies leading to a narrower price differential between the two products;
- Evidence of customer shifting to own label and evidence that own label was gaining its own 'brand' presence;
- No significant pricing gaps across branded and own label, and evidence of customer switching between them;
- Evidence that de-listing or promotional activity of one had affected sales of the other.

**How to answer the SSNIP question**

- (1996) KC/Scott: Toilet paper, paper towels and tissues, each constitute a separate product market, comprising both branded and private label products.
- (2001) SCA Metsa Tissue:

**“to what extent final consumers considered branded and private label tissue products to be in the same market”?**

- (2008) Friesland Foods/Campina : Branded and non-branded milk belong to the same relevant market.
- (2010) Novartis/Alcon: the market for contact lens multipurpose solutions in Germany includes also private label products.

**Additional case-law**



- The analyses of product market definition is not the end of the story;
- Upstream market: the production and supply segment;
  - Bilateral negotiations between suppliers/manufacturers on retailers' shelf-space.
  - A different **SSNIP** question, which takes into account the outside options of both the retailer and the producer:  
Is the manufacturer able to sell his product elsewhere, and/or, is the retailer able to purchase an alternative product to sell downstream?

**Upstream market**

- Barriers to entry for private label manufacturers;
- Similar or distinct brand/private label manufacturers?
- Profit margins;
- Ease of switching suppliers;
- Differences in procurement processes;
- Retailer buyer power?

**Factors affecting market definition at the wholesale level**

Kimberly-Clark/Scott (1996); SCA/Metsa Tissue (2001);  
SCA/P&G (2007) :

- Downstream competition between branded and private label tissues in the product relevant market.

**“it could not be excluded that private label competed with branded products at the retail level”**

- Insufficient competition in the upstream segment:

**“the supply of branded and private-label tissue products is characterised by two different sets of competitors which have only limited economic incentives and financial capabilities to seriously challenge each other’s product markets.”**

Case-law



➤ A **broad** market definition in the product market (brands + private labels), while a **narrow** market definition in the production and supply segment (separate markets for brands and private labels):

”As a result, the competitive interaction at the procurement level between producers of branded products and producers of private labels is **asymmetric** and very partial: the former can exert competitive pressure on the latter, but not vice-versa. Moreover, if one also considers that producers’ **margins are typically higher** for branded products than for private label products, it appears that manufacturers producing both branded and private labels would therefore normally prefer to use their capacity for production of branded products. As a result, the owners of strongly positioned tissue brands have a **clear focus on branded production** and mostly produce private labels to the extent necessary to utilise spare production capacity and gain economies of scale. SCA The Commission therefore considers that branded and private label consumer tissue products can compete with each other at the retail level, while being in Separate markets at the wholesale level.”

**Tissues (continued)**

➤ **Refresco/Pride Foods (2013):** The European Commission identified several distinct upstream markets:

“The market investigation indicates that although from a supply-side perspective the same machines can produce and bottle both private label and branded NCSDs, there is separate demand for the production and bottling of private label NCSDs from that of contract manufacturing branded NCSDs. Retailers require both on their shelves, but **the two markets operate according to different dynamics with differences in sharing of risks and responsibilities, length of contract, prices per litre, sales and tender process ...**

In view of the above and for the purpose of this Decision, the production and bottling of private label NCSDs for retailers and the contract manufacturing of branded NCSDs for brand-owners are considered as belonging to separate markets.”

**Case law (continued)**

- Friesland Foods/Campina (2008) : In the Dutch milk market where private label market share exceeds 50% and continues to rise, private label are presumed to restrain branded milk effectively.

“on the **retail-to-consumer level**, private label products compete with (producer) branded products.

[T]he extent to which **upstream** suppliers of private label and/or brands as well as the purchasing retailers, take into account in their upstream negotiations the competitive pressure that private labels and supplier brands mutually exert on each other at consumer level ...

depending on the relative importance of private label sales, suppliers cannot ignore the competitive pressure that private label exerts on their brands. This is especially the case when the suppliers of branded products are also the suppliers of private label products and both compete in the downstream market. In situations where the bulk of both the private label and the branded products are supplied by the same firms, it can thus be presumed that these firms would take into account, when supplying retailers, the substitutability of private label and supplier brands among end customers.”

**Case law (continued)**



Case	Parties	Downstream Market Definition	Upstream Market Definition	Decision
Tissue product mergers (EC)	Manufacture brands as well as PL for retailers	Broad (OB+PL)	Narrow (separate markets)	Approved under commitments
Milk: Friesland Foods/ Campina	Two largest dairy cooperatives in NL, producing branded dairy products	Broad (OB+PL)	Broad (OB+PL)	Merger compatible
Multipurpose solutions: Novartis/Alcon	Parties produce branded as well as PL pharmaceutical products	Broad (OB+PL) in Germany while narrow in other countries	Addressed in the competitive assessment	Approved under commitments
Soft drinks: Refresco/Pride Foods	Parties produce and bottle PL beverages for retailers as well as for brand owners through contract manufacturing.	Not directly dealt with	Narrow (separate markets in production and bottling)	Approved under commitments

## Interim case-law overview

## Diageo/United Spirits (OFT 2013):

- Diageo manufacturers branded Vodka and Scotch. United Spirits produces both brands and private label.
- Downstream market: retail (end-consumer) perspective.
- Upstream market: suspected unilateral effects between the parties, affecting retailers' ability to switch to alternative private label suppliers.
- OFT: “The boundaries of the market do not determine the outcome of the OFT’s assessment in any mechanistic way, and the OFT may take into account constraints from outside the relevant market, or the degree to which competitive constraints – inside and outside of the market—are more important than others”.



## Diageo/United Spirits (OFT 2013)

- Starting point: Market for branded Vodka (produced by both parties).
- Empirical evidence suggesting end-consumer willingness to substitute private-label and branded Vodka.
- But, almost all off-trade customers noted that private label vodka exerted no constraint on branded vodka, and did not affect the wholesale prices of branded vodka.
- Some retailers noted that private label profit margins are lower for private label than for branded vodka. This may limit the extent that retailers can threaten to switch (or may wish to switch) to private label.
- Conclusion: Vodka (excluding private label) is the relevant market, on a cautious basis.

**Branded Vodka**



## **Diageo/United Spirits (OFT 2013)**

- Off-trade customers explained that they would buy more branded Scotch if the price of private label Scotch increased, pointing to a strong constraint from branded on private label Scotch.
- Most retailers earned higher profit margins in private label than branded Scotch.
- End consumer switching data (Nielsen) indicated strong diversion between brands as well as considerable diversion to private labels.
- As a result, private label and branded whisky were considered together in the competitive assessment of the supply of blended Scotch in the off-trade.

**Scotch Whisky to the off-trade**



Diageo

15-25% losses  
(Nielsen)



20-30% losses  
(Nielsen)

United Spirits

- Analysis does not separate upstream from downstream market definitions.
- Private label competitive constraints are not assessed in the market definition stage, but rather in the competitive assessment.
- Regardless of the relevant market defined (narrow in Vodka, or broad in Whisky), private label competition is not excluded from the competitive assessment.

**Does it really matter?**

- The private label revolution is here to stay;
- Consumers may be happy, but future implications on competition remains to be seen;
- Short term v. long term market evolution;
- Does being outside the relevant market preclude the possession of market power ('binary fallacy')?
- Does a broad market definition (parties 'win') imply the possession of low market power?
- How is dominance assessed in upstream/downstream conflicting market definitions?
- What is the meaning of market shares when brands and private labels are produced by the same manufacturer ('dual producers')? Should private label market shares in such cases be attributed to retailers?
- How does the shift of power from suppliers to retailers and vice versa, affect the analysis?
- Is market definition at all important, once own brand/private label competitive constraints are introduced during the competitive assessment, regardless of the market definition outcome?

**Some relevant questions regarding the relevant market**

## Note I: A.A. ter Beek/Continental Bakeries (2016):

- Merger initially blocked, because retailers were presumably dependent on remaining two instead of three producers for their tenders of private label biscuit products, leaving insufficient competitive pressure to discipline the parties concerned.
- On appeal, the Trade Tribunal concluded that the Authority failed to provide sufficient reasons for blocking the proposed acquisition, because it erred in defining the relevant market.

Note I: Is “Raisin Bran” a kids cereal?

**“Placing less emphasis on market delineation and market shares would be for the best in many antitrust cases, but market delineation serves analytical and narrative purposes not served by other tools. Professor Kaplow’s proposal to abandon market definition would bring chaos to antitrust litigation.”**



G. Werden 2012



My conclusion: Market definition makes a useful tool to organize one's thoughts, but special nuances may apply.

Thank you!!