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MONOPSONY AND BUYER POWER

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FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Monopsony and Buyer Power held by the Competition Committee in October 2008.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

PRÉFACE

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur les monopsones et le pouvoir d'achat qui s'est tenue en octobre 2008 dans le cadre du Comité de la concurrence.

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

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EXECUTIVE SUMMARY

-- By the Secretariat --

Considering the discussion at the roundtable, the delegates' written submissions, and the background paper, the following key points emerge:

(1) Buyer power is concerned with how downstream firms can affect the terms of trade with upstream suppliers. There are two types of buyer power: monopsony power and bargaining power.

The distinction between the two types of buyer power is based on their source and the effect of their exercise. A firm has monopsony power if its share of purchases in the upstream input market is sufficiently large that it can cause the market price to fall by purchasing less and cause it to rise by purchasing more.

When there are relatively few suppliers and buyers and the terms of trade are determined by bilateral bargaining, bargaining power determines the extent to which a buyer is able to extract surplus from a supplier. Differences in bargaining power are reflected in differences in individually negotiated discounts. Bargaining power refers to the bargaining strength that a buyer has with respect to its suppliers.

Both types of buyer power result in lower prices, though the lower price obtained from monopsony power is achieved through the act of purchasing less, whereas the lower price obtained from bargaining power is achieved through the threat of purchasing less. A key difference is that the exercise of monopsony power results in prices being depressed below competitive levels, whereas the exercise of bargaining power might countervail seller market power and push prices toward competitive levels.

(2) The welfare implications, and therefore the appropriate enforcement policies, of the two types of buyer power are very different. Both result in lower input prices, but the exercise of monopsony power usually results in higher prices downstream. Reductions in input prices in the case of bargaining power are typically beneficial, so requiring an explanation of how increases in bargaining power would harm downstream consumers will help to avoid inadvertently deterring pro-competitive behaviour.

Monopsony and oligopsony power, assuming the absence of price discrimination, will result in a quantity distortion and loss of efficiency in the input market that will usually harm not only upstream suppliers, but also downstream consumers. The exercise of monopsony power in the input (upstream) market results in a transfer of profit from upstream suppliers to the buyer and a reduction in output below competitive levels. A firm with monopsony power will behave in the output market as if it had higher marginal costs than a firm that does not have monopsony power. As a result, prices downstream will be higher and downstream consumers are harmed even though input prices are lower. This is true even if the monopsonist is a competitive firm in the downstream market and supply from competing suppliers is perfectly elastic. If the monopsonist also has market power in the downstream market, the harm to efficiency and consumers is greater than if it does not.

It is less clear what the welfare implications are, and therefore what the role of competition policy is, with respect to bargaining power. Indeed, to the extent that bargaining power exercised by buyers is countervailing (i.e., offsets in whole or in part the market power of sellers), it may increase output in the upstream market and increase the welfare of consumers in downstream markets. The extent to which consumers benefit from the exercise of bargaining power depends on the nature of the upstream contracts and the extent of competition downstream. The more downstream competition there is and the greater the extent to which bargaining power results in discounts in the wholesale price, the greater the benefit to consumers. Negative welfare effects from the exercise of bargaining power must be indirect and arise by affecting competitors in some adverse way sufficient to substantially reduce competition in a market. Because of the potential for consumers in downstream markets to benefit from the exercise of bargaining power, it is important to identify how its exercise might harm them.

This suggests the value of a consumer harm test as a threshold screen. Such a screen follows from the observation that reductions in prices upstream are usually procompetitive and that it is difficult to determine whether increases in bargaining power will have negative or positive effects. Therefore, balancing Type I and Type II errors suggests the high threshold implied by a consumer harm screen to avoid chilling competitive behaviour.

(3) Distinguishing between the exercise of buyer power and conduct that creates, enhances or maintains buyer power is important.

The welfare effects of the exercise of buyer power should inform policy towards conduct that creates, enhances, or maintains buyer power. However, it may be difficult for competition policy and enforcement institutions—both agencies and courts— to restrain the exercise of buyer power effectively. The control of the exercise of buyer power, if required, may therefore be better assigned to a regulatory agency. The focus of antitrust agencies and competition law should be identifying and restraining conduct that creates, enhances, or maintains buyer power and results in harm to competition, i.e., reduces efficiency or harms consumers.

(4) The key to identifying monopsony power in practice is recognizing that it is the existence of alternatives for sellers that determines the extent of a buyer's monopsony power.

If sellers can easily find other buyers, then a buyer will have limited monopsony power. Other buyers may be in different geographic regions, have a different use for the input, or demand a different input that can be made from the same productive assets. The relevant market for the purpose of identifying monopsony power is the smallest set of products in the smallest geographic area such that a hypothetical monopsonist of those products in that area would be able to depress prices by a small but significant and non-transitory amount.

(5) When the number of buyers and sellers is small, bargaining is likely to be over the incremental surplus available to a buyer and seller relative to their outside options. The distribution of that surplus depends on relative bargaining power.

Incremental surplus is the gain over and above the benefit the buyer and seller would realize if trade between them breaks down and they instead trade with their next best alternative, i.e., their outside options. The greater the effectiveness of a buyer at bargaining, the larger the buyer's outside option, and the smaller the outside option of the seller, the greater the share of incremental surplus captured by the buyer. The value of the buyer's outside option depends on its ability and willingness to substitute alternative suppliers. Similarly, the value of the seller's outside option depends on its ability and willingness to substitute alternative buyers.

Identifying bargaining power involves determining whether, in a buyer's absence, sellers would exercise market power. Substantial bargaining power is typically linked to two factors which indicate that the buyer's outside option is better than the sellers': (i) the buyer can easily switch to alternative suppliers, sponsor new entry, or self supply without incurring substantial sunk costs and (ii) the buyer is a gateway to a downstream market.

To understand the buyer as a gatekeeper and the role of market power downstream, it is useful to recognize that the buyer is providing "distribution services" to the seller. The buyer is a gatekeeper when it has market power—as a *seller*— in the market for distribution in a geographic area. This will be the case, for instance, if upstream firms cannot access end customers efficiently without using the buyer (i.e., upstream firms have poor alternatives to the buyer to access the downstream distribution market).

(6) Conduct that gives rise to bargaining power might warrant scrutiny if (i) the lower wholesale prices obtained from this conduct lead to lower downstream market prices that decrease the profitability of a buyer's competitors, leading to their exit and an increase in its downstream market power, harming final consumers; or (ii) the lower wholesale prices obtained from this conduct by a buyer with market power results in an increase in the wholesale price to other buyers—a so-called waterbed effect—that results in an increase in prices to downstream consumers.

In scenario (i), intervention based on competition laws is problematic since it involves foregoing immediate and certain gains for consumers for the purpose of averting potential harm in the future. In scenario (ii), the increase in the price to other buyers raises their costs, leading either to their exit or giving them an incentive to raise their downstream price. However, there may not be a waterbed effect. Indeed, the price to buyers with less bargaining power might also decrease. Alternatively, other buyers may be able to implement counterstrategies that eliminate or narrow any asymmetries of buying power, thereby obtaining access to matching wholesale prices and benefiting consumers. Furthermore, even if there is a waterbed effect, prices to consumers in the downstream market might still decrease.

The effect on downstream prices depends on the interaction of three effects: (i) the firm with enhanced buyer power will have an incentive to lower its prices, since its marginal cost will have decreased and (ii) its downstream rivals will find it profit-maximizing to lower their prices in response, but (iii) the waterbed effect means that the rival firms have an incentive to raise their prices since their marginal costs have increased.

(7) The exercise of buyer power may affect dynamic efficiency by reducing the incentives of upstream firms to invest.

The prevailing view is that the exercise of buyer power undermines incentives for suppliers to invest. It is argued that a stronger buyer is more likely to "hold up" the supplier, extracting a larger fraction of the additional profits that the suppliers' upfront investment generates.

The relationship between buyer power and incentives for investment by upstream firms is complex. Suppliers who face a stronger buyer have increased incentives to undertake innovation and investment if such investment neutralizes some of the increased buying power. In particular, by lowering its cost or making its product more attractive, a supplier can reduce the buyer's outside option by making the buyer's competitors more profitable. A key distinction suggested in the literature, therefore, is between the effect of enhanced buyer power on the incentives for incremental investment and innovation (which may be positive), and on non-incremental

investment decisions (new product or whether to remain in the market) where the incentives depend on the absolute level of profit.

However, the presence of fewer and stronger buyers may make a hold-up problem less likely. For instance, larger buyers may find it in their own interest to engage with the supplier early on and to co-finance some of the required investment. Moreover, powerful buyers may indeed be necessary to discipline suppliers: a large buyer may be more willing to substitute away from a given supplier if the supplier's product falls short of expectations. Alternatively, powerful buyers may be more willing to integrate back into functions up the supply chain if suppliers perform poorly.

In the long run, hold up of suppliers by buyers with bargaining power may have negative ramifications for competition upstream: less investment and higher input prices if sellers exit the market as a result. These effects, if material, would eventually lead to harm in the downstream market in the form of higher prices and, perhaps, a loss in variety. The actual results will typically be difficult to predict with confidence. They are long-run effects that will require an assessment of how the transaction and the increase in buyer power will affect industry structure upstream. Moreover, these long-run costs, if any, may be offset in part by gains to consumers in downstream markets in the short run, depending on the extent of competition downstream. To avoid over-enforcement and false positives, the evidentiary threshold should therefore likely be relatively high.

(8) Bargaining power may be a countervailing factor that mitigates the possibility of an increase in market power from a merger.

A countervailing power defence to a merger among sellers requires a demonstration that, after the transaction, buyer power will remain sufficient to undermine attempts by sellers to increase prices. If the outside options of strong buyers remain unchanged by the transaction, then it may be the case that sellers will not be able to increase prices post-transaction.

If countervailing power substitutes for the competition lost in a merger of sellers, that substitution is based on short-run considerations (i.e., the ability to restrain price increases). Countervailing power may not be an equally good substitute for competition in the long run. In particular, countervailing power may not be as effective as competition among the sellers at preventing X-inefficiency and promoting product innovation and cost reduction.

SYNTHÈSE

-- par le Secrétariat --

Un certain nombre de points clés ressortent du débat organisé dans le cadre de la table ronde, des documents soumis par les délégués et du document de référence :

(1) *Le pouvoir de l'acheteur concerne la manière dont les entreprises en aval peuvent influencer les conditions d'échange avec les fournisseurs en amont. Il existe deux types de pouvoir de l'acheteur : le pouvoir de monopsone et le pouvoir de négociation.*

La distinction entre les deux types de pouvoir de l'acheteur repose sur leur source et sur l'effet que produit leur exercice. Une entreprise dispose d'un pouvoir de monopsone si l'importance de la part des achats qu'elle réalise sur le marché amont des produits intermédiaires est telle que l'entreprise est en mesure de faire chuter ou croître les prix sur le marché en réduisant ou en augmentant ses achats, respectivement.

Lorsque fournisseurs et acheteurs sont relativement peu nombreux et les conditions d'échange sont déterminées dans le cadre d'une négociation bilatérale, le pouvoir de négociation indique dans quelle mesure un acheteur peut obtenir un surplus de la part d'un fournisseur. Les différences de pouvoir de négociation tiennent aux écarts entre les remises négociées individuellement. Le pouvoir de négociation fait référence à la marge de manœuvre dont dispose l'acheteur pour négocier avec ses fournisseurs.

Les deux types de pouvoir de l'acheteur se traduisent par une baisse des prix, bien que celle obtenue grâce au pouvoir de monopsone résulte d'une réduction des achats, alors que celle obtenue grâce au pouvoir de négociation résulte de la menace d'une réduction des achats. Une différence fondamentale réside en ce que l'exercice du pouvoir de monopsone entraîne une baisse des prix au-dessous des niveaux de concurrence, alors que l'exercice du pouvoir de négociation est susceptible de compenser le pouvoir de marché du vendeur et de tirer les prix vers les niveaux de concurrence.

(2) *Les conséquences sur le bien-être, et donc les mesures d'application appropriées, liées aux deux types de pouvoir de l'acheteur sont très différentes. Ces deux types de pouvoir se traduisent par une baisse des prix des produits intermédiaires, mais l'exercice du pouvoir de monopsone entraîne généralement une hausse des prix en aval. La baisse des prix des produits intermédiaires résultant de l'exercice du pouvoir de négociation a d'ordinaire des effets positifs, c'est pourquoi la demande d'explications sur la manière dont le renforcement du pouvoir de négociation pourrait porter préjudice aux consommateurs en aval contribuera à prévenir les comportements proconcurrentiels involontairement dissuasifs.*

Si l'on suppose qu'il n'existe aucune discrimination de prix, les pouvoirs de monopsone et d'oligopsone engendreront sur le marché des produits intermédiaires une distorsion quantitative et une perte d'efficience qui, en règle générale, porteront préjudice non seulement aux fournisseurs en amont, mais aussi aux consommateurs en aval. L'exercice du pouvoir de monopsone sur le marché des produits intermédiaires (en amont) se traduit par un transfert de bénéfices des fournisseurs en amont vers l'acheteur et par une baisse de la production au-dessous des niveaux de concurrence. Une entreprise en position de monopsone se comportera sur le marché des produits finals comme si elle avait des coûts marginaux supérieurs à ceux d'une entreprise sans

pouvoir de monopsone. Par conséquent, les prix seront plus élevés sur le marché en aval et les consommateurs présents sur ce marché seront lésés, bien que les prix des produits intermédiaires soient inférieurs. Ce phénomène est avéré même si le monopsoneur est une entreprise concurrente située sur le marché en aval et l'offre des fournisseurs concurrents est parfaitement élastique. Si le monopsoneur jouit également d'un pouvoir de marché sur le marché en aval, la perte d'efficience et le préjudice causé aux consommateurs sont plus grands que dans le cas contraire.

Les conséquences sur le bien-être et, par conséquent, le rôle de la politique de la concurrence sont moins évidents en ce qui concerne le pouvoir de négociation. En effet, dans la mesure où le pouvoir de négociation exercé par les acheteurs est un facteur d'équilibre (c'est-à-dire qu'il compense totalement ou partiellement le pouvoir de marché des vendeurs), il peut accroître la production sur le marché en amont et renforcer le bien-être des consommateurs sur les marchés en aval. L'ampleur des avantages que retirent les consommateurs de l'exercice du pouvoir de négociation dépend de la nature des contrats en amont et de l'intensité de la concurrence en aval. Ces avantages sont d'autant plus grands que la concurrence en aval est plus intense et que les rabais sur les prix de gros liés à l'exercice du pouvoir de négociation sont importants. Les effets négatifs sur le bien-être découlant de l'exercice du pouvoir de négociation doivent être indirects et se manifester en influant sur les rivaux d'une manière suffisamment néfaste pour réduire sensiblement la concurrence sur un marché donné. Étant donné la possibilité pour les consommateurs présents sur les marchés en aval de tirer parti de l'exercice du pouvoir de négociation, il importe de savoir en quoi celui-ci pourrait leur être préjudiciable.

Aussi la réalisation d'un test de préjudice causé aux consommateurs présente-t-elle un intérêt pour déterminer le seuil d'intervention. Cette procédure découle d'une double observation : les baisses de prix en amont favorisent généralement la concurrence et il est difficile de savoir si le renforcement du pouvoir de négociation aura des effets positifs ou négatifs. Par conséquent, compte tenu des erreurs de type I et II, le seuil élevé qu'implique le test de préjudice causé aux consommateurs semble nécessaire pour ne pas réfréner les comportements concurrentiels.

(3) Il est important de faire la distinction entre l'exercice du pouvoir de l'acheteur et les comportements qui confèrent un pouvoir à l'acheteur, renforcent ce pouvoir ou l'entretiennent.

Les effets qu'a sur le bien-être l'exercice du pouvoir de l'acheteur devraient guider les mesures visant les comportements qui confèrent un pouvoir à l'acheteur, renforcent ce pouvoir ou l'entretiennent. Or, la politique et les autorités de la concurrence (organismes publics et tribunaux) peuvent avoir du mal à limiter l'exercice du pouvoir de l'acheteur. Il est donc sans doute préférable d'en confier le contrôle, au besoin, à une institution disposant de pouvoirs réglementaires. La principale préoccupation des autorités de la concurrence et du droit de la concurrence devrait être de définir et de limiter les comportements qui confèrent un pouvoir à l'acheteur, renforcent ce pouvoir ou l'entretiennent, nuisant ainsi à la concurrence en réduisant l'efficience ou en portant préjudice aux consommateurs.

(4) Pour caractériser le pouvoir de monopsone dans la pratique, il faut avoir conscience que c'est l'existence d'options pour les vendeurs qui détermine l'ampleur du pouvoir de monopsone de l'acheteur.

Si les vendeurs peuvent facilement trouver d'autres acheteurs, alors l'acheteur aura un pouvoir de monopsone limité. Les autres acheteurs peuvent se trouver dans des régions distinctes, utiliser différemment les produits intermédiaires ou avoir besoin d'un produit intermédiaire différent qui peut être fabriqué à partir des mêmes actifs productifs. Le marché à prendre en compte pour

caractériser le pouvoir de monopsone est constitué par le plus petit ensemble de produits dans la plus petite zone géographique, de telle sorte que l'éventuel détenteur d'un monopsone sur ces produits dans cette zone serait en mesure de faire baisser les prix dans des proportions restreintes, mais de manière significative et durable, néanmoins.

(5) Dans le cas où le nombre d'acheteurs et de vendeurs est faible, les négociations porteront probablement sur le surplus marginal dont peuvent bénéficier un acheteur et un vendeur au regard de leurs options extérieures. La répartition de ce surplus est fonction du pouvoir de négociation relatif.

Le surplus marginal correspond au gain par rapport au bénéfice que l'acheteur et le vendeur réaliseraient si, au lieu de poursuivre leurs relations commerciales, ils avaient recours à leurs options extérieures. Plus un acheteur est efficace dans ses négociations, plus son option extérieure est large, et plus celle du vendeur est restreinte, plus le surplus marginal sera proportionnellement élevé pour l'acheteur. La valeur de l'option extérieure de l'acheteur dépend de sa capacité et de sa volonté de changer de fournisseurs. De même, la valeur de l'option extérieure du vendeur dépend de sa capacité et de sa volonté de choisir d'autres acheteurs.

La caractérisation du pouvoir de négociation implique de déterminer si, en l'absence d'acheteur, les vendeurs exerceraient un pouvoir de marché. Un fort pouvoir de négociation est généralement associé à deux critères indiquant que l'option extérieure de l'acheteur est meilleure que celles des vendeurs : i) l'acheteur peut aisément recourir à d'autres fournisseurs, parrainer une nouvelle entrée sur le marché ou s'auto-approvisionner sans supporter des coûts irrécupérables élevés ; ii) l'acheteur joue le rôle de passerelle vers le marché en aval.

Si l'on part du principe que l'acheteur est en position de gardien et si l'on considère le rôle du pouvoir de marché en aval, il est bon de reconnaître que l'acheteur fournit des « services de distribution » au vendeur. L'acheteur est en position de gardien lorsqu'il détient un pouvoir de marché (en tant que *vendeur*) sur le marché de la distribution dans une zone géographique donnée. Ce sera le cas, par exemple, si les entreprises en amont ne peuvent atteindre les consommateurs finaux de manière efficiente sans l'intervention de l'acheteur (autrement dit, les entreprises en amont disposent de maigres options, hormis l'acheteur, pour accéder au marché aval de la distribution).

(6) Les comportements qui donnent naissance à un pouvoir de négociation pourraient justifier une certaine vigilance si : i) l'obtention de prix de gros inférieurs du fait de ces comportements entraîne une baisse des prix sur le marché en aval qui diminue la rentabilité des concurrents d'un acheteur, conduisant à leur éviction et à un renforcement de son pouvoir de marché en aval néfastes pour les consommateurs finaux ; ii) l'obtention par un acheteur disposant d'un pouvoir de marché de prix de gros inférieurs du fait de ces comportements aboutit à une augmentation du prix de gros appliqué aux autres acheteurs, selon le principe des vases communicants, d'où une hausse des prix subie par les consommateurs en aval.

Dans le cas de figure i), l'intervention fondée sur la législation de la concurrence pose problème car elle suppose de renoncer à des gains immédiats et certains pour les consommateurs afin d'éviter un éventuel préjudice à l'avenir. Dans le cas de figure ii), l'augmentation du prix appliqué aux autres acheteurs entraîne une hausse de leurs coûts, ce qui conduit à leur éviction ou les incite à relever leur prix en aval. Toutefois, il peut ne pas y avoir d'effet de vases communicants. En effet, le prix appliqué aux acheteurs disposant d'un moindre pouvoir de négociation pourrait aussi diminuer. En revanche, il se peut que d'autres acheteurs soient à même de mettre en œuvre des contre-stratégies qui éliminent ou réduisent toute asymétrie de pouvoir de

l'acheteur, leur permettant ainsi d'obtenir l'alignement des prix de gros qui leur sont appliqués, et ce au bénéfice des consommateurs. De plus, même s'il se produit un effet de vases communicants, les prix appliqués aux consommateurs sur le marché en aval pourraient encore baisser.

L'impact sur les prix en aval dépend de l'interaction de trois facteurs : i) l'entreprise bénéficiant d'un pouvoir de l'acheteur accru aura tendance à réduire ses prix du fait de la baisse de ses coûts marginaux ; ii) ses concurrentes en aval auront intérêt en termes de maximisation des bénéfices à réagir par une baisse de leurs prix ; iii) l'effet de vases communicants implique néanmoins une incitation des entreprises rivales à augmenter leurs prix en raison de la hausse de leurs coûts marginaux.

(7) L'exercice du pouvoir de l'acheteur peut influer sur l'efficacité dynamique en réduisant l'incitation des entreprises en amont à investir.

On estime généralement que l'exercice du pouvoir de l'acheteur compromet l'incitation des fournisseurs à investir. Il y a plus de chances qu'un acheteur puissant « prenne en otage » le fournisseur (hold-up), s'appropriant une part plus importante des bénéfices supplémentaires découlant de l'investissement initial réalisé par le fournisseur.

La relation entre le pouvoir de l'acheteur et l'incitation des entreprises en amont à investir est complexe. Les fournisseurs confrontés à un acheteur plus puissant ont davantage intérêt à innover et à investir si cela permet de neutraliser une partie du pouvoir accru de l'acheteur. En particulier, en réduisant ses coûts ou en faisant en sorte que son produit soit plus attractif, un fournisseur peut affaiblir l'option extérieure de l'acheteur en rendant plus rentables les concurrents de ce dernier. Selon les travaux publiés sur la question, il est donc essentiel d'opérer une distinction entre les effets d'un pouvoir de l'acheteur accru sur les incitations à l'investissement et l'innovation continus (ces effets pouvant être positifs) et sur les décisions d'investissement discontinues (nouveau produit ou décision de rester sur le marché ou d'en sortir), ces incitations étant fonction du niveau absolu des bénéfices.

Toutefois, la présence d'acheteurs moins nombreux et plus puissants peut réduire la probabilité d'un problème de hold-up. Par exemple, les grands acheteurs peuvent juger qu'il est dans leur propre intérêt de s'impliquer à un stade précoce auprès des fournisseurs et de cofinancer une partie de l'investissement requis. En outre, des acheteurs puissants peuvent en fait être nécessaires pour discipliner les fournisseurs : un tel acheteur risque d'être plus enclin à remplacer un fournisseur donné si son produit ne répond pas aux attentes, ou bien à réintégrer des fonctions situées en amont dans la chaîne d'approvisionnement si les fournisseurs offrent des prestations médiocres.

À long terme, le hold-up des fournisseurs par les acheteurs au moyen du pouvoir de l'acheteur risque d'avoir des effets négatifs sur la concurrence en amont, à savoir une diminution de l'investissement et une hausse des prix des produits intermédiaires si les vendeurs sont évincés du marché. Ces effets, s'ils se concrétisent, finiraient par être préjudiciables sur le marché en aval, se traduisant par une hausse des prix et, peut-être, une perte de diversité. D'une manière générale, les effets réels seront difficiles à prévoir avec certitude. Il s'agit d'effets à long terme qui exigeront de déterminer en quoi la transaction et le renforcement du pouvoir de l'acheteur influeront sur l'organisation du secteur en amont. De plus, ces coûts à long terme éventuels peuvent être partiellement compensés par des gains à court terme pour les consommateurs présents sur les marchés en aval, en fonction de l'intensité de la concurrence en aval. Pour éviter

l'excès de mesures d'application et les faux positifs, le seuil de la preuve devrait donc être relativement élevé.

(8) Le pouvoir de négociation peut être un facteur de compensation qui atténue la possibilité d'un renforcement du pouvoir de marché suite à une fusion.

Pour faire valoir efficacement l'argument tiré du pouvoir compensateur en cas de fusion de vendeurs, il faut démontrer que le pouvoir de l'acheteur restera suffisant après l'opération pour entraver toute tentative de hausse des prix de la part des vendeurs. Si les options extérieures des acheteurs puissants restent inchangées malgré l'opération, il se peut que les vendeurs ne soient pas en mesure d'augmenter leurs prix à l'issue de l'opération.

Lorsqu'un pouvoir compensateur remplace la perte de concurrence découlant d'une fusion de vendeurs, cette substitution repose sur des considérations à court terme (à savoir la capacité de contenir les hausses de prix). Un tel pouvoir compensateur peut ne pas être aussi efficient à long terme. En particulier, le pouvoir compensateur peut ne pas être aussi efficace que la concurrence entre les vendeurs pour ce qui est d'empêcher l'inefficience X et de promouvoir l'innovation et la réduction des coûts.

BACKGROUND NOTE[1]

1. Introduction

The last fifteen years or so have seen a marked increase in awareness and concern regarding conduct that creates, maintains or enhances buyer power, including monopsony power. The increased interest in appropriate competition enforcement policy raised by buyer power is reflected in not one, but two, previous OECD "Best Practice" roundtables: one in 1998 on the *Buying Power of Multiproduct Retailers*[2] and one in 2004 on *Competition and Regulation in Agriculture: Monopsony Buying and Joint Selling*.[3] There was a session on buyer power, featuring a panel discussion and six papers, at the 2000 Fordham Corporate Law Institute on International Antitrust Law & Policy,[4] and the American Antitrust Institute has had two symposia on buyer power.[5] The Federal Trade Commission held a workshop on slotting allowances and other marketing practices in the grocery industry in 2000[6] and subsequently released two related staff reports.[7] There was also a panel on monopsony power at the joint workshop sponsored by the Antitrust Division of the Department of Justice and the Federal Trade Commission on merger enforcement in 2004.[8] The interest continues. As a final example, the International Competition Network created a task force on "Abuse of Superior Bargaining Position" and held a special plenary session on the topic at its annual meeting in the spring of 2008.[9]

The policy interest is matched by litigation and enforcement. Concerns over collusion among buyers have been at issue in cases involving blueberries,[10] prescription drugs and dispensing fees,[11] acquisition of

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1 Prepared by Jeffrey Church, Department of Economics and Institute for Advanced Policy Research, University of Calgary, Calgary, Alberta, Canada. Mathew Reimer provided excellent research assistance.

2 See OECD Roundtable on Buying Power of Multiproduct Retailers (1998), available online at http://www.oecd.org/dataoecd/1/18/2379299.pdf.

3 See OECD Roundtable on Competition and Regulation in Agriculture: Monopsony Buying and Joint Selling (2004), available online at http://www.oecd.org/dataoecd/7/56/35910977.pdf.

4 See Hawk (2001).

5 The first in 2004. The second, more recently, in 2007. Five papers from the first, along with three others were subsequently published in the *Antitrust Law Journal* 72(2). The presentations from the second are available online at http://www.antitrustinstitute.org/Archives/2007_Buyer_Power.ashx.

6 See http://www.ftc.gov/bc/slotting/presentations/index.shtm.

7 Federal Trade Commission, *Report on the Federal Trade Commission Workshop on Slotting Allowances and Other Marketing Practices in the Grocery Industry* (2001) available online at http://www.ftc.gov/os/2001/02/slottingallowancesreportfinal.pdf and Federal Trade Commission, *Slotting Allowances in the Retail Grocery Industry: Selected Case Studies in Five Product Categories* (2003) available online at http://www.ftc.gov/os/2003/11/slottingallowancerpt031114.pdf.

8 See http://www.usdoj.gov/atr/public/workshops/mewagenda2.htm.

9 See http://www.icn-kyoto.org/documents/abuse.html#questionnaire and http://www.icn-kyoto.org/agenda/index.html.

10 Peace v. Jasper Wyman & Son, CV-00-015 (Super. Ct. Me. Nov. 18, 2003).

11 Bellevue Drug Co. v. Advance PCS, CV 03-47431 (E.D. Pa. Mar. 2, 2004).

tobacco leaf,[12] travel agent services[13] and basketball coaches at the college level in the United States.[14] Concerns over the potential for a transaction to create buyer power have been an issue in merger cases on both sides of the Atlantic, including transactions in grain trading, [15] health care[16] and retailing.[17] Predatory bidding to create monopsony power was the conduct at issue in the U.S. Supreme Court's recent decision in *Weyerhaeuser*,[18] while the Federal Trade Commission's successful action in Toys 'R' Us centered on the use of buyer power by Toys 'R' Us to raise the costs of, and exclude, downstream rivals.[19] Finally, in both Australia and the United Kingdom there was a recent inquiry into the retailing of groceries in which buyer power and its effects were a major focus.[20]

The objective of this background note is to provide a review of the economics literature on buyer power, including monopsony and bargaining power. Various definitions of buyer power are considered and the relationship between monopsony, bargaining, and countervailing power is discussed in Section 2. Sections 3 and 4 consider the sources and welfare effects of monopsony and bargaining power. Section 5 considers some issues in competition policy raised by buyer power, focusing on (i) predatory bidding by buyers in input markets; and (ii) buyer power in merger enforcement.[21] Section 6 considers a number of cases that illustrate some of the issues raised in competition policy enforcement by buyer power.

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12 Deloach v. Philip Morris Cos., No. 1:00CV01235, 2001 WL 724490 (E.D. Pa. 2004).

13 Hall v. United Airlines, 296 F. Supp. 2d 652 (E.D.N.C. 2003).

14 Law v. National Collegiate Athletic Association 134 F.3d 1010 (10th Circ. 1998).

15 United States v. Cargill Inc., No 1:99CV01875 (D.D.C).

16 United States v. Aetna, Inc. No. 3-99CV1398-H (N.D. Tex) and more recently Caremark Rx, Inc./Advance PCS, FTC File No. 031 0239 (Feb. 11, 2004).

17 In the EU see, Keso/Tuko, O.J. L 110/53 (1997), Rewe/Meinl, O.J. L 274/1 (1999), and Carrefour/Promdes (Case M. 1684). In the United Kingdom see Competition Commission, Safeway plc and Asda Group Limited (owned by Wal-Mart Stores Inc); Wm Morrison Supermarkets PLC; J Sainsbury plc; and Tesco plc A report on the mergers in contemplation (2003).

18 Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber. Co., 127 S. Ct. 1069 (2007).

19 Federal Trade Commission v. Toys "R" Us, 221 F. 3d 923.

20 See Competition Commission, *Market investigation into the supply of groceries in the UK 2008*, and Australian Competition & Consumer Commission, *Report of the ACCC Inquiry into the Competitiveness of Retail Prices for Standard Groceries* (2008). The inquiry in the United Kingdom follows up on a previous inquiry. See Competition Commission, *Report on the Supply of Groceries from Multiple Stores in the United Kingdom 2000*.

21 This note does not consider two other enforcement concerns related to buyer power. These are buyer groups and buyer-led vertical restraints. For an recent overview of the competitive effects of buyer groups, with a focus on both enhanced coordination in input markets, as well as when and how buyer power results in incentives for downstream firms to engage in vertical restraints that harm consumers, see Office of Fair Trading (2007). Another recent survey of buyer-led restraints is Dobson (2008). See also Comanor and Rey (2000) for analysis of buyer led vertical restraints to preserve market power in the downstream market by excluding entry and Marx and Shaffer (2007) for an analysis of slotting allowances and buyer power that finds that downstream firms with buyer power can use slotting allowances to exclude other downstream firms. For a contrary view see Klein and Wright (2007).

1.1 Key Points

1.1.1 Definitions

Buyer power is concerned with how downstream firms can affect the terms of trade with upstream suppliers. A distinction is made between monopsony power and bargaining power. A buyer has monopsony power if it can profitably reduce the price paid below competitive levels by withholding demand. Bargaining power refers to the bargaining strength that a buyer has with respect to suppliers with whom it trades. The lower price obtained from monopsony power is achieved through the act of purchasing less, not, as with bargaining power, the *threat* of purchasing less. Bargaining power is only exercised when in its absence suppliers would exercise market power. It is countervailing power.

The welfare implications of the two types of buyer power are very different. Monopsony and oligopsony power, assuming the absence of price discrimination, will result in a quantity distortion and loss of efficiency in the *input* market, and will likely harm consumers in downstream markets. It is less clear what the welfare implications are, and therefore what the role of competition policy is with respect to bargaining power. Indeed, to the extent that bargaining power exercised by buyers is countervailing (i.e. offsets in whole or in part the market power of sellers), it may increase output in the upstream market and increase the welfare of consumers in the downstream market.

1.1.2 Monopsony Power

A precondition for the exercise of monopsony power is the existence of supplier rents. Supplier rents can either be Ricardian, quasi, or monopoly. The welfare implications of the exercise of monopsony power depend on the type of rents available.

Ricardian rents exist when the factors of production used by suppliers are differentiated in terms of their productivity. Ricardian rents give rise to upward sloping *long-run* supply curves. The exercise of monopsony power depends on the elasticity of supply. The more inelastic supply, the greater the ability to exercise monopsony power. The exercise of monopsony power leads to a quantity distortion in the input market and typically harms consumers in the downstream market even though the input price decreases. A firm with monopsony power will behave in the output market as if it had higher marginal costs than a firm that does not have monopsony power. Consumers are harmed downstream even if the monopsonist is a competitive firm in the downstream market and there is perfectly elastic supply. If the monopsonist also has market power in the downstream market, the harm to efficiency and consumers is greater than if it does not.

A monopsonist may be able to make all-or-none offers to individual suppliers. The profit-maximizing all-or-none offer is for the competitive quantity for a total payment that just covers the costs of supply. Relative to a uniform price, an all-or-none offer is more efficient and, because it involves greater purchases of the input, better for consumers in the downstream market. Unless normative weight is given to the distribution of Ricardian rents accruing to suppliers, the welfare implications of all-or-none offers are not ambiguous: they are welfare enhancing. Preventing all-or-none offers, for example by requiring uniform prices, will harm consumers in the downstream market and reduce efficiency. Moreover, a danger with putting greater weight on the rents of producers, relative to consumers, is the adoption of policies that end up restricting competition and innovation among suppliers.

The key to identifying monopsony power in practice is recognizing that it is the existence of alternatives for the sellers that determine the extent of a buyer's monopsony power. If the sellers can easily find other buyers (who use the input for a different use), other buyers in different geographic areas (who use the input for a similar use), or other buyers for whom the assets can be used to make a different input,

then a buyer will have limited monopsony power. The relevant market for the purpose of identifying monopsony power is the smallest set of products in the smallest geographic area such that a hypothetical monopsonist of those products in that area would be able to depress prices by a small but significant and non-transitory amount.

Quasi-rents are the difference between total revenue and short-run avoidable costs. In the short run, a monopsonist may be able to extract quasi-rents. In the long run, any attempt to expropriate suppliers' quasi-rents will induce their exit: anticipating that they will not be able to recover their sunk investments, suppliers do not reinvest. Hence, if the input market is competitive, a monopsonist will not be able to exercise monopsony power in the long run unless there are Ricardian rents.

In the case of bilateral monopoly, joint profit maximization is preferable to either the upstream or downstream firms making take-it-or-leave it offers since the two firms will internalize each other's margins and this will lead to an expansion in output both up and downstream.

The creation of countervailing power to offset monopoly power in the upstream market might lead to an increase in output upstream and lower prices downstream. However, such countervailing power might not increase welfare if it results in negotiation failures, leads to enhanced coordination by the buyers in other markets, leads to the expropriation of Ricardian rents or quasi-rents, or reduces incentives for innovation upstream.

1.1.3 Bargaining Power

Bargaining power is typically defined as the strength of a buyer in its negotiations with sellers. Bargaining power is applicable to understanding the nature of trade between input suppliers and downstream firms when the interface or framework between trading partners involves bilateral negotiations. In this framework there are relatively few upstream and downstream firms and firms negotiate bilaterally over terms and conditions of supply.

Bargaining is likely to be over the incremental surplus available to a buyer and seller. Incremental surplus is the gain over and above the gains the buyer and seller could realize relative to their outside options. The greater the effectiveness of a buyer at bargaining, the larger the buyer's outside option, and the smaller the outside option of the seller, the greater the share of incremental surplus captured by the buyer. The value of the buyer's outside option depends on its ability and willingness to substitute to alternative suppliers. Similarly, the value of the seller's outside option depends on its ability and willingness to substitute to alternative buyers.

A buyer will have substantial buying power if (i) it can easily switch to alternative suppliers, sponsor new entry or self supply without incurring substantial sunk costs and (ii) it is a gateway to the downstream market. In the conception of the buyer as a gate-keeper and the role of market power downstream, it is useful to recognize that the buyer is providing "distribution services" to the seller. If the buyer is a gate-keeper, then the buyer has market power—as a *seller*— in the market for distribution in a geographic area. This will be the case, for instance, if upstream firms cannot access end customers efficiently without using the buyer (i.e. upstream firms have poor alternatives to the buyer to access the market). Identifying buyer power requires precise and careful market definition of the relevant downstream product and geographic markets to identify market power in distribution services provided by the buyer.

Two welfare issues arise with respect to bargaining power. The first is the welfare effects of the *exercise* of bargaining power. The second is the welfare effects of *conduct that creates, enhances or maintains* bargaining power. The two are related since the welfare effects of the exercise of bargaining power should inform the assessment of the welfare effects of conduct that creates bargaining power.

Looking, however, at the effect of the lower price (i.e. a discount to a large buyer), is not sufficient. Instead, an equilibrium analysis is required. The advantage of an equilibrium analysis is that responses by other firms (both upstream and downstream) to the discount given to the large buyer determine the ultimate effects of the exercise of bargaining power.

Differential bargaining power across buyers induces price discrimination in the upstream market with more powerful buyers paying less. The economics literature on the effect of price discrimination induced by differential bargaining power suggests that in general it is efficiency enhancing and benefits consumers downstream. If there is efficient contracting, then banning price discrimination is not efficiency enhancing or good for consumers in downstream markets. When contracting in upstream markets involves linear wholesale prices, then the welfare effects of price discrimination depend on the source of the bargaining power. If it is based on the threat of backwards integration by buyers, then price discrimination is harmful to consumers in the short run, but not necessarily the long run, depending on the incentives and ability for investment in cost reduction by the downstream firms. It is possible that the effect of banning price discrimination will decrease the incentives of both firms to engage in cost reduction, thereby harming consumers in the long run. If it is based on bilateral bargaining when the threat to integrate does not bind, price discrimination is much more likely to be beneficial to consumers unless the stronger buyer receives discounts substantially greater than its rivals and bargaining between the supplier and the strong buyer sets the common wholesale price.

Conduct that gives rise to bargaining power might attract competition policy concern if (i) the lower wholesale prices of the large buyer leads to lower prices downstream, which negatively affect the profitability of its competitors, leading to their exit and an increase in market power for the large buyer downstream, harming final consumers; or (ii) a discounted price to a buyer with market power results in an increase in the wholesale price to other buyers—a so-called waterbed effect. The increase in the price to other buyers raises their costs downstream, leading either to their exit or giving them an incentive to raise their downstream price. Scenario (i) is problematic since it involves trading off immediate and certain gains for consumers against potential harm in the future. However, a third possible outcome is that a greater price discount for a buyer whose power has increased leads to lower prices in the downstream market, both because other downstream firms respond to the decrease in price initiated by the wholesale price cut attributable to buyer power, and because they too are able to bargain for a lower wholesale price. Other buyers may be able to implement counter strategies that eliminate or narrow any asymmetries of buying power and benefit consumers.

It may be in the interests of the supplier to lower the price to smaller firms when there is an increase in buyer power by a dominant downstream firm. In an efficient contracting environment, as buyer power increases and a greater share of the joint profits are captured by the dominant downstream firm, the supplier upstream may places less weight on maximizing joint profits and more weight on the profitability of the competitive fringe. Lowering the transfer price to smaller buyers increases their output and profits, leading to lower prices and greater output in the downstream market. Moreover, to the extent smaller firms downstream are squeezed because of the lower costs of their larger rivals, their demand for the input falls, putting downward pressure on their price.

For a waterbed effect, changes in buyer power must result in a change in the transfer price paid per unit by rival downstream firms. Hypotheses that suggest the potential for a waterbed effect assume that buyers and sellers use simple linear contracts (i.e. all trade takes place at a negotiated wholesale price per unit). Even if there is a waterbed effect, prices to consumers in the downstream market might still decrease. The effect on downstream prices depends on the interaction of three effects: (i) the firm with enhanced buyer power will have an incentive to lower its prices, since its marginal cost will have decreased and (ii) its downstream rivals will find it profit-maximizing (assuming their costs are unchanged) to lower their

prices in response, but (iii) the waterbed effect means that the rival firms have an incentive to raise their prices since their marginal costs have increased.

There are three coherent case theories that could lead to a waterbed effect. The first two involve changes in the market structure upstream. Under the first, an increase in the bargaining power of a buyer reduces the profitability of upstream suppliers, this reduction in profitability leads in the long run to rationalization upstream, resulting in a decrease in the number of suppliers, and the reduction in the number of suppliers increases the bargaining power of the remaining suppliers, resulting in an increase in the upstream price paid by downstream rivals. Under the second, increases in buyer power might make entry less attractive by raising entry barriers and thereby reducing the profitability of serving small buyers, leading to an increase in the price small buyers pay. The key to a waterbed effect is that the greater the demand by the power buyer, the smaller demand from other buyers and hence the greater the average cost and price of supplying the small buyers.

The third waterbed theory involves market share shifting. A reduction in input prices reduces the marginal cost of the firm with enhanced buyer power, leading to an increase in their downstream sales, some of which is at the expense of its rivals. This shift in market share reduces the bargaining power of its downstream rivals, leading to an increase in their wholesale prices, further exacerbating the input price differential, downstream market size, and bargaining power differential.

1.1.4 Competition Policy Enforcement and Buyer Power

Predatory bidding involves a buyer increasing its purchases in the upstream market in order to raise the price of the input and reduce the profits of competing buyers, inducing their exit or marginalization and raising the buyer's monopsony power. There are good reasons for the liability standard in cases of predatory bidding to mirror the liability standard in cases of predatory pricing. The standard of liability for predatory bidding involves: (i) below cost pricing of the predator's *output*, and (ii) a dangerous probability of recouping its investment in below cost pricing. As with predatory pricing, the concern is that less stringent standards will chill pro-competitive price increases in input markets. The rationale for similar standards is stronger, as are the parallels between predatory bidding and predatory pricing, if it is recognized that the effect on input suppliers in the case of predatory bidding is symmetric with that of the effect of predatory pricing on downstream consumers. If the objective of competition policy is to protect market participants from anticompetitive conduct, then the harm to input suppliers from predatory bidding makes obvious the validity of using the two prongs of *Brooke Group* in cases involving predatory bidding.

A merger between buyers could create, enhance or maintain either classic monopsony power or bargaining power. If its effect is to increase monopsony power, then the welfare effects are to reduce price and quantity in the upstream market. In addition, the merged firm will behave as if its marginal cost in the downstream market has increased, reducing output and leading to an increase in prices in the downstream market.

The situation is not so straightforward if the merger increases bargaining power. If the effect of the increase in bargaining power is to increase the ability of the buyer to reduce the exercise of market power upstream, and if it leads to a reduction in the marginal expenditure paid by the buyer when input usage is increased, then it may have positive effects on the level of trade in both the input market and the downstream output market and the increase in buyer power is a source of efficiency gain from the transaction. However, increases in buyer power may not be beneficial depending on the equilibrium adjustments by suppliers and other buyers.

The presence of bargaining power may be a countervailing factor that mitigates the possibility of an increase in the exercise of market power from the merger. A countervailing power defence to a merger

among sellers requires a demonstration that after the transaction buyer power remains sufficient to undermine any price increases by the sellers. If the outside options of strong buyers remain unchanged by the transaction, then it may be the case that sellers will not be able to increase prices post-transaction.

If countervailing power substitutes for the competition lost in a merger of sellers, that substitution is based on short-run considerations (i.e. the ability to restrain price increases). The question is whether countervailing power is as good a substitute in the long run. In particular, is countervailing power as effective as competition among the sellers at preventing X-inefficiency and promoting product innovation and cost reduction? The issue of long-run industry performance might depend upon two trade-offs: (i) whether the characteristics of the industry mean that innovation is promoted more by competition among sellers or by cooperation between sellers and buyers, and (ii) whether innovation is promoted or hindered by a balanced vertical market structure, in which buyers and sellers are relatively equal.

2. Buyer Power: Definitions and Antitrust Issues

This section considers definitions of buyer power and introduces the antitrust issues specific to considerations of buyer power.

2.1 Definitions

Concerns regarding buyer power and its effects are typically raised in the context of transactions in intermediate goods, or input markets, where an upstream firm (the supplier) sells to a downstream firm (the buyer). In the simplest context, the downstream firm would use the input to produce and sell in a downstream market to consumers. Buyer power then is ultimately concerned with how the downstream firm can affect the terms of trade between it and its upstream suppliers. However, it has been pointed out that, "A casual reader of the literature on buyer power can be forgiven for feeling confused about what buyer power means."[22]

The literature is characterized by a distinction between monopsony power and bargaining power: the distinction between the types of buyer power is based on its source. The literature distinguishes between two types of trading environments or frameworks. The first is a market interface where traders on both sides of the market interact to set a market price, a price that in the absence of price discrimination, all buyers pay and all sellers receive. The second is a trading environment where there are relatively few suppliers and buyers and the terms of trade are determined by bilateral bargaining.[23]

In a market interface, a buyer has monopsony power if it can profitably reduce the price paid below competitive levels or its value of the marginal product.[24] This definition is symmetric with the usual

22 See Chen (2008, p. 2).

23 See Inderst and Mazzarotto (2008, pp. 1954-1955) or Chapter 14 of the Report of the ACCC Inquiry into the Competitiveness of Retail Prices for Standard Groceries by the Australian Competition & Consumer Commission (2008) available online at http://www.accc.gov.au/content/index.phtml?itemId=838251 for more on this distinction.

24 The marginal revenue product for a firm equals the marginal product of the input (how much production rises from purchasing another unit of the input) times the value of the output to the firm. If the downstream market for the firm is competitive, its marginal revenue product is simply the product of the price of output and the marginal product of the input, i.e. the value of its marginal product.

definition of market power: a firm with market power can profitably raise its price above competitive levels or marginal cost. For instance, Noll defines buyer power as: [25]

> A buyer has market power if the buyer can force sellers to reduce price below the level that would emerge in a competitive market. Thus buyer power arises from monopsony (one buyer) or oligopsony (a few buyers), and is the mirror image of monopoly or oligopoly.

As with market power, monopsony power arises if the buyer side of the market is sufficiently concentrated that buyers recognize that they are "price makers". They understand that if they withhold demand and purchase less, the price will fall, or if they increase their purchases the price will rise. Monopsony and oligopsony refer to the ability of a buyer to exercise market power, where the extent of buyer market power depends on the number and concentration of buyers.

In a bargaining framework, buyer power is associated with the ability of the buyer to extract surplus from a supplier. In this setup, differences in buyer power are reflected in differences in individually negotiated discounts.[26] In this context, a number of definitions of buyer power have been suggested including "the bargaining strength that a buyer has with respect to suppliers with whom it trades",[27] where the bargaining strength of a buyer depends on its ability to credibly threaten to impose an opportunity cost—harm or withdrawal of a benefit—if it is not granted a concession.[28]

Bargaining power is different from monopsony power. The lower price obtained from monopsony power is achieved through the act of purchasing less, not, as with bargaining power, the *threat* of purchasing less.[29] Moreover, bargaining power cannot be exercised when suppliers are competitive. It is not possible to push suppliers to price below marginal cost. Bargaining power can only be exercised when in its absence suppliers would exercise market power.

An immediate initial observation is that the welfare implications of the two types of buyer power are going to be very different. Monopsony and oligopsony power, assuming the absence of price discrimination, will result in a quantity distortion and loss of efficiency in the *input* market, and will likely harm consumers in downstream markets. It is less clear what the welfare implications are, and therefore

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25 See Noll (2005, p. 589).

26 See Inderst and Mazzarotto (2008, p. 1955).

27 See Inderst and Mazzarotto (2008, p. 1954).

28 See Kirkwood (2005, p. 637). In a draft of the paper for the OECD Roundtable Buyer Power of Large Scale Multiproduct Retailers, the OECD secretariat stated the following:

> A retailer is defined to have buyer power if, in relation to at least one supplier, it can credibly threaten to impose a long term opportunity cost (i.e. harm or withheld benefit) which, were the threat carried out, would be significantly disproportionate to any resulting long term opportunity cost to itself. By disproportionate, we intend a difference in relative rather than absolute opportunity cost, e.g. Retailer A has buyer power over Supplier B if a decision to delist B's products would cause A's profit to decline by 0.1 percent and B's to decline by 10 percent.

However, in the final paper, the OECD uses a more general definition: buyer power is "the ability of a buyer to influence the terms and conditions on which it purchases goods." See OECD Roundtable on Buying Power of Multiproduct Retailers at p. 18 http://www.oecd.org/dataoecd/1/18/2379299.pdf.

29 See Chen (2008).

what the role of competition policy is with respect to bargaining power. Indeed, to the extent that bargaining power exercised by buyers is countervailing (i.e. offsets in whole or in part the market power of sellers), it may increase output in the upstream market and increase the welfare of consumers in the downstream market.[30]

2.2 Antitrust Concerns

Competition policy involves identifying and enjoining firm conduct that creates, maintains, or enhances market power that, in turn, reduces welfare. Conduct that gives rise to anticompetitive harm means a harm to competition such that either consumer or total welfare is reduced.[31] As indicated in the previous section, the two types of buyer power give rise to potentially very different effects. In the next two sections the economics of each type of buyer power is explored in detail, with a focus on the conditions necessary for their exercise, and an understanding of the welfare effects of their exercise. It is, however, worthwhile flagging two key issues in advance. They are:

(i) Does the exercise of monopsony power harm downstream consumers? If it does *not,* should conduct that creates, maintains, or enhances monopsony power be enjoined? Is it sufficient that behaviour creates monopsony power and results in competitive harm in the upstream market (i.e. inefficiency in the input market)?

(ii) How does the exercise of bargaining power result in antitrust injury? If its exercise does not give rise to anticompetitive harm, why does bargaining power or conduct that enhances bargaining power raise antitrust concerns?

3. Monopsony Power

If the monopsonist is restricted to offering a common price, then a necessary condition for the profitable exercise of monopsony power is positive economic rents for suppliers.[32] The profitable exercise of monopsony power involves transferring these rents from suppliers to the buyer. Rents are positive if total revenues exceed the amount just required for suppliers to produce the quantity of goods sold. There are three types of rents that make suppliers vulnerable to the exercise of monopsony power:

- *Ricardian rents*. Ricardian rents exist when the factors of production used by suppliers are differentiated in terms of their productivity. More productive factors of production imply a lower cost of production for the firm that uses them. In competitive upstream markets, the marginal

30 John Kenneth Galbraith introduced and developed the concept of countervailing power to describe how buyer market power might arise in response to the exercise of market power by sellers. See Galbraith (1952).

31 Consumer surplus is a measure of the gains from trade that accrue to consumers. It is the sum over all units of the difference between what a consumer was willing to pay for a unit less what they actually had to pay for that unit. A total welfare standard is implemented by assessing changes in total surplus. Total surplus is the sum of producer and consumer surplus. Producer surplus is the difference between revenues and avoidable costs: it is a measure of the gains from trade that accrue to firms. When economists observe that a conduct is inefficient, they mean that it results in a decrease in total surplus. Because consumer and producer surplus are dollar measures of changes in welfare, when total surplus decreases from a change then those made better off by the change—the winners— could not compensate those harmed by the change—the losers—and still be better off, i.e., winners. An efficiency enhancing change increases total surplus, implying that winners could compensate losers and still be better off. It does not imply that compensation will be paid, only that the change creates enough wealth that it could be.

32 The following is based on Noll (2005).

supplier (or unit) is the firm (or unit) whose marginal cost just equals the price. Lower cost firms (or units) therefore earn a rent based on their lower cost and higher productivity. The rent earned per unit is the difference between the price received and marginal cost of supply. Ricardian rents give rise to upward sloping *long-run* supply curves.

- *Quasi-rents.* Quasi-rents are the difference between total revenue and short-run avoidable costs. The difference between long-run avoidable costs (when all factors of production are variable) and short-run avoidable costs are sunk expenditures. If the firm earns revenues at least as large as its avoidable costs (in the short run) it will stay in business. In the long run, however, it must recover – or expect to recover – all of its costs, including sunk expenditures, if it is going to stay in business.

  Short-run supply curves slope upwards if there is diminishing marginal productivity from increasing utilization of at least one variable factor. For the marginal unit supplied, its price equals marginal cost. All inframarginal units supplied earn quasi-rents or producer surplus, the difference between the price received and marginal cost of the inframarginal unit. The exercise of monopsony power can transfer some of these quasi-rents to the buyer, in the short run, but not in the long run. For the exercise of monopsony power to persist in the long run, it must be based on transferring Ricardian rents or monopoly rents.

- *Monopoly profits.* If the upstream suppliers have market power, they might earn monopoly rents. Monopoly rents are the difference between total revenues and the opportunity cost of all factors of production, where the opportunity cost includes Ricardian rents.

  The welfare issues raised by the exercise of monopsony power depend on the type of rents captured.

3.1 Ricardian Rents

The effects of monopsony power can be easily determined by considering the simplest possible case: the downstream firm is a monopsonist in the upstream market, but supplies output into a downstream market that is competitive. This would correspond to upstream markets that are local and characterized by one buyer, but downstream markets that are much broader where the buyer in each local upstream market competes with all other buyers. The limit on the number of upstream firms in each local market might be attributable to economies of scale and the small geographic extent of the market to high transportation costs. For example, the upstream market might be for an agriculture commodity, the buyer a food processor, and the food processors compete against each other downstream in the markets for food products.[33]

This model can be generalized in three respects: (i) introducing market power for the buyer downstream, (ii) introducing competition for the buyer in the upstream market and (iii) introducing market power for the sellers upstream. This last scenario provides a natural introduction to bargaining power discussions of buyer power.

3.1.1 Monopsony Upstream and Competition Downstream

Assume a pure monopsonist upstream who is a price-taker in downstream markets. A profit-maximizing firm will employ an input up until its marginal benefit equals its marginal cost. The benefit to the firm of purchasing another unit is its marginal revenue product. This is equal to the additional output

[33] This example is from Noll (2005, p. 597).

produced from purchasing another unit of the input multiplied by marginal revenue in the downstream market. The downstream market structure pins down marginal revenue: if the monopsonist is a price-taker in the downstream market, then marginal revenue is simply the price received downstream.[34]

A competitive purchaser in the upstream market would set its value of marginal product equal to the price of the input.[35] However, the monopsonist recognizes that eliciting supply of another unit of the input, when there is an upward sloping supply curve, requires an increase in the input price, not just for the marginal unit, but for all units. Hence the increase in expenditure for a monopsonist from purchasing another unit of the input consists of the price it pays for the marginal unit *plus* the increase in expenditures (from the higher price) on its inframarginal units (units it was already purchasing). The increase in expenditures on inframarginal units equals its total purchases multiplied by the increase in price required to elicit supply of the marginal unit. The total increase in expenditures to the monopsonist of purchasing another unit is its marginal factor cost. Marginal factor cost for the monopsonist exceeds the price of the input (by the amount of the increase in expenditure on inframarginal units) and hence, the expenditure for another unit is greater for a monopsonist than a competitive purchaser. Since the benefit from purchasing another unit of the input is the same, but the expenditure higher, a monopsonist will purchases less in the upstream market (i.e. there is a quantity distortion). The monopsonist buys less to lower the price it pays. This has two effects: (i) there is a transfer from suppliers to the buyer of some of the Ricardian rents, and (ii) the level of trade is inefficient. The exercise of monopsony power reduces the total gains from trade, but the monopsonist captures more; its profits increase.

Total welfare is reduced by the quantity distortion. Just as with the exercise of market power in downstream markets, the exercise of market power in the upstream market results in a deadweight loss. This is a quantification of the reduction in the value of output produced by the misallocation of resources. It equals, per unit of the input, the difference between the value of marginal product and the cost to supply the input. Summing up this difference, over all units that comprise the quantity distortion (the difference between the competitive output level and the lower monopsony quantity) equals the deadweight loss in the input market.

In the downstream market, the effect of the exercise of monopsony power can be easily identified. The marginal cost of downstream production for a monopsonist is greater than for a firm that is a price-taker in the upstream market. The marginal cost for a monopsonist equals marginal factor cost divided by the marginal product of the input. The marginal cost of a price-taker in the input market is the upstream price divided by the marginal product of the input. Since the marginal factor cost is greater than the input or upstream price, the effect of exercising monopsony power is to increase the marginal cost of the firm in the downstream market and hence, it will reduce its output.[36]

It is worth emphasizing that the effect of the exercise of monopsony power is harmful on downstream consumers even though it results in a lower upstream price. The reason is clear. The monopsonist purchases less of the input and hence supplies less in the downstream market. This will result in a decrease in output downstream and an increase in price, thereby harming consumers in the downstream market.

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34 In this case marginal revenue product is known as the value of marginal product.

35 In this case $VMP = P * MP = w$, where w is the factor price, MP marginal product, and P the downstream price. This can be rewritten as $P = w / MP = MC$ where MC is marginal cost, the familiar condition for profit maximization by a price taking firm. Marginal cost is the increase in cost from an increase in output. It equals the rate of change of cost divided by the rate of change in output. Increasing output requires using another unit of an input, which increases output at the rate MP and cost at the rate w.

36 This is true regardless of the downstream market structure. Profit maximization downstream involves setting output where marginal revenue equals marginal cost. If marginal cost increases, then a profit-maximizing firm will respond by reducing its output until marginal revenue again equals marginal cost.

An interesting and controversial variant of this analysis is to assume further that the competitors of the monopsonist downstream have constant average cost (i.e., the industry supply curve is perfectly elastic). The controversy is whether under these circumstances the exercise of monopsony power harms downstream consumers. Some commentators have argued that it does not, since the price downstream is set by the costs of the monopsonist's competitors.[37] The implication is that under a consumer welfare standard, this exercise of monopsony power is welfare neutral even if it creates deadweight loss in the upstream market.

Noll, however, suggests otherwise.[38] Under the circumstances assumed, the monopsonist reduces its purchases of more productive inputs and produces less for the downstream market. For there not to be an output effect in the downstream market, the monopsonist's competitors must expand their output to make up for the reduction in output. They do this by using less productive inputs (by definition, since the costs of rival firms are higher). However, since those inputs are less productive, the competitors' downstream increase in use of the input is greater than the monopsonist's decrease in the use of the input. As a result, the opportunity cost of the downstream good has risen (more input is required, implying a greater reduction in the output of the next best alternative good), leading to an increase in the *real price* of the downstream good (what must be forgone for another unit) and making consumers in the downstream market worse off.

The debate over the necessity for downstream effects as a prerequisite for antitrust enforcement in the case of conduct that creates monopsony power has instead centered on the objective of the antitrust laws. Federal Trade Commissioner Rosch, for instance, argues for a consumer welfare standard: antitrust liability requires market power over consumers in a downstream market.[39] Werden reviews the legislative history and case law in the United States and argues that both are not consistent with the necessity of showing consumer harm in the downstream market for liability under the *Sherman Act*.[40] Instead, Werden's reading of the record is that "sellers victimized by cartelization or monopolization" are, and were intended to be, protected by the *Sherman Act*.[41] Werden notes that the courts in the United States have emphasized protection of the competitive process because that process advances the interests of consumers, but that does not mean that the goal is only the welfare of consumers. Instead Werden argues that looking at the effect of conduct on the welfare of consumers promotes clarity in identifying the effect of the conduct on the competitive process.[42] Consumer welfare is a means to an end, but not the end.

The debate is in some sense therefore a false debate. Consumers are harmed by the exercise of monopsony power, so whether a total welfare standard or a consumer welfare standard is adopted, the exercise of monopsony power is not desirable. On the other hand, the debate may be about being able to identify in which market consumers are harmed and the magnitude of harm.

3.1.2 Monopsony Upstream and Monopoly Downstream

In this case the monopsonist has market power both up and downstream. The monopsonist will find its profit maximizing use of the input by setting its marginal factor cost equal to its marginal revenue product. Since marginal revenue is less than price—reflecting that to induce consumers to buy another unit

37 See for example Blair and Harrison (1993, p. 41), Jacobson and Dorman (1992, p. 161), and, more recently, Salop (2005, p. 673) and Rosch (2007).

38 See Noll (2005, pp. 599-600).

39 See Rosch (2007).

40 See Werden (2007).

41 See Werden (2007, p. 735).

42 See Werden (2007, p. 736).

in the downstream market, the monopolist downstream has to reduce its price on all units sold—the benefit to the monopsonist from purchasing another unit is less than it is for a competitive firm. Hence, a monopsonist with market power downstream will reduce its purchases of the input by more than if it were a price-taker downstream. Alternatively, since the effective marginal cost of a monopsonist in the downstream market is higher, a monopolist's marginal costs will be greater when it is a monopsonist than when it is a price-taker in the input market and it will, accordingly, charge a higher price and sell less in the downstream market. Increases in monopsony power when firms have market power downstream will be harmful to both total surplus and consumers downstream.

3.1.3 Oligopsony Upstream

If there is oligopsony upstream, then there will be competition among a few buyers for the input. If there is a limited number of large buyers and an upward-sloping supply curve, then it would be normal to expect (in a static setting) a Nash equilibrium in input purchases. In a Nash equilibrium in input purchases, each buyer sets their value of marginal product equal to the expected marginal factor cost, where they recognize that the input price depends on the aggregate purchases of all buyers. In the Nash equilibrium, they will exercise buyer market power, where the amount they exercise depends on their value of marginal product, the number of competing buyers, and the elasticity of supply. The Nash equilibrium in input purchases, given that the buyers are price-takers in the downstream market, is a mirror image, or symmetric to the Nash equilibrium in quantities in the downstream market when the sellers are price-takers in the upstream market(s).

3.1.4 Collusive Monopsony

The oligopsony Nash equilibrium will not maximize the profits of the buyers. In the Nash equilibrium each buyer will set their value of marginal product equal to their marginal factor cost, where each firm's marginal factor cost incorporates the effect of the increase in price from purchasing another unit of the input only on its inframarginal units. In the Nash equilibrium each buyer will not take into account that, at the margin, the increase in price required to purchase another unit will also increase the expenditures of each of their rivals. Relative to the level of input purchases that maximize downstream buyer profits, buyers overbuy and reduce profits. There will be an incentive, as with oligopolists, to coordinate purchases, exercise collective market power, and raise profits by reducing aggregate purchases and the input price.

The effect on expenditures on inframarginal units industry wide is incorporated into marginal factor cost for a pure monopsonist or a collusive monopsony seeking to maximize aggregate buyer profits. Of course, the failure of individual firms to internalize the effect of purchasing another unit on their rivals' profits is also why, in general, at least one buyer will have an incentive to cheat from a collusive monopsony outcome.

As with oligopoly, therefore, oligopsonists attempting to coordinate purchases and collectively exercise market power will have to be able to solve the following two problems: (i) they have to agree to the collusive outcome and (ii) they have to enforce the agreement by ensuring that the lost profits from cheating on the agreement, due to punishment in the future, are greater than the gains from cheating. As with oligopoly, these difficulties will be easier for oligopsonists to overcome the fewer the number of firms, the more transparent prices, and the less differentiated the input. The less the elasticity of supply and the greater barriers to entry into buying, the greater the gains from collusion.[43]

[43] See Blair and Durrance (2008) for discussion of factors that make coordination more or less difficult in oligopsony or Church and Ware (2000) for discussion of factors that make coordination more or less difficult in oligopoly.

3.1.5 All or None Offers

A monopsonist may be able to make so called all-or-none offers. The nature of such an offer is that the monopsonist agrees to pay a per unit price for all units purchased from a specific supplier, but specifies the total number of units it will purchase. In such a setting, the normal supply curve for a supplier, which specifies the price required to elicit supply of the marginal unit, is replaced instead by an all-or-none supply curve which specifies the price the supplier must receive in order to be willing to supply all of the units requested. At this price, the supplier just breaks even on the total volume, unlike a normal supply curve were the supplier breaks even at the margin (price equals marginal cost). The price for a total quantity supplied, given by the all-or-none supply curve, is lower than the price for the last unit of that aggregate quantity given by the normal supply curve. Under the all-or-none supply curve, rents made on the first units produced subsidize more expensive units produced at the margin, which the supplier loses money on if it accepts an all-or-none offer.[44]

In such a setting, the monopsonist will select the quantity that maximizes the total gains from trade (i.e., where its value of marginal product equals the marginal cost of production). However, it will not pay the competitive price for this competitive quantity, but instead, the price required so that the supplier just breaks even. This average price can be significantly lower than the marginal cost of the last unit.

The welfare effects of profit-maximizing all-or-none offers are interesting. The effect of monopsony is simply redistributive: it does not result in inefficiencies. The socially optimal amount of the input is produced and sold, but the monopsonist gets a larger share of the supplier's rents. Indeed, the supplier is left with exactly zero rents. Thus relative to a uniform price, an all-or-none offer is more efficient and, because it involves greater purchases of the input, better for consumers in the downstream market (some of the benefits of the lower price in the upstream market will be passed on to downstream consumers). Unless normative weight is given to the distribution of Ricardian rents accruing to suppliers, the welfare implications of all-or-none offers are not ambiguous: they are welfare enhancing. Preventing all-or-none offers, for example by requiring uniform prices, will harm consumers in the downstream market and reduce efficiency. Moreover, a danger with putting greater weight on the rents of producers, relative to consumers, is the adoption of policies that end up restricting competition and innovation among suppliers. [45]

3.1.6 Measuring Monopsony Power

The usual index used to measure the extent of market power exercised by a seller is the Lerner Index. In the case of a monopolist, it can easily be shown that:

$$L = \frac{P - MC}{P} = \frac{1}{\eta}$$

where the Lerner Index is the markup (price less marginal cost) as a percentage of price and it is equal to the inverse of the elasticity of demand (η). In the case of a monopsonist, the mirror image is the Buyer Power Index (BPI):[46]

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44 See Blair and Harrison (1993, pp. 73-75) for more on the all-or-none supply curve.

45 See Noll (2005, pp. 621-622 and 624).

46 See Blair and Harrison (1993).

$$\lambda = \frac{VMP - w}{w}$$

where w is the factor price and VMP the value of marginal product. In a competitive market $VMP = w$ and $\lambda = 0$. For a monopsonist it is easy to show that

$$\lambda = \frac{1}{\varepsilon}$$

where ε is the elasticity of supply. Hence, as with a monopolist, the ability of a monopsonist to exercise buyer market power depends on the willingness and ability of the other side of the market to substitute. In the case of a monopsonist, the greater the inelasticity of supply, the less sensitive supply to price, the greater the exercise of monopsony power. This makes intuitive sense, since the avenue through which suppliers can discipline the exercise of monopsony power is by reducing their supply. This harms the monopsonist since she loses her margin ($VMP - w$) on units no longer available to purchase when she reduces the price.

If there is a "competitive fringe" of small buyers that compete in the input market with one large buyer, then the buyer market power of the dominant firm will be constrained not only by the elasticity of supply of the sellers in the upstream market, but also by the fringe of small buyers. The more elastic the demand by the fringe, the more their purchases rise as the price falls, and the more difficult it will be for the dominant firm to exercise buyer side market power. The reduction in its demand, and hence the profits foregone, as it attempts to depress the price, will be greater as suppliers can instead substitute and sell to the fringe. It is possible to show that the BPI in the case of a dominant buyer is[47]

$$\lambda = \frac{s}{\varepsilon + \eta_f(1-s)}$$

where s is the share of purchases of the dominant buyer and η_f is the elasticity of demand of the competing buyers in the fringe. As expected, the exercise of market power by the monopsonist is inversely related to the elasticity of supply and the elasticity of demand for the fringe.

In equilibrium, the market share of the dominant firm and its exercise of market power will be correlated. The greater its share of purchases, the greater will be the BPI. However, this is not a causal relationship as both the BPI and s are endogenous. Instead it means that the larger the advantage the dominant firm has vis-à-vis the buyer fringe, the greater its market power. Presumably, the reason the dominant buyer is dominant is because its marginal revenue product is significantly higher than the fringe buyers' value of marginal product (i.e. because it is more efficient and/or its use for the input has a higher end value).

In the case of oligopsony with a downstream competitive market, the BPI for an individual buyer is:

$$\lambda_i = \frac{s_i}{\varepsilon}$$

where s_i is the share of purchases by firm *i*. Starting with this expression, it is possible to show that the exercise of monopsony power in the market (λ) is given by a weighted average of each firm's exercise of monopsony power,

47 See Blair and Harrison (1993, p. 51) or Blair and Durrance (2008, p. 406) for derivations of the BPI.

$$\lambda = \sum_{i=1}^{N} \lambda_i s_i = \frac{HHI}{\varepsilon}$$

where the weights are each firm's share of purchases and $HHI = \sum_{i=1}^{N} s_i^2$ is the Herfindahl –Hirschman Index based on share of purchases when there are N buyers.[48]

3.1.7 Identifying Monopsony Power

Monopsony power is the mirror of monopoly power: buyer market power instead of seller market power. Monopsony power can either be inferred from indirect evidence or measured directly. In rare instances, when a firm has already exercised monopsony power, there might be direct evidence of its exercise. That is, there might be empirical evidence that attests to the firm's ability to profitably decrease prices below competitive levels. Direct evidence of the exercise of market power typically involves reliable evidence on the competitive price level that can then be compared to the price observed. The difficulty is that only actual prices are observed, not competitive levels, and obtaining reliable estimates for the competitive price can be onerous or impossible.

The indirect approach involves defining the relevant market and assessing market shares, barriers to entry, and other relevant factors. In the case of monopsony power, some adjustments have to be made to reflect buyer market power, but the basic approach appears to be sound. There are two key adjustments:

(i) *Market Definition.* The hypothetical monopolist test needs to be adjusted to become the hypothetical monopsonist test. The relevant market for the purpose of identifying monopsony power is the smallest set of products in the smallest geographic area such that a hypothetical monopsonist of those products in that area would be able to depress prices by a small but significant and non-transitory amount. The base price would be competitive levels when the case is retrospective and, typically, the current price when the case is prospective, unless it is reasonable to expect that the price for the input is going to rise.

The purpose of market definition is to identify a set of productive assets over which a buyer could exercise monopsony power. The key to identifying monopsony power in practice is recognizing that it is the existence of alternatives for the sellers that determine the extent of a buyer's monopsony power. If the sellers can easily find other buyers (who use the input for a different use), other buyers in different geographic areas (who use the input for a similar use), or other buyers for whom the assets can be used to make a different input, then a buyer will have limited monopsony power.

(ii) *Barriers to Entry.* The relevant barriers to entry are the barriers that make entry into purchasing the input either *not* timely, likely or sufficient.

3.2 Quasi-Rents

In the short run, a monopsonist may be able to extract quasi-rents. Presumably the suppliers would not have incurred their sunk expenditures if they anticipated having their quasi-rents expropriated by a

[48] This expression for the weighted average exercise of buyer market power mirrors the expression for the weighted average exercise of seller market power when competition among the few is Cournot. See Church and Ware (2000, p. 239).

monopsonist. In the long run, any attempt to expropriate suppliers' quasi-rents will instead induce their exit: anticipating that they will not be able to recover their sunk investments, suppliers do not reinvest. Hence, if the input market is competitive, a monopsonist will not be able to exercise monopsony power in the long run unless there are Ricardian rents and the monopsonist can commit to not expropriating any quasi-rents.[49] Indeed, unless there are zero quasi-rents, or the monopsonist can commit to not expropriating quasi-rents, there is unlikely to be any supply in the long run. Suppliers who anticipate potential monopsony exploitation will refuse to invest in sunk assets and will either exit or not enter the market. This has obvious negative implications for efficiency and consumer welfare. Moreover, unless the mechanisms to protect against expropriation are perfect, which is unlikely to be the case, suppliers may be reluctant to enter or will protect themselves by under-investing.

An alternative outcome is that in the long run, as suppliers exit, those that remain develop market power. This market power is a countervailing factor against the market power of the buyer, such that suppliers are able to at least recover their long run average cost of supply. Relative to a competitive industry upstream and no monopsony power, the evolution of the industry structure to oligopoly upstream and monopsony power downstream is likely inefficient, and harms consumers in the downstream market.[50]

3.3 Bilateral Monopoly

The last case to consider is that of bilateral monopoly. In the simplest case, there is a single seller in the upstream market and a single buyer, who is also a monopolist, in the downstream market. If the buyer is able to make take-it-or-leave-it offers to the seller, then the outcome will be the same as pure monopsony. The monopsonist would set the monopsony price and the upstream firm would act as a price taker. If the upstream monopolist can make a take-it-or-leave-it offer, then it will profit maximize by setting the profit-maximizing price, and the downstream firm would act as a price-taker and choose how much to buy. However, both of these outcomes fail to maximize joint profits. When the upstream monopolist is able to make a take-it-or-leave-it offer, the downstream firm does not take into account that for every unit it sells downstream, the upstream monopolist makes a positive margin.[51] Likewise, when the downstream monopolist makes a take-it-or-leave-it offer, the upstream firm does not take into account that for every unit it sells at that price, the downstream firm makes a positive margin.

Given their mutual interdependency and the fact that neither is likely to be in a position to make a take-it-or-leave-it offer, the two firms are likely to instead behave very differently.[52] The hypothesis is that they will maximize joint profits, by appropriate choice of quantity, and then negotiate a transfer price that allocates the surplus. The quantity that maximizes joint surplus sets marginal revenue downstream equal to

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49 The incentives for expropriation of quasi-rents and hold up, as well as the extent to which contracts and other mechanisms, such as exchange of hostages or investing in a reputation not to act opportunistically, mitigate the incentive to act opportunistically is one of the main concerns of transaction cost economics. See Church and Ware (2000) Chapter 3 for an introduction, as well as references therein.

50 See Grimes (2005) for an extended discussion of the vulnerability of suppliers in competitive industries to hold up because of temporal specificity and inelastic supply. Temporal specificity arises when timing of performance is critical to realizing value. Temporal specificity means that delay or threats of delay can be very effective hold up strategies since the outside option will be low. See Masten (1996) or Church and Ware (2000, p. 72). See *infra* for more on the importance of outside options and bargaining over quasi-rents.

51 This is commonly known as the double mark up problem. See Church (2008, pp. 1466-1468) for discussion.

52 See Noll (2005, p. 602) or Office of Fair Trading (1998, pp. 17-18).

marginal cost upstream.[53] If the upstream firm has all of the bargaining power, then the maximum price the downstream firm would pay would give it zero profits: this is its average value product. Alternatively if the downstream firm has all of the bargaining power, then the minimum price the upstream firm will accept is that which gives it zero profits: this is its average cost of production.

When the two firms joint profit maximize, they internalize the lost margins of the other firm in determining the optimal amount of the input to trade. This means that joint profit maximization will involve an output level for the input that exceeds either of the take-it-or-leave-it offer possibilities discussed above. This increase in output increases both efficiency and, since it corresponds to an increase in output downstream, the welfare of final consumers.

3.4.1 Countervailing Power

It is important to observe that in the standard models of monopsony, the decrease in input price from the exercise of monopsony power is not passed onto consumers. The exercise of monopsony power is inefficient and harms consumers in the downstream market.[54] The bilateral monopoly model suggests, however, that it might be the case that monopsony power, created in response to upstream monopoly power, *might* be efficiency enhancing and beneficial to consumers downstream.

Relative to monopoly upstream and competitive buyers, if the buyers were to merge or otherwise coordinate to act like a monopsonist, it is possible that output upstream, and hence output downstream, might increase. The monopolist upstream would profit-maximize by setting its marginal revenue (based on the derived demand of the competitive buyers) to its marginal cost. If the buyers were to coordinate and exercise monopsony power, then it is hard to see why they would do worse. After all, they could just accept the monopoly price.[55] However, if they are able to coordinate and exercise monopsony power they will be able to do better if they can negotiate a lower price and increased output in the upstream market. This expansion in output in the upstream market would lead to greater output in the downstream market, lower prices, and hence be both efficiency enhancing and beneficial to downstream consumers.

The creation of opposing market power in response to original market power described in the preceding paragraph suggests that the creation of opposing market power can be socially beneficial because it is a countervailing force that offsets, at least in part, the original market power of the upstream monopolist.[56]

There are, however, at least four reasons for caution before accepting that the creation of countervailing power enhances efficiency and benefits downstream consumers:[57]

(i) Negotiation failures. If the monopolist and monopsonist are not able to come to an agreement on the division of joint profits, negotiation and trade can break down.

(ii) Spillovers into other markets. The coordination among the buyers will not necessarily be contained in the input market that is monopsonized. Instead the coordination in that market may

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53 Note that we have assumed one unit of upstream input is required to produce one unit of output downstream and that there are no other costs of production downstream.

54 The exception is if the monopsonist makes all or none offers in which case the outcome is the same as if there was a competitive upstream market.

55 See Noll (2005, p. 607).

56 See Galbraith (1952).

57 See Noll (2005, pp. 607-609).

reduce the costs of coordinating in *other* input markets or in downstream markets, thus creating original market power downstream or in another input market. This is particularly likely to be a problem if the upstream product is required as an input for all products in the downstream market and the geographic market downstream is similar to the geographic market upstream, so that the set of buyers upstream is similar to the set of sellers downstream.

(iii) Containing bilateral monopoly. Monopoly rents are not the only rents that may be transferred with the exercise of monopsony power. Coordination by buyers might result in successful attempts to capture quasi-rents or Ricardian rents, both of which can easily result in a reduction in trade in the upstream market and harm consumers in downstream markets.

(iv) Schumpeterian competition. If the monopoly position upstream is attributable to successful innovation or is otherwise the outcome of the competitive process, then monopoly profits are the reward for superior competitive performance. Efforts to reduce the extent of those rewards (i.e. through effective coordination by buyers), will reduce the incentives for firms to compete to become monopolists on the basis of being more efficient or having a superior product. While the creation of monopsony power might enhance short-run efficiency, the long-run costs may well be greater.

These considerations assume that the downstream market is competitive. The modern literature on countervailing power attempts to consider the effect of increases in buyer power on competition in both upstream and *downstream* markets. This literature is considered in the next section.

4. Bargaining Power

An alternative approach to considering buyer power is from the perspective of bargaining power. Bargaining power is typically defined as the strength of a buyer in its negotiations with sellers. Bargaining power is applicable to understanding the nature of trade between input suppliers and downstream firms when the interface or framework between trading partners involves bilateral negotiations. In this framework there are relatively few upstream and downstream firms and firms negotiate bilaterally over terms and conditions of supply. For instance, negotiations might be over discounts, with stronger buyers negotiating larger discounts. In this framework lower prices are not market-wide and not obtained by reducing purchases. Instead, buyers negotiate individual discounts based on the threat of purchasing less, but with the objective of maintaining or increasing purchases.

This section presents an overview of how terms of trade are negotiated, the role and determinants of buyer power, and the welfare impacts of input price discrimination based on differential buyer power. It is worth emphasizing that discounts to large buyers might not be due to bargaining power. They might, instead, be based on efficiencies associated with large volumes. The focus here is on non cost-related, or non-justifiable discounts.[58]

4.1 Understanding Bargaining Power

A simple example is often used to illustrate the bilateral bargaining framework, as well as the determinants and effect of bargaining power.[59] A downstream firm (the buyer) and an upstream firm (the

[58] It might also be the case that the buyers downstream are price takers, but the supplier upstream engages in profit-maximizing price discrimination. See *infra* at Section 4.3.1.

[59] See Inderst and Mazzarotto (2008, pp. 1954-1955) or the Australian Competition & Consumer Commission, *Report of the ACCC Inquiry into the Competitiveness of Retail Prices for Standard Groceries* (2008) Appendix I.

seller) enter into negotiations for the seller to provide the buyer with the upstream good. Let the value to the buyer of obtaining the input from the seller equal *V*. This is the net profit from sales downstream made possible if the input from the seller is acquired. The cost to the seller of supplying the input equals *C*. Hence, the joint profit available if the seller and buyer trade is *V*-*C*.[60] The two firms bargain over how to split this surplus. Let the payment from the buyer to the seller equal *W*. The question is how is *W* determined? If the seller has all of the bargaining power, then $W = V - C$ and the seller appropriates all the gains from trade. If the buyer has all of the bargaining power, then $W = C$ and the buyer appropriates all the surplus created by the trade.

However, suppose that if the buyer does not trade with this seller, they anticipate being able to realize profits of V_B from acquiring the input (or a different input) from another seller instead. Moreover, suppose that the seller could realize net profits of V_S if they traded with a different buyer. V_B and V_S are the breakdown or outside option payoffs. The buyer will not agree to a *W* that gives it payoffs less than V_B, nor the seller a *W* that gives it a payoff less than V_S. Instead they would terminate negotiations and exercise their outside option.

This means that the available surplus to be allocated by negotiation is the incremental surplus that can be realized by consummating a trade with each other that is over and above their combined outside options. This incremental surplus equals $V - V_B - V_S$. The effectiveness of bargaining of the buyer and seller determines how this will be split. The share of the net surplus is an ex post measure of their relative bargaining effectiveness. Suppose that the buyer's share is λ. Then the buyer's share of the incremental surplus is $\lambda\left(V - V_B - V_S\right)$, $W = (1-\lambda)(V - V_B) + \lambda V_S$ and the profits of the buyer are $V_B + \lambda(V - V_B - V_S)$.[61] The greater the effectiveness of the buyer at bargaining (as measured by λ), the larger its outside option, and the smaller the outside option of the seller, the smaller *W* and the greater the share of profits from the trade captured by the buyer.

4.1.1 Complications

The simple example of the last section ignores two important complications:

(i) It assumes either that the buyer and seller are negotiating over a single unit of the input, and hence, over its price, or that the buyer and seller have determined the volume of trade that maximizes joint profits and are negotiating the total payment from the buyer to the seller. The "what" of the negotiations will have implications on the effect of buyer power on downstream markets. Unless the effect of buyer power on the negotiations reduces the buyer's marginal cost of supplying the downstream market, the level of buyer power will not have an effect on the downstream market. If increased buyer power leads to an increase in wholesale price discounts then the buyer will have an incentive to increase supply and lower its price in the downstream market. If increased buyer power results only in a smaller fixed fee being paid to the upstream supplier or increased slotting allowances, it will not affect the incentives of the buyer in the

60 In the discussion of bilateral monopoly above, *V*-*C* equals the maximized profits from setting the level of the input such that marginal revenue downstream equals marginal cost of supply.

61 The solution applied to solve the bargaining problem is that of Nash. The Nash Bargaining Solution (NBS) was introduced by Nash (1950). More recently, modern bargaining theory has show that the NBS is the equilibrium to a standard non-cooperative bargaining game. See Binmore, Rubinstein, and Wolinsky (1986).

downstream market, at least in the short run.[62] Hence, the nature of the contracts between upstream and downstream firms is a critical issue in assessing the effects of buyer power.

A second critical issue is the extent of competition downstream since that determines the extent to which any decrease in marginal cost will be passed on to consumers as lower prices. Even a monopolist would lower its downstream price when its marginal cost falls.[63]

It is well known that when firms both up and downstream have market power, the use of simple wholesale prices leads to the double mark-up problem. It is also well known that there are more complicated non-linear contracts that internalize the externality associated with linear pricing (simple wholesale prices) and lead to joint profit-maximizing. An example is the use of a two-part tariff where the price per unit is the upstream marginal cost and the fixed payment is the share of joint profits captured by the upstream supplier. However, firms may still use, at least in part, contracts that involve a wholesale price that exceeds marginal cost. Doing so creates a margin for both the upstream firm and the downstream firm that encourages them to expand sales. Hence, double marginalization may be instituted as a response to situations of double moral hazard.[64]

(ii) It ignores that buyers and sellers may be in multiple bilateral negotiations. A buyer may be negotiating with multiple sellers and a seller may be negotiating with multiple buyers. This can be accounted for by recognizing that the outside options are endogenous in these circumstances.[65] Indeed the number of attractive options for either a buyer or seller is likely to raise their outside option. As discussed in the next section, the extent of competition between sellers to supply a buyer, or between buyers to purchase from a seller, are important determinants of buyer power.

4.2 Sources of Bargaining Power

The framework in the last section identifies three factors that determine bargaining power. These are the outside option of the buyer, the outside option of the seller, and relative bargaining effectiveness. Especially in the context of the relationship between grocery retailers and their suppliers, there has been considerable discussion of the determinants of these three factors.[66]

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62 Whether a reduction in fixed costs results in a decrease in price in the downstream market in the long run depends on the nature of competition in the downstream market and whether other firms receive a similar reduction. If they do, then the effect of a decrease in fixed costs is similar to a reduction in economies of scale and if that reduction in average cost results in greater entry in the long run, then the decrease in fixed costs will, to a certain extent, be passed on to final consumers.

63 See van Dijk and Verboven (2008, pp. 2342-2433) for a discussion of the determinants of pass through.

64 See Church (2008, p. 1468) for discussion. In addition low wholesale prices might lead to aggressive competition downstream: charging higher wholesale prices, because it raises the costs of buyers downstream, leads to a dampening of competition. See Bonanno and Vickers (1988) on incentives for wholesale prices above marginal cost to dampen competition.

65 Recent work by Björnerstedt and Stennek (2007) shows that intermediate goods markets may be efficient when there are multiple buyers and multiple sellers and interdependent bilateral bargaining. They show that the equilibrium quantities are the same as would be the case if the upstream market was competitive.

66 The following is based on a number of existing surveys, including Inderst and Mazzarotto (2008), Inderst and Shaffer (2008), Spector (2008), Dobson (2005), Bloom (2001), Collins (2001), and Australian Competition & Consumer Commission, *Report of the ACCC Inquiry into the Competitiveness of Retail Prices for Standard Groceries* (2008).

4.2.1 Buyer's Outside Option

The larger the buyer's outside option the greater its bargaining power. The value of its outside option will depend on its ability and willingness to substitute to alternative suppliers. The following factors influence its ability and willingness to source from other suppliers, thereby raising the value of its outside option.

- *Size of the buyer.* The size of a buyer may be an important determinant of the value of its outside option. In particular, the larger the buyer, the easier it may be for it to expand the pool of potential suppliers.[67] The larger the buyer, the cheaper it is, on a per unit basis, to switch suppliers if there is a fixed cost required to switch. The fixed cost to find alternative sources of supply might be associated with vertically integrating upstream and producing the input itself, the costs of switching to an alternative supplier (i.e. identifying and negotiating supply from another supplier), or the costs of sponsoring entry of a new supplier by agreeing to underwrite some or all of its costs of entry. Finally, the larger the buyer is, the greater the incentive to invest in information regarding alternatives.

- *Competition upstream*. If there are lots of potential suppliers of similar quality inputs, then the outside option of the buyer will be relatively large. In particular, if the buyer has many competitive alternatives to the input of a supplier, the buyer will have a high outside option. On the other hand, if the ability to substitute to other inputs is expensive or difficult, then the outside option of the buyer will be small. In a retailing context, a high outside option would correspond to a wide range of substitutable products and the absence of a "must stock" brand.[68]

- *Relative size of the buyer and the supplier.* If the buyer is large relative to the seller, then if the supplier is subject to a capacity constraint or has rising marginal cost, the larger the buyer, the greater the outside option of the buyer. In this case, the incremental cost to serve a large buyer increases less than proportionally with the buyer's size. The logic is that small buyers negotiate at the margin, where costs are higher, but large buyers negotiate for greater volumes, not at the margin, where average incremental cost is smaller. As a result, large buyers are able to negotiate larger discounts.[69]

  Recent results indicate if there is competition among suppliers, then suppliers will be uncertain as to which buyers they will eventually supply. As a result, when there are economies of scale, larger buyers will have an advantage since their expected incremental costs of supply will be lower.[70]

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67 The classic references here are Katz (1987) and Scheffman and Spiller (1992).

68 See Rey (2001). Rey observes that in the context of retailing the outside options from delisting a brand depend on whether the brand is a must stock, in which case if a retailer delists the brand, consumers will substitute retailers, or whether consumers will substitute an alternative brand instead of an alternative retailer if the brand is delisted.

69 See Inderst and Wey (2007) and Chipty and Snyder (1999). Raskovich (2003) terms the relationship between buyer power and the shape of suppliers' cost functions a relative effect. He also identifies an absolute size effect: if a buyer is large enough that it is pivotal, then it will have less buyer power than smaller non-pivotal buyers. A pivotal buyer is defined as a buyer sufficiently large that if the seller does not reach an agreement with it, the supplier will exit the market.

70 See Smith and Thanassoulis (2008).

4.2.2 Seller's Outside Option

The larger the seller's outside option the greater its bargaining power. The value of its outside option will depend on its ability and willingness to substitute to alternative buyers. The following factors limit the ability and willingness of a seller to substitute to other buyers, thereby reducing the value of its outside option.

- *Relative size of the buyer and the seller.* If the supplier is subject to a capacity constraint or has rising marginal cost, the larger the buyer, the smaller the outside option of the seller. A large buyer will have bargaining power over a supplier because the supplier will have difficulty finding buyers with a willingness to pay as much for the volumes purchased by the large buyer. By withdrawing their volumes, a large buyer is able to "inflict a more than proportional loss" on the supplier.[71]

- *Market power downstream.* The seller's outside option is going to be reduced if it is difficult to replace the buyer. This will be the case if there is limited competition in the downstream market. In an extreme case, alleged to be important in retailing, the buyer acts as a gate-keeper. A gate-keeper is a retailer that has significant market power in the downstream market because there are no other options for distribution. Without access to the retailer, the supplier cannot get efficient distribution of its product.

  In the conception of the retailer as a gate-keeper and the role of market power downstream, it is useful to recognize that the retailer is providing a service to the manufacturer. Thus it is really the retailer who is providing the upstream good, call it distribution, to the downstream firm, the manufacturer. In its role as a gate-keeper, the retailer has market power—as a *seller*— in the market for distribution in a geographic area.

- *Financial dependency.* In the event of a breakdown in negotiations, if the supplier is not well capitalized (i.e. it is "financially fragile") it may not have the resources to survive while it looks for alternative markets. Its outside option will therefore be relatively poor.

In considering the factors that influence the buyer's and seller's outside option, what may be critical for buyer power is their relative size. For instance, if terminating the relationship resulted in a 0.1 percent loss in profit for the buyer, but a 10 percent loss in profit for the seller, the buyer is likely to have bargaining power. The relative costs of making concessions will also be important in determining the distribution of surplus. If it is costly for a firm to make a concession, then it will have greater bargaining power. One such cost from conceding might be damage to a reputation for tough bargaining.

Moreover, some of the factors that make the buyer's outside option larger also make the seller's outside option smaller. This is particularly true with respect to competitive conditions up and downstream. Buyer power is likely to be more important (and seller bargaining power less) when the buyer has downstream market power and there are lots of competitive alternatives upstream. Conversely when the seller has market power and there are lots of competitors downstream, then buyer power will be less important. The value of outside options is closely related to the usual competition policy concept of market power: they are both based on the willingness and ability of a trading partner to substitute when faced with a disadvantageous change in the terms of trade.

[71] See Inderst and Wey (2007, p. 653).

4.2.3 Bargaining Effectiveness

The third potential source of buyer power relates to the ability of the buyer to extract a larger share of the incremental surplus. Two factors have been highlighted.[72] The first is that the trading party that has greater patience is more likely to have an advantage. If the buyer accounts for a large fraction of a supplier's trade, trade with the supplier does not account for a large fraction of the buyer's profits, and the supplier is financially constrained, then the buyer is likely to be more patient than the supplier (i.e. willing to wait and negotiate longer). The relative urgency on the part of the supplier will give the buyer an advantage in the negotiations. Second, a larger buyer is more likely to make investments in information to reduce the extent of asymmetric information. Bargaining models suggest that private information can provide a firm with an advantage. For instance, a seller will find it advantageous to inflate the *reported* value of its outside option if its value is unknown to the buyer. That is, in negotiating with the buyer, the seller has an incentive to try to mislead the buyer into believing that the seller's outside option is greater than its true value. Investments in information by the buyer can eliminate trading advantages the seller may have, based on buyer uncertainty about the seller's outside option.

4.2.4 Identifying Substantial Bargaining Power

In a recent report for the Office of Fair Trading (2007) in the United Kingdom, RBB has proposed a framework to identify "substantial buyer power". Substantial buyer power is intended to indicate that the buyer can affect terms of trade *for the market.* The framework involves using the hypothetical monopolist test to define the relevant upstream and downstream markets. A buyer will have substantial buying power if (i) the buyer can easily switch to "alternative suppliers, sponsor new entry or self supply without incurring substantial sunk costs"[73] and (ii) the buyer is a gateway to the downstream market. A buyer is a gateway to the market if it has market power in distribution services (see *supra).* This will be the case, for instance, if upstream firms cannot access end customers efficiently without using the buyer (i.e. upstream firms have poor alternatives to the buyer to access the market). RBB assess whether a buyer is a gate keeper by considering its share of purchases in the upstream market or the "sales channel"; barriers to entry in the downstream market; and the size of other buyers.

If the power of the buyer comes from its gate keeping role, then what is more important than its share of purchases in the upstream market is its *market power* and hence market share in the relevant downstream market.[74] Identifying buyer power requires precise and careful market definition of the relevant downstream product and geographic markets to identify market power in distribution services provided by the buyer.[75]

4.3 Welfare Effects of Bargaining Power

Two welfare issues arise with respect to bargaining power. The first is the welfare effects of the *exercise* of bargaining power. The second is the welfare effects of *conduct that creates, enhances or maintains* bargaining power. The two are related since the welfare effects of the exercise of bargaining power should inform the assessment of the welfare effects of conduct that creates bargaining power.

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72 See Inderst and Mazzarotto (2008, p. 1632).

73 Office of Fair Trading (2007 at 1.21).

74 See Bloom (2001, pp. 402-404) on market power in downstream markets as the source of buyer power.

75 See Schwartz (2004) for discussion on the importance of proper market definition in assessing buyer power.

4.3.1 The Exercise of Bargaining Power

Bargaining power is only going to arise in a setting where suppliers have market power. Competitive sellers will not discount below their marginal cost. Hence, prima facie, it appears that the exercise of bargaining power, to the extent that it leads to lower input prices and increased trade volumes, is efficiency enhancing. Moreover, if the increase in volume of the input and lower input prices lead to increased output and lower prices in the downstream market, consumers in that market will also benefit from the exercise of bargaining power by buyers. Looking, however, at the effect of the lower price (i.e. a discount to a large buyer), is not sufficient. Instead, an equilibrium analysis is required. The advantage of an equilibrium analysis is that responses by other firms (both upstream and downstream) to the discount given to the large buyer determine the ultimate effects of the exercise of bargaining power.

Differential bargaining power across buyers induces price discrimination in the upstream market. There is a very large literature on the economics of price discrimination, but most of it assesses the incentive and effects of price discrimination when the seller discriminates between final consumers. This literature assumes, therefore, that demand is independent. In the case of price discrimination in intermediate goods markets, to the extent buyers compete with each other in downstream markets, demands will be interdependent. There is a very small literature on price discrimination by a monopolist in intermediate goods markets.[76] There is an even smaller literature that considers price discrimination by a monopolist in intermediate goods markets where prices are set by bilateral bargaining with buyers.[77]

Intermediate market price discrimination without buyer power

When there is oligopoly in the downstream market, firms compete in quantities supplied (i.e. are Cournot competitors), and each buyer is subject to an individualized take-it-or-leave-it offer by the monopolist upstream (the seller has all of the bargaining power), the results in the literature indicate that price discrimination is likely to be inefficient, though not necessarily harmful to downstream consumers.

Under price discrimination, the monopolist would raise the price charged to efficient downstream firms and lower the price charged to inefficient firms. The reason is that downstream firms with a cost advantage have relatively inelastic demands. To understand the effect of price discrimination, suppose that downstream production involves fixed proportions between the monopoly supplied input and an outside input. Downstream firms differ in their efficiency with regard to the amount of each of the two inputs they require to produce a unit of output.

If downstream firms are ordered, such that if a firm uses less of the monopoly supplied input relative to a rival, then it also uses less of the outside input, then relative to a uniform price, price discrimination, at best, leaves total downstream output and total surplus unchanged. If there is no difference in the use of the monopoly supplied input, total output downstream is unchanged, but total welfare decreases. Total welfare declines since price discrimination transfers production from efficient to inefficient firms.[78] If there is not a difference in the use of the outside input, but only the monopoly supplied input, then total output falls in the downstream market and efficiency is reduced.[79] When there is only a difference in the use of the monopoly supplied input, the effect of the price discrimination is more harmful, since the monopolist has an extra incentive to raise the price to the efficient firms in order to extract profits, thereby increasing their marginal cost and reducing output. When demand is linear then only if (i) there is relatively extreme

[76] See Katz (1987), DeGraba (1990), Yoshida (2000), Valletti (2003), Beard, Kaserman, and Stern (2008).

[77] See Katz (1987), O'Brien and Shaffer (1994), O'Brien (2008), and Inderst and Valletti (2008a).

[78] See Katz (1987) and DeGraba (1990).

[79] See Yoshida (2000).

negative correlation between a firm's efficiency in use of the monopoly input and the outside input and (ii) total output decreases will price discrimination increase welfare. Of course since total output decreases, final consumers are harmed.[80] Indeed if total output *rises* under price discrimination, the harm from productive inefficiency must exceed the gain to consumers and total welfare falls.[81]

On the other hand, if the downstream market is competitive, then price discrimination could be good for consumers and efficiency. The upstream monopolist will have an incentive to shift demand to the efficient firms, since the margin available is greater for every unit made by the efficient downstream firm relative to the inefficient downstream firm. Charging the efficient firm a smaller price and the inefficient firm a greater price shifts their market shares downstream and by doing so could increase the profits of the monopoly supplier.[82] If markets downstream are competitive, this may increase total output, reducing prices in the downstream market and increasing efficiency.

Intermediate market price discrimination with buyer power

The effect of buyer power on the pattern of price discrimination in intermediate goods markets reverses the main finding of the analysis in the previous section when prices are linear: instead of large buyers paying more than smaller buyers, large buyers will pay less. The literature considers the following three situations:

1. take-it-or-leave-it contracts offered by the monopolist supplier, linear pricing in the wholesale market, and buyers have the option to integrate upstream;

2. nonlinear contracting and bilateral bargaining; and

3. linear pricing, bilateral bargaining, and buyers have the option to integrate upstream.

In the simplest case, (1), the exercise of buyer power is restricted to the option of integrating upstream if the take-it-or-leave-it offer by the monopoly supplier is too unattractive. In (2) and (3) the terms of trade are determined in accordance with the Nash bargaining solution (see *supra*) with two differences: the nature of the contracts upstream and, in (3) if the bargaining outcome is sufficiently poor, the larger buyer can integrate backwards.

Take-it-or-leave-it contracts, linear pricing, and threat of integration

Consider first the case of two downstream buyers, only one of which is able to integrate backwards, and an upstream monopoly supplier.[83] This might be the case if the firm that can integrate is a large buyer, its rival small, where the large buyer is a multimarket firm, while its rival is not. For instance the large buyer might participate in many markets against a single different competitor in each, e.g., a chain store in many geographic markets who competes in each geographic market against a single independent firm. If it is profitable for the monopolist upstream to price such that the chain store does not have an incentive to integrate, then relative to uniform pricing, total output downstream falls and welfare decreases when the monopolist engages in price discrimination. When increasing the price of the small buyer increases the profits of the large buyer when it does not integrate, then under price discrimination, the monopoly

80 See Valletti (2003). Most of the results are based on linear demand downstream, though Valletti has shown that they often hold when demand is concave or not too convex.

81 See Yoshida (2000).

82 See Beard, Kaserman, and Stern (2008).

83 The following is based on Katz (1987).

supplier will raise the price charged to both firms, relative to uniform prices. Only if price discrimination prevents inefficient backwards integration, i.e., the integrated buyer is relatively inefficient in upstream production, is price discrimination more efficient, though it still might harm consumers in the downstream market.

Suppose, however, that both downstream firms can integrate backwards, but that they differ in their efficiency. Then under take-it-or-leave-it offers, the upstream monopolist will price such that each is just indifferent to integrating or not (their indifference constraint binds). In this case, the buyer with the smallest marginal cost will have an advantage: its indifference constraint will bind at a lower wholesale price than its less efficient rival.[84] The price of the inefficient firm will exceed the optimal uniform price, which in turn is greater than the input price of the efficient firm under price discrimination. Consumer surplus increases in the short run with a ban on price discrimination, but in the long run, because it reduces the incentives for the inefficient firm – and maybe the efficient firm - to invest in cost-reduction, the ban may end up harming consumers. In particular the less efficient firm always has an incentive to reduce its investment. Investment by the inefficient firm relaxes the indifference constraint for the efficient firm, making it less likely that it will integrate, which then raises the uniform price charged both firms if price discrimination is banned.

Nonlinear contracting and bilateral bargaining

The second situation that has been considered involves a monopolist who negotiates nonlinear contracts with duopolists downstream who produce a differentiated product. Under these circumstances, a duopolist downstream has an extra incentive to negotiate a lower marginal input price as it gives it a competitive advantage downstream over its rival. This is especially the case if negotiations between a manufacturer and supplier are private: in this situation the rival downstream firm does not know the terms of the contracts negotiated by a firm and the supplier. The equilibrium result is that the contract negotiated between the supplier and a downstream firm maximizes their joint profits taking as given the price of the other downstream firm. Consequently, the monopoly supplier and each downstream firm have an incentive to act as if they were in a bilateral monopoly situation: they set the transfer price at marginal cost to maximize their joint profits. The joint profits are divided between the two firms based on the size of the fixed fee paid by the downstream firm to the supplier. The size of the fixed fee, and hence the division of the joint profits, is based on relative bargaining strengths.[85]

In considering a ban on price discrimination, there are three possibilities: (a) fixed fees are banned and the two suppliers have to be charged the same wholesale (transfer) price; (b) fixed fees and the wholesale price charged each firm have to be the same; and (c) the wholesale prices must be the same, but the fixed fees can differ. In all three cases, the effect of the ban on price discrimination is to raise downstream retail prices, harm consumers, and reduce welfare. This is not surprising, since the bargaining solution arrived at in the absence of a ban resulted in efficient pricing in the input market.

In (a) the upstream monopolist responds to the ban on fixed fees by raising its wholesale prices in order to extract profits. The result is double marginalization. In (b) the incentive to bargain for lower prices is removed, since lower input prices must be shared. Instead the monopolist sets wholesale prices above marginal cost to restrict competition downstream between the two firms, and extracts the profits through the fixed fees. In (c), the monopolist upstream is not constrained to a common fixed fee. Hence it uses the wholesale price to restrict competition downstream, thereby raising it above marginal cost and the firm-specific fixed fees to extract rents.

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84 See Inderst and Valletti (2008a).

85 This is based on O'Brien and Shaffer (1994).

Bilateral bargaining, linear pricing, and threat of integration

The third situation generalizes the first by assuming that the monopolist supplier engages in bilateral bargaining with the two downstream firms instead of assuming that the monopolist supplier makes take-it-or-leave it offers, subject to the constraint that the large buyer can integrate backwards.[86] The effect of price discrimination depends on whether or not the bilateral bargaining results in an outcome that would trigger backwards integration. If it would, then the outcome is the same as in the first situation. However, if the bilateral outcome results in an outcome that the large buyer prefers (the integration constraint does not bind), then the welfare effects of price discrimination are very different.

The bargaining power of the buyers depends on their bargaining effectiveness, the value of their outside option, and the value of the seller's outside option. The greater their bargaining effectiveness, the value of their outside option, and the lower the seller's outside option, the lower their wholesale price. If these three factors are the same for both buyers, then each will get the same wholesale price. A buyer will get a discount relative to its downstream rival if it has an advantage with respect to any one of these three factors, i.e., a greater outside option, a lower seller outside option, or greater bargaining effectiveness. The greater its advantage, the greater its discount. The discount could increase because its wholesale price is reduced by more than its rival or because its wholesale price decreases and that of its rival increases.[87]

If price discrimination is prohibited and a common wholesale price required, the results depend on the distribution of buyer power. If the two buyers are symmetric, then banning price discrimination results in higher input prices for both firms. The reason is that banning price discrimination affects the concession costs (the effect on profits of an adverse change in the wholesale price) for both buyers and the seller. It lowers the concession costs for the buyer, since if they agree to a higher wholesale price it will not result in a competitive disadvantage since their rival will also have to pay a higher wholesale price. Moreover, it raises the concession costs for the supplier, since if they agree to a lower wholesale price, it will be granted to all buyers. Forbidding price discrimination thereby increases the relative bargaining position of the seller and reduces it for buyers.

If the buyers' bargaining power is asymmetric, then the effect of a ban on price discrimination depends on which buyer the supplier negotiates with. If it is the weaker buyer, then the input price under the ban exceeds the average wholesale price in its absence. If the downstream firms compete over quantity and the technology downstream is fixed proportions (one unit of input required for one unit of output) then total output, and hence both consumer welfare and efficiency are higher with price discrimination than without.

If it is the stronger buyer with whom the supplier negotiates, then the effects of banning price discrimination are ambiguous. If the strong buyer has substantially more bargaining power than its downstream rival, the uniform wholesale price will be below the average input price under price discrimination. If not, the uniform price will exceed the average input price under price discrimination.

The welfare effects of price discrimination in input markets when buyers have buyer power

The limited literature that considers the welfare effects of price discrimination in input markets when there is buyer power suggests that those effects are very different from situations where there is not buyer power. If there is efficient contracting, then banning price discrimination is not optimal or good for consumers in downstream markets. When contracting in upstream markets involves linear wholesale

86 The following is based on O'Brien (2008).

87 O'Brien (2008) does not investigate the circumstances when the price of the buyer with less bargaining power rises or falls and none of his results depend upon it.

prices, then the welfare effects of price discrimination depend on the source of the bargaining power. If it is based on the threat of backwards integration, then price discrimination is harmful to consumers in the short run, but not necessarily the long run, depending on the incentives and ability for investment in cost reduction. If it is based on bilateral bargaining when the threat to integrate does not bind, the price discrimination is much more likely to be beneficial to consumers unless the strong buyer receives discounts substantially greater than its rivals and bargaining between the supplier and the strong buyer sets the common wholesale price.

4.3.2 Effects of Bargaining Power on Competition

In the previous section the welfare effects of the exercise of buyer power were considered. That analysis informs this section in which the focus is on conduct that increases, enhances, or maintains buyer power. The legal status of that conduct should depend on its effects. Except in the case where the exercise of buyer power involved exercising the option to integrate backwards, the exercise of buyer power was typically, though not always, found to be beneficial for consumers and efficiency enhancing. This suggests that considerable caution is warranted before enjoining behaviour simply because it creates buyer power.

Given that caveat, there are two possibilities under which conduct that gives rise to buyer power might attract competition policy concern:

(i) The lower wholesale prices of the large buyer leads to lower prices downstream, which negatively affect the profitability of its competitors, leading to their exit and an increase in market power for the large buyer downstream, harming final consumers.[88] The analysis above assumes that small buyers remain active in the downstream market. If they do not then that analysis is not appropriate.

(ii) A discounted price to a buyer with market power results in an increase in the wholesale price to other buyers—a so-called waterbed effect.[89] The increase in the price to other buyers raises their costs downstream, leading either to their exit or giving them an incentive to raise their downstream price. In either case, the result is an increase in price and market power downstream for the large buyer. Indeed, to the extent that its rivals' market share is squeezed by their higher input costs and the large firm's lower input costs, the result of buyer power could be a virtuous circle for the firm with buyer power and a vicious circle for its downstream competitors, and ultimately, consumers in the downstream market.

The potential for conduct to be anticompetitive because it gives rise to a waterbed effect is reflected in the European Commission's *Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements*:[90]

> the primary concerns in the context of buying power are that lower prices may not be passed on to customers further downstream and that it may cause cost increases for the purchasers' competitors on the selling markets because either suppliers will try to recover price

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88 Assuming entry barriers are sufficiently high to stop re-entry when the large buyer attempts to exercise its enhanced market power downstream.

89 The term originates from observing that pushing down on a waterbed in one spot results in the waterbed rising in another spot.

90 Official Journal C 3 of 06.01.2001, p. 2 at paragraph 126. See also the example at paragraph 135. Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2001:003:0002:0030:EN:PDF.

> reductions for one group of customers by increasing prices for other customers or competitors have less access to efficient suppliers.

> In addition, the Competition Commission in the United Kingdom considered the potential for an adverse impact on competition from a waterbed effect in its investigation of a supermarket merger.[91]

A third possible outcome is that a greater price discount for a buyer whose power has increased leads to lower prices in the downstream market, both because other downstream firms respond to the decrease in price initiated by the wholesale price cut attributable to buyer power, and because they too are able to bargain for a lower wholesale price. Other buyers may be able to implement counter strategies that eliminate or narrow any asymmetries of buying power and benefit consumers.

The first scenario that gives rise to market power downstream in the long run raises difficulties from a competition policy perspective. The theory of anticompetitive harm rests on the premise that an efficiency gain, despite its immediate benefits for consumers, gives rise to a structural change in the downstream market that results in an increase in market power. Competitors downstream are excluded only because they are unable to compete against a more efficient competitor, not because of conduct that is predatory or exclusionary. Without an exclusionary effect on competitors downstream, it is not clear that the conduct which created the buyer power should be subject to antitrust sanction.[92]

The second scenario does raise the possibility that the increase in buyer power directly harms a competitor leading to harm to consumers in the downstream market. This is when there is a waterbed effect. The next section discusses the possibilities of a waterbed effect. Not surprisingly, given that price discrimination based on buyer power in an intermediate good market is only harmful when there is a threat of upstream integration, it is that effect upon which the foundation for coherent theories of a waterbed effect are based.

4.4 The Economics of Bargaining Power: Retail Price Effects

The economics literature that considers the equilibrium effects of increasing bargaining power is very small. Untangling the effect of increases in bargaining power can be relatively tricky if the increase in buyer power is from a merger, which also has implications for market power in the downstream market. While the increase in buyer power puts downward pressure on the upstream price, the increase in market power downstream puts upward pressure on the downstream price.

For instance, consider a situation where a monopolist upstream supplies an oligopoly downstream.[93] Assume that the buyers are all symmetric and consider what happens if their buyer power is increased by

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91 See Competition Commission, Safeway plc and Asda Group Limited (owned by Wal-Mart Stores Inc); Wm Morrison Supermarkets PLC; J Sainsbury plc; and Tesco plc A report on the mergers in contemplation (2003) at 2.218. Available at http://www.competitioncommission.org.uk/rep_pub/reports/2003/481safeway.htm#full.

92 See Antitrust Division Submission for OECD Roundtable on Portfolio Effects in Conglomerate Mergers (2001), available at http://www.usdoj.gov/atr/public/international/9550.pdf for the difficulties of implementing welfare enhancing competition policy based on conduct that creates efficiencies and is not exclusionary or predatory.

93 See von Ungern-Sternberg (1996) and Dobson and Waterson (1997). von Ungern-Sternberg assumes a monopoly supplier, Cournot competition downstream with a homogenous good, and Nash bargaining in the upstream market. Dobson and Waterson is similar, except downstream products are differentiated and competition is over price.

assuming a merger between two of them. Such a merger would appear to reduce the outside option for the upstream monopolist, reducing its bargaining power and hence, the price upstream. However, whether it does in fact, depends on the nature of competition downstream. If the downstream market is not very competitive, then the reduction in the number of firms downstream leads to an increase in market power. This means that the outside option of the seller when negotiations fail with one downstream firm increases since the elimination of another firm downstream would raise the profits of the remaining downstream firms. The result is an *increase* in the wholesale price. Only if there is relatively strong competition downstream does the increase in buyer power from a merger result in a decrease in the wholesale price and a reduction in the price downstream. In these circumstances, the upstream monopolist's profits are subject to considerable dissipation and it may respond by refusing to supply all but one downstream firm, leading to higher prices and a reduction in variety.

The symmetry of the downstream firms, and the fact that the buyer power of all of them is increased by the merger, raises issues as to the generality of the results. The concern, after all, is with the implications of asymmetric buyer power on firm-specific wholesale prices. There are two strands to the literature that looks at the effect of firm-specific discounts attributable to asymmetric bargaining power.

4.4.1 Anti-Waterbed Effects

It has been argued that an analysis of countervailing power should incorporate two relevant features. The first is asymmetries of size among buyers. Specifically, in many instances where buyer power is a concern, there is a dominant downstream firm constrained only by smaller firms. These smaller firms are characterized as a competitive fringe that responds to the downstream price set by the dominant firm. The second is that contracting between the suppliers and downstream firms should not be restricted to simple linear pricing, but instead be more general.

In a contracting environment under which two-part tariffs, for example, can be used, the monopolist upstream and the dominant firm who maximize joint profits may institute efficient pricing. Efficient pricing means that the transfer price of the input is set at marginal cost. The bargaining between the input supplier and the dominant firm is over the share of profits. Increasing buyer power, as reflected in the dominant firm capturing a larger share of joint profits, cannot have an effect on competition in the downstream market because the increase in bargaining power does not change its marginal cost.

In response to an increase in bargaining power, however, the monopoly supplier upstream has an incentive to lower the unit price charged to the downstream competitive fringe.[94] As buyer power increases and a greater share of the joint profits are captured by the dominant downstream firm, the upstream monopolist places less weight on maximizing joint profits and more weight on the profitability of the competitive fringe. Lowering the transfer price to the fringe increases their output and profits, leading to lower prices and greater output in the downstream market. The monopolist supplier extracts the increased profits of the downstream fringe firms by increasing the fixed fee of their two-part tariff. This example also illustrates the incentive upstream firms have to maintain a large number of buyers downstream to avoid excessive dependence and the creation/enhancement of buyer power.

The literature on vertical mergers also suggests an anti-waterbed effect. That literature suggests the possibility that a vertical merger resulting in higher input prices for unintegrated firms is not a certainty. While it is true that the merged firm has an incentive to withdraw supply from the upstream market, since it benefits from a higher price, whether the equilibrium outcome is a higher price is much less clear. The lower costs of the merged firm, from internalizing double marginalization, squeeze the market share of its unintegrated rivals in the downstream market. As a result their demand for the input falls, putting

94 See Chen (2003).

downward pressure on its price.[95] Similarly in the case of buyer power, to the extent smaller firms downstream are squeezed because of the lower costs of their larger rivals, their demand for the input will fall, putting downward pressure on their price.

Small buyers downstream might also benefit if the presence of a large buyer, with buyer power, makes collusion upstream difficult. This might be the case if the presence of a large buyer creates incentives for sellers to offer a lower price and deviate from the coordinated price. If the sellers cannot price discriminate between the buyers downstream, then small buyers will benefit from the lower prices that the sellers will agree on in order to make deviations less profitable.[96]

4.4.2 Waterbed Effects

For a waterbed effect, changes in buyer power must result in a change in the transfer price paid per unit by rival downstream firms. Hypotheses that suggest the potential for a waterbed effect assume that buyers and sellers use simple linear contracts (i.e. all trade takes place at a negotiated wholesale price per unit). The theories differ in terms of how differentials in buyer power result in an increase in the upstream price paid by downstream rivals. Two are dynamic and involve changes in market structure and market power upstream. The third looks only at how changes in buyer power downstream shift market shares downstream, thus negatively affecting the bargaining power of competing downstream firms.[97]

Even if there is a waterbed effect, prices to consumers in the downstream market might still decrease. The effect on downstream prices depends on the interaction of three effects: (i) the firm with enhanced buyer power will have an incentive to lower its prices, since its marginal cost will have decreased and (ii) its downstream rivals will find it profit-maximizing (assuming their costs are unchanged) to lower their prices in response, but (iii) the waterbed effect means that the rival firms have an incentive to raise their prices since their marginal costs have increased.

The results for the three theories with waterbed effects that are profit maximizing, depend upon competition, or at least the potential for competition upstream. Before discussing these three coherent theories of possible waterbed effects, it is important to understand that neither depends on the following commonly held intuition.

It is alleged that the price for rival firms must increase when a powerful buyer receives a discount because the supplier has to make up its margins to cover its fixed costs. This is an unsatisfactory explanation since, if it is profit-maximizing for the seller to increase its price after the discount, it should have been profit-maximizing for it to increase the price before the discount. Indeed, the dynamic put into play might be that other downstream firms demand a similar discount.[98] Moreover, the implication is that the seller must raise its prices to others in order to break even. That, however, implies an absence of market power that is inconsistent with waterbed effects.[99]

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95 See Church (2008, p. 1477).

96 See Snyder (1996) for a formalization of this argument.

97 There are three recent contributions that derive waterbed effects in a formal economic model. These are Majumdar (2006), Inderst (2007), and Inderst and Valletti (2008b). These papers are discussed extensively in Dobson and Inderst (2008).

98 The granting of a discount to one buyer makes it more profitable to grant discounts to other buyers since it lowers the outside option of the seller. It lowers the outside option because the seller now makes lower margins on sales to the downstream firm first granted a discount.

99 See Dobson and Inderst (2008, p. 342).

Dynamic hypothesis: Changing the upstream market structure

The dynamic hypothesis is based on the following logic: (i) an increase in the bargaining power of a buyer reduces the profitability of upstream suppliers, (ii) this reduction in profitability leads in the long run to rationalization upstream, resulting in a decrease in the number of suppliers, (iii) the reduction in the number of suppliers increases the bargaining power of the remaining suppliers, resulting in an increase in the upstream price paid by downstream rivals, and (iv) the consolidation upstream is not sufficient to eliminate the preferential terms negotiated by the powerful buyer.

For this hypothesis to make sense, it must be the case that competition upstream is such that suppliers are earning close to competitive returns. Moreover, it is problematic in that it is not clear that the buyer has an incentive to squeeze suppliers such that their long-term survival is put in doubt. However, it has been suggested that this might happen because of asymmetries of information regarding the profitability of the suppliers, that large buyers downstream are in a prisoners' dilemma (each gains by expropriating quasi-rents before its rivals, even though all would be better off in the long run if none expropriated quasi-rents) and, finally, that the consolidation might end up benefiting large buyers and discriminating against small buyers in such a way that the profits of the large buyer are greater with a more concentrated upstream market.[100]

Increasing entry barriers upstream

Increases in buyer power might make entry less attractive by raising entry barriers and thereby reducing the profitability of serving small buyers, leading to an increase in the price small buyers pay.[101] For instance, suppose there is a chain retailer who participates in many local geographic markets. In each local market there is also an independent retailer. Competition downstream is over quantities. There are two upstream suppliers and production upstream requires a sunk fixed cost and a per unit marginal cost. Suppose that the chain store puts its requirements out to bid and signs contracts with suppliers prior to the commercial arrangements between the suppliers and independents being finalized. Suppose further that after the contract(s) between the chain store and the suppliers has been set, there is a spot market for supplying the independent retailers.

Because of economies of scale, the chain store will contract with only one of the potential suppliers. The winner of the supply contract with the chain store will anticipate that in the competition to supply the local retailers it will win at a price equal to the average cost of its rival: the rival will not enter at a price that does not allow it to recover its fixed costs. In the bid for the volumes of the chain store, this means that the winning supplier is willing to bid marginal cost. The winning bidder knows that it will recover its fixed costs from the local suppliers, based on the lowest price its competitor is willing to bid and still enter the market.

The key to a waterbed effect is that the more markets in which the chain store operates, the smaller demand in the spot market, the smaller spot volumes, and hence the greater the average cost and price of supplying the independent retailers. Expansion by the chain store (by merger) into local markets raises the costs of its rivals, reducing their market share.

The welfare impact of an increase in the size of the chain store depends on the net effect of the changes in three types of local markets: (i) where the chain store does not operate, welfare goes down as the costs of both local retailers has increased, (ii) in the markets where the chain store has expanded, the output of the acquired firms goes up, that of the competing local retailer down, and (iii) in the markets

100 See Kirkwood (2005, p. 650) and Dobson and Inderst (2008, p. 345).

101 See Majumdar (2006).

where the chain store was already operating, output goes down because of the rise in cost for the competing local firm.[102]

Market share shifting

An alternative possible source of a waterbed effect arises from the effect that shifts in market share from differential wholesale prices have on bargaining power.[103] A reduction in input prices reduces the marginal cost of the firm with enhanced buyer power, leading to an increase in their downstream sales, some of which is at the expense of its rivals. This shift in market share reduces the bargaining power of its downstream rivals, leading to an increase in their wholesale prices, further exacerbating the input price differential, downstream market size, and bargaining power differential.

The link between downstream market size and bargaining power is based on the ability of a buyer to substitute to another supplier to avoid the exercise of bargaining power by a supplier. If there are fixed costs of switching suppliers or vertically integrating, the larger a buyer the lower the average cost of switching to another source of supply, and the greater the bargaining power of the buyer.[104] Alternatively, the smaller a buyer, the less attractive its outside option, the smaller its bargaining power and the greater the price a supplier can charge before the small buyer is indifferent to continuing trade or exercising its outside option.

To see the possibility of a waterbed effect, suppose that there are multiple local geographic markets with competition between two firms, one of which is potentially owned by a chain. Competition in each local market is over prices between differentiated products.[105] There is a monopoly supplier in the upstream market who can price discriminate. The price charged by the monopolist to each downstream firm makes it indifferent between accepting that price or investing in the fixed-cost required to self-supply. Investment to self-supply means that the marginal cost of the downstream firm matches the marginal cost of the upstream firm. The upstream monopolist can preclude this option. If it prices at marginal cost, the downstream firms are better off accepting since they then do not incur the fixed-costs of sourcing an outside supply option. This means that the monopolist can raise its price above marginal cost until the buyer becomes indifferent. The indifference of a downstream firm defines the upper limit on the wholesale price for that downstream firm.

A waterbed effect is established by comparing two different market structures. In the first, all firms participate only in a single market. In the second, there is a chain store (multi-market firm) that participates in more than one local market. A waterbed effect arises because the price paid by the multi-market firm falls and the price paid by the local firm in markets with the chain store rises.

It is easy to see why the price for the multi-market firm falls. The profitability of accessing outside supply has increased, since it can spread the fixed start-up costs over multiple markets. To avoid the multi-market firm exercising this option, the monopolist upstream supplier must decrease its wholesale price. An alternative characterization is that the average cost of outside supply has dropped, necessitating a reduction in price by the monopolist to remain competitive.

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102 In the case of linear demand, Majumdar (2006) shows that aggregate welfare always declines.

103 See Inderst (2007) and Inderst and Valletti (2008b).

104 See Katz (1987).

105 Differentiation in each local market is assumed to follow the standard Hotelling address model, with the firms located at the end of the unit interval and the preferences of consumers distributed uniformly on the unit interval.

However, the change in the wholesale price received by the multi-market firm also affects the indifference constraint of the competing local retailer. The decrease in the wholesale price for the multi-market firm, ceteris paribus, leads to an increase in its market share and a decrease in that of its rival. This raises the average cost of the competing firm accessing an outside supply source. However, for this to provide a margin for the monopolist wholesaler to raise its price, the effect on the indifference constraint must be asymmetric. That is, the decrease in the input price of the chain store must affect the outside profits of the local retailer *more* than it affects the profits of the local retailer from continuing to source from the monopolist. Only if there is such a differential created can the upstream monopolist increase its wholesale price.

An asymmetric effect arises because the decrease in the marginal cost of the multi-market firm on the profits of the local firm depends on the level of the local firm's marginal cost. The lower a firm's marginal cost, the greater the effect of a decrease in a rival's marginal cost on the firm's profits. That is, an efficient firm will be harmed more by a decrease in a rival's marginal cost than will an inefficient firm. Since the marginal cost of outside supply is less than the wholesale price of the monopolist, the reduction in outside profits is greater when the chain store's cost falls as a result of its increase in buyer power.

The greater the existing differential between wholesale prices the stronger the waterbed effect will be. If the existing differential is small, then the effect of the increase in buyer power is to reduce *all* retail prices. The multi-market firm reduces its prices because its marginal cost has fallen: with a small waterbed effect, the competing local firm responds to the increase in competition downstream by lowering its price. On the other hand, if the existing differential is wide, then an increase in buyer power can lead to an increase in the price of the local competitor and a decrease in consumer welfare. An existing wholesale price differential that is large will be reflected in a small market share for the local firm.

Instead of a geographic market expansion as the source of increase in buyer size and hence, buyer power, an alternative is that a firm's size increases because of cost-reducing investment.[106] When a downstream firm lowers its marginal cost or increases the quality of its product, it has a differential effect on the indifference constraint for the firm that determines its upstream price. Lowering its cost or increasing its product quality increase its profits from exercising its outside option more than it increases its profits from continuing to source from the upstream monopolist if, as is usually the case, a reduction in marginal cost increases a firm's profits more when its marginal costs are already low. As a result, to stop the firm from exercising its outside option the monopolist has to reduce its wholesale price. The decrease in marginal cost of the first downstream firm relaxes the indifference constraint on its competitor so that the upstream monopolist can now raise its price (as discussed above).

One implication is that growth by acquisition and growth by investment in cost reduction/quality improvement are complementary. The lower a firm's cost, the more incentive it has to expand into other markets through acquisition and the greater the number of markets a firm participates in, the greater the incentive to invest in cost reduction. The concern is that the exercise of buyer power initiates a "creeping concentration process" that results in a reduction in competition downstream and higher downstream prices.

4.5 The Economics of Countervailing Power: Upstream Investment Effects

An alternative theory of harm from the exercise of buyer power is that it reduces the incentives for upstream firms to innovate and invest. The argument is a variant of the classic holdup problem.[107] If a supplier anticipates that the buyer will be able, because of its bargaining power, to extract a large share of

106 See Inderst (2007).

107 See Church and Ware (2000, Chapter 3) for an introduction and references.

the gains from trade, and in particular, make investment non-profitable, then the supplier will under-invest. While the danger to suppliers of hold up may be greater, there may be more efficient ways to address the hold-up problem when there is a large buyer. For instance a large buyer may have more of an incentive to develop a reputation for not acting opportunistically, or it may be willing to fund, at least in part, investments of the suppliers.

Recent theoretical work suggests that buyer power can result in an inefficient reduction in product variety.[108] A second strand of work emphasizes the importance of rivalry among buyers in minimizing their bargaining power and enhancing the share of profits earned by upstream suppliers. This work shows that an increase in buyer power reduces the share of suppliers and in so doing, reduces their incentive to invest in research and development or quality.[109]

The relationship between buyer power and incentives for investment by upstream firms is complex.[110] Suppliers who face a stronger buyer have increased incentives to undertake innovation and investment if such investment neutralizes some of the increased buying power. In particular, by lowering its cost or making its product more attractive, a supplier can reduce the buyer's outside option by making the competitors of the buyer more profitable. A key distinction suggested, therefore, is between the effect of enhanced buyer power on the incentives for incremental investment and innovation (which may be positive), and on non-incremental investment decisions (new product or whether to remain in the market) where the incentives depend on the absolute level of profit.[111]

5. Enforcement and Buyer Power

This section discusses select enforcement issues raised by conduct that enhances, maintains or creates buyer market power. The enforcement issues considered are (i) predatory bidding to create monopsony power and the appropriate standard for liability; and (ii) implications of buyer power for merger enforcement policy.

5.1 Predatory Bidding

Predatory bidding involves a buyer increasing its purchases in the upstream market in order to raise the price of the input and reduce the profits of competing buyers, inducing their exit or marginalization and raising the buyer's monopsony power. Predatory pricing involves similar behaviour by a seller: increasing output and reducing price in a downstream market to reduce the profitability of rivals with the intent to induce their exit or marginalization and thereby raise the seller's market power. Predatory bidding mirrors predatory pricing: both involve pricing that involves incurring loses today—for certain—in exchange for the possibility of exercising greater market power and earning larger profits in the future.[112]

5.1.1 Liability standards

A key issue has been the liability standard required for a finding of monopolization by predatory bidding. The U.S. Supreme Court held in *Weyerhaeuser* that the standards for a plaintiff to prevail in a predatory bidding case should be based on the two-prong test it found was required in the case of predatory

108 See Chen (2004) and Inderst and Shaffer (2007).

109 See Battigalli, Fumagalli, and Polo (2007).

110 See Inderst and Wey (2007).

111 See Inderst and Wey (2007) or Inderst and Mazzarotto (2008).

112 Weyerhaeuser Company v. Ross-Simmons Hardwood Lumber Co., Inc. 127 S. Ct. 1069, 1077.

pricing in *Brooke Group*.[113] For a finding of liability in a predatory pricing case, the plaintiff, under *Brooke Group* must demonstrate: (i) the price of the predator was below an appropriate measure of cost,[114] and (ii) the predator had a "dangerous probability of recouping its investment in below-cost prices."[115]

In *Weyerhaeuser,* the U.S. Supreme Court held that the two prongs required for the plaintiff to prevail in a predatory bidding case are: (i) below cost pricing of the predator's *output*, and (ii) a dangerous probability of recouping its investment in below cost pricing by exercising monopsony power.[116] Below cost pricing by the predator in the downstream market means that the revenues received from the output produced from the input (whose price is bid up) is less than the cost of additional input. Whether the symmetry of predatory bidding and monopsony with predatory pricing and monopoly justifies the same liability standard depends on the rationale for the standard in the case of predatory pricing and whether that rationale is applicable to the case of predatory bidding.

The justification for the two-prong test in the case of predatory pricing is based on an analysis of error costs, the probability of error, and enforcement costs.[117] There are two possible errors: (i) false conviction whereby the predator did not engage in harmful pricing but is found guilty of predation; and (ii) false acquittal whereby the predator did engage in harmful pricing but is found innocent of predation. An optimal enforcement policy involves minimizing expected costs of errors and enforcement costs. Challenging pricing behaviour is optimal if the expected loss from not challenging (false acquittal) is greater than the expected loss from challenging (false conviction) plus enforcement costs.[118] Because lowering prices is beneficial to consumers and intrinsic to the competitive process, optimal policy should be concerned about the possibility that false convictions will cast a chill over price competition. Moreover, the expected costs of false acquittals may not be significant for two reasons: (i) the prior belief that predatory pricing is rarely attempted and even more unlikely to have been successful, and (ii) even if a firm is successful, there is still the possibility that its market power will be eroded by developments in the market—there is a possibility for correction.

The rationale for the requirement for a price-cost test arises from the difficulty of a judicial process determining whether a price above cost is predatory or legitimate and the concern over casting a competitive chill. The requirement for recoupment, the second prong, reflects that predation must be rational and result in competitive harm to consumers. If below cost pricing does not result in an increase in monopoly power, that ultimately harms consumers, then it is not predatory. Such pricing is not likely to persist, since it is self-correcting: firms that lose money are either forced to change their strategy or exit. Moreover, it benefits consumers.

In determining the applicability of the *Brooke Group* test to predatory bidding, the Supreme Court observed that there are numerous pro-competitive or efficiency motivations for why a firm might bid up input prices and outbid competitors. The Court explicitly identified the following:[119] (i) the alleged predator might be more efficient; (ii) there might be differential demand shocks that favor the alleged

113 Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209.

114 *Brooke Group* at 222.

115 *Brooke Group* at 224.

116 *Weyerhaeuser* at 1078.

117 See *Brooke Group* and *Weyerhaeuser*. For extensive discussion of the decision theoretic framework see Hylton (2008).

118 Cooper et al (2005, p. 659). A false clearance or false negative is a type II error and indicates under deterrence. A false injunction or false positive is a type I error and indicates over deterrence.

119 Weyerhaeuser at 1077.

predator; (iii) overestimate of demand by the alleged predator; (iv) adoption of a new technology that uses the input more intensively by the alleged predator; and (v) as a hedge against expectations of price increases. Thus just like in the case of predation, the Court identified legitimate rationales for a firm to engage in behaviour that raises prices in input markets. The adoption, suitably adapted, of the price-cost test is based on concerns, similar to predatory pricing, of chilling pro-competitive behaviour.[120]

The Court also noted that while failed predatory pricing schemes always benefit consumers, failed predatory bidding schemes (i.e. those that do not meet the recoupment requirement) might benefit final consumers if the increase in input purchases results in an increase in output downstream. The Court concluded by noting, however, that predatory bidding might be successful without harming consumers because it does not rely on raising prices in the downstream market: output prices might remain constant both during the predation phase and the recoupment phase.[121]

The Court's standard of liability for predatory bidding has raised a number of issues, including the following:

(i) *Symmetry between predatory bidding and predatory pricing*. The Court did not characterize the extent of the symmetry between predatory bidding and predatory pricing correctly. In particular, the Court did not appear to recognize the symmetry between input suppliers and consumers. In predatory pricing, consumers first gain, and then if there is recoupment, are harmed. In predatory bidding, it is input suppliers that first benefit—from the increase in input prices during the predatory phase—and then are harmed when monopsony power is exercised during recoupment. Instead of recognizing this symmetry, the Court focused on the effect of final consumers under both predatory pricing and predatory bidding. This undercuts the analysis, since the Court accepted that if the downstream market is competitive, final consumers might not be either hurt or harmed.[122] This might suggest a weaker standard for a plaintiff to prevail for predatory bidding than predatory pricing. As discussed above however, consumers are harmed even when there is perfectly elastic supply in the downstream market.

(ii) *Economic incentives and effects*. The economic incentive to engage in predatory bidding may be greater than predatory pricing and the harmful effects of predatory bidding might be greater.

    (a) Predatory bidding might well be more problematic than predatory pricing because it may result not only in monopsony power, but also the creation or enhancement of market power in the downstream market.[123] If the competing buyers are also competitors of the predator in the downstream market, their exit or marginalization in the upstream market is also likely to mean their exit or marginalization in the downstream market.

The exercise of market power by an upstream monopsonist who is also a downstream monopolist is greater than that of either a monopolist downstream or a monopsonist upstream. [124]This suggests that the costs of predatory bidding can be higher than predatory pricing.

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120 Weyerhaeuser at 1078.

121 Weyerhaeuser at 1077-1078.

122 See Hylton (2008) or Blair and Lopatka (2008).

123 See Hylton (2008).

124 The Lerner Index in the downstream market for a monopsonist who is also a monopolist downstream (dual monopolist) is:

(b) In the case of predatory bidding, there are two markets in which the monopsonist can try to recoup its investment in predatory bidding. Predatory bidding can create market power both upstream and downstream.[125]

However, the role of input prices is to provide information on the relative value of resources. They play a critical role in allocating resources to their most valuable uses, especially when conditions change and reallocation of resources is required. Hence even though economic incentives and harm might be greater under predatory bidding than predatory pricing, the cost of chilling pro-competitive price increases in inputs is likely to be very costly. Hence it has been argued that the standard for liability for predatory bidding should not be weaker than for predatory pricing.[126]

(iii) *Price cost test.* The price cost test in the first prong does not work very well in two circumstances:

(a) The alleged predator stores or destroys the extra input, thereby insuring that price does not fall below cost in the output market. In this case it is possible to include the cost of the input destroyed or the "increased" input stored as part of marginal cost in the price cost test. It may be very difficult to distinguish between competitively benign inventory levels and excessive accumulation of inventories, or to determine that some of the input is destroyed rather than used because of a decision that turns out to be a mistake ex post, not because of predation. The difficulties with making these distinctions likely mean that an adjustment to the first prong is not possible.[127] Instead, if it can be established that an alleged predator increased purchases and, to a significant extent, the increase in purchases was not used, but destroyed, then the onus falls on the purchasing firm to explain why ex ante the increase in input purchases was pro-competitive even if output price exceeds marginal cost.[128]

(b) If the predatory bidder has market power downstream, then the increase in inputs from predatory bidding need not result in the price cost test being met. Instead, while the increase in inputs increases downstream output, that increase may not be sufficient to

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$$L^{DS} = \frac{1}{\varepsilon^{DS}} + \frac{1}{\varepsilon^{US}+1} - \frac{1}{\varepsilon^{DS}(\varepsilon^{US}+1)}$$

where ε^{DS} is the elasticity of demand downstream and ε^{US} is the elasticity of supply upstream. The Lerner Index in the downstream market for a monopsonist who is also a price-taker in the downstream market is

$$L^{DS} = \frac{1}{\varepsilon^{US}+1}$$

and the Lerner Index in the downstream market for a monopolist that is a price-taker in all input markets is

$$L^{DS} = \frac{1}{\varepsilon^{DS}}.$$

Comparing the three Lerner Indexes, the exercise of market power by the dual monopolist is greater than that of either a monopolist downstream or a monopsonist upstream. See Hylton (2008) for derivations.

125 Hylton (2008, p. 60).

126 Hylton (2008).

127 See Blair and Lopatka (2008).

128 See Blair and Lopatka (2008, p. 463).

reduce the downstream price sufficient to satisfy the price cost test. Instead in this case, a profit-sacrifice test may have to be used to avoid under deterrence.[129]

However, if the predatory bidder has monopsony power (i.e. is dominant upstream, but still a price taker in the downstream market), then a modest increase in its purchases, up to the competitive level, would not be identified by the price-cost test, since the value of marginal product would still exceed the input price. It is only if the input price is bid above competitive levels that the price cost test would identify predatory bidding. As with above cost predatory pricing, this will generate false negatives, though that may be optimal if it is necessary to avoid the costs of false positives.

(iv) *Standards versus rules.* Some commentators have suggested that a lower threshold for proof than the one adapted in *Brooke Group* should be used. Instead they have argued for a rule of reason test that encompasses some variant of the following four requirements:[130]

(a) A showing that a buyer with monopsony power engaged in conduct that raised input prices paid by its competitors.

(b) The increase in the input price for competitors reduced the ability of competitors to compete for the input.

(c) The injury to competitors created, maintained or enhanced monopsony power.

(d) Consumers in the *downstream* market are harmed.

The use of a standard of reasonableness would lead to an increase in enforcement costs, relative to the specific liability rules annunciated in *Weyerhaeuser.* Moreover, to reduce these costs, it has been suggested that (a) requires a price cost test and (c) and (d) include an analysis of recoupment.[131] Under this formulation, the rule of reason proposed is very similar to the liability rules adopted in *Weyerhaeuser.* The key difference is the need to show harm to consumers in the downstream market.

In predation cases, as discussed above, the recoupment requirement serves two purposes: (i) it tests whether prices that do not pass the price-cost test are in fact consistent with predation, and (ii) provides evidence that the predatory plan is harmful for consumers. The harm to consumers follows from the fact that the profits of the firm and the welfare of consumers are negatively correlated. In the predatory phase, consumers will gain and the firm will incur losses. If the predation phase is successful, then in the monopoly phase the firm will have higher profits and consumer welfare will

129 See Blair and Lopatka (2008, p. 465).

130 See Kirkwood (2005, p. 661) and Salop (2005, p. 690). However, Salop also suggests that in principle a court might replace the four-step rule of reason with the two prongs of *Brooke Group:* (i) a below-cost price test and (ii) a test for likelihood of recoupment (pp. 701-702). Kirkwood and Salop differ on the use of a below-cost test and the extent of consumer harm in the downstream market that must be shown (Kirkwood 2005, p. 666 and Salop 2005, p. 694). Salop argues that consumer harm must be significant, Kirkwood only that they be harmed, as well Salop would require a below-cost price test . The differences between the two is based on Kirkwood having different views on the relative frequency of predatory bidding and that concerns about chilling price increases in input markets should not hold the same weight as chilling price decreases in output markets (Kirkwood 2005, p. 667).

131 Salop (2005, pp. 704-705).

be lower relative to no predation. If recoupment is found, then overall predation was profitable, and this likely means that overall consumers were harmed.

The linkage between downstream consumer welfare and recoupment in a case of predatory bidding, however, is weak. Recoupment can instead be based only on monopolization of the input market. It is the welfare of input suppliers that will be negatively correlated with recoupment based on acquiring or maintaining monopsony power. The focus on welfare of final consumers would appear to result in a stronger threshold for liability, not a weaker one.

If instead of consumer welfare, the objective of competition policy is to protect market participants from anticompetitive conduct, then showing harm to input suppliers should be all that is required. If so, then the symmetry of predatory pricing by a monopolist and predatory bidding by a monopsonist is preserved, thereby making obvious the validity of using the two prongs of *Brooke Group* in cases involving predatory bidding.[132]

5.2 Buyer Power and Merger Policy

Buyer power has raised the following two issues with respect to merger policy:[133]

(i) A merger between two buyers creates, enhances or maintains buyer power in an upstream market.

(ii) Whether countervailing power exercised by buyers can offset the effect on seller market power in the *upstream* market from a merger between sellers.

5.2.1 Transaction Affects Buyer Power

A merger between buyers could create, enhance or maintain (hereafter simply increase) either classic monopsony power or bargaining power.

Monopsony Power from a Merger

If its effect is to increase monopsony power, then the welfare effects are to reduce price and quantity in the upstream market.[134] In addition, the merged firm will behave as if its marginal cost in the downstream market has increased, reducing output and leading to an increase in prices in the downstream market.

The decrease in the price the merged firm pays is not a social benefit, but a private benefit. Hence, even though the price in the upstream market falls, it does not lead to an increase in output in the downstream market. It should not, therefore, be considered a source of efficiency gains against which any downstream harm from the merger is weighed. It is a further harm, in addition to any increase in market power in the downstream market.

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132 See Blair and Lopatka (2008, pp. 445-446).

133 For discussion of the implications of buyer power for merger policy, see Inderst and Shaffer (2008) and Spector (2008).

134 Assuming it does not price discriminate in the upstream market.

Bargaining Power

The situation is not so straightforward if the merger increases bargaining power. If the effect of the increase in bargaining power is to increase the ability of the buyer to reduce the exercise of market power upstream, and if it leads to a reduction in the marginal expenditure paid by the buyer when input usage is increased, then it may have *positive effects* on the level of trade in both the input market and the downstream output market. The increase in buyer power is a potential source of efficiency gain from the transaction.

On the other hand, as shown in the discussion of the theoretical models above, there are three caveats that render the transaction potentially harmful. The first is that the merger increases market power downstream. The second is that a waterbed effect means that competitors of the merged firm pay higher input prices potentially leading to harm to consumers in the downstream market. The third caveat is that the beneficial effects of the increase in bargaining power follow from extracting monopoly rents from the sellers. If instead, the increase in bargaining power is sufficiently large, it may result in the extraction of quasi-rents.

In the long run the expropriation of quasi-rents will likely have negative ramifications for competition upstream: less investment and higher input prices as sellers exit the market. These effects, if material, would eventually lead to harm in the downstream market in the form of higher prices and, perhaps, a loss in variety. These effects will typically be difficult to assess with confidence. They are long-run effects that will require an assessment of how the transaction and increase in buyer power will affect industry structure upstream. Moreover, these long-run costs, if any, may be offset in part by gains to consumers in downstream markets in the short run, depending on the extent of competition downstream. To avoid over-enforcement and false positives, the evidentiary threshold should therefore likely be relatively high.

5.2.2 Countervailing Power

The other relevant possibility is that the presence of buyer power reduces or eliminates the possibility that a merger between sellers in the upstream market will enhance market power. The presence of bargaining power may be a countervailing factor that mitigates the possibility of an increase in the exercise of market power from the merger.

In a bargaining framework, the effect of a merger between sellers depends on its effects on the outside options of buyers and the sellers. If it lowers the outside option of the buyers, or raises the outside option of the sellers, it might reduce the bargaining power of the buyers and reduce the effectiveness of countervailing power. Whether countervailing power provides a defense in the case of a merger by sellers depends on whether countervailing power is sufficient, post transaction, to prevent prices from increasing. Determining the effect of the transaction on the outside options will involve, at the very least, considering the effect of the transaction on the alternatives available to buyers and the sellers. In this regard, an upstream merger might reduce the bargaining power of a buyer because it eliminates a substitution alternative.

A countervailing power defense to a merger among sellers requires instead a demonstration that after the transaction buyer power remains sufficient to undermine any price increases by the sellers. If the outside options of strong buyers remain unchanged by the transaction, then it may be the case that sellers will not be able to increase prices post-transaction. Circumstances under which this is likely to be true include: (i) sufficient alternative suppliers remain to make switching credible, (ii) difficulty among sellers finding replacement volumes, (iii) evidence that lost volumes will increase the costs of sellers, making it difficult for them to compete with other sellers, (iv) ability to sponsor new sources of supply by

underwriting entry or vertical integration, (v) low switching costs for buyers, and (vi) large sunk capital investments on the part of the seller.[135]

In the case of concerns regarding the potential for a coordinated effect from a merger among suppliers, as discussed above, large buyers may make coordination difficult. This will be especially true if large orders can be fulfilled under long-term contracts, allowing large buyers to induce sellers to deviate.[136]

A further issue that arises is whether all buyers are protected by the countervailing power or just those buyers with sufficient bargaining power. It may be the case that some buyers (often smaller suppliers with limited alternatives) are not protected from price increases because they lack sufficient bargaining power. If the concern is a unilateral effect, this will depend on how effectively sellers can engage in price discrimination. If the concern is a coordinated effect, then the "shield of countervailing power" may also extend to small buyers. The ability of large buyers to undermine coordination may also limit the ability of sellers to coordinate against small buyers. Coordination among smaller buyers may also be more difficult the greater the large buyer, since the punishment from deviating—lost collusive profits—will be less the smaller total coordinated sales.[137]

If countervailing power may substitute for the competition lost in a merger of sellers, that substitution is based on short-run considerations (i.e. the ability to restrain price increases). The question is whether countervailing power is as good a substitute in the long run.[138] In particular, is countervailing power as effective as competition among the sellers at preventing X-inefficiency and promoting product innovation and cost reduction? The issue of long-run industry performance might depend upon two trade-offs: (i) whether the characteristics of the industry mean that innovation is promoted more by competition among sellers or by cooperation between sellers and buyers, and (ii) whether innovation is promoted or hindered by a balanced vertical market structure, in which buyers and sellers are relatively equal.

6. Selected Cases

This section considers a number of relatively recent cases to illustrate some of the nuances associated with buyer power.

6.1 Buyer Power and Merger Enforcement

In this section three merger cases in which buyer power played an important role are considered. In two the enforcement agency determined that the transaction would create buyer power. In both of these the enforcement agency found that the transaction would harm downstream consumers. In the *Safeway* case in the United Kingdom, the link from enhanced buyer power to harm in the downstream market is, perhaps, tenuous. In *Aetna,* the Department of Justice used a bargaining power analysis to conclude that the transaction would create monopsony power, thereby raising competitive concerns in both the upstream and downstream markets. The third case involves two mergers in the liquid packaging market in Europe. In these, though the mergers appeared to create market power, the Commission found, using a bargaining power analysis, that buyer power would prevent the exercise of market power.

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135 See European Commission, *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentration between undertakings,* Official Journal of the European Union (2004/C 31/03) at 65 and discussion *supra.*

136 *Ibid* at 57. See Snyder (1996)

137 See Inderst and Shaffer (2008, p. 1631).

138 See Inderst and Shaffer (2008, p. 1633).

6.1.1 Safeway

On January 9, 2003, Wm Morrisons Supermarkets PLC announced an agreement to merge with Safeway. This announcement was then followed by other offers to acquire Safeway from Tesco plc, J Sainsbury's plc and Asda Group Limited (owned by Wal-Mart Stores Inc).[139] Due to concern that the acquisitions would result in a substantial lessening of competition, the Secretary of State for Trade and Industry in the United Kingdom referred each proposed merger to the Competition Commission (CC) under the merger provisions of the *Fair Trading Act 1973*.

The proposed acquisition of Safeway came after the CC had issued a comprehensive report on the grocery sector in 2000.[140] A major component of its investigation concerned the accumulation, exercise and effects of buyer power by the large supermarkets in procurement markets. Based on concerns over a number of trade practices found to be anticompetitive, the CC recommended that a Supermarket Code of Practice (SCOP) be implemented. The SCOP, overseen by the Office of Fair Trading, was intended to regulate the use of trade practices that had raised concerns. In the spring of 2002, the Office of Fair Trading and the major retailers negotiated and implemented the SCOP. It applied to all grocery chains whose purchases accounted for more than 8 percent of grocery purchases for resale.

Buyer power was identified in 2000, in part, by two key metrics: (i) "significant inverse correlation between the prices paid by multiple grocery retailers and their share of total purchases", a relationship that was true for even the largest suppliers, and (ii) "the great majority of suppliers were far more dependent on their multiple customers than the multiple grocery retailers were on them".[141]

At the time of the inquiry, Safeway was the fourth largest grocery retailer in the UK with 481 locations ranging from large supermarkets to small convenience stores, and sales (turnover) of £8.6 billion. It was the smallest of the four grocery retailers with a national presence. The other three were Tesco (779 stores with sales of £21.6 billion), Sainsbury's (498 stores with sales of £14.3 billion), and Asda.[142] The sixth largest grocery retailer in the UK, Morrisons, was a regional player with 119 stores and £4.3 billion in sales.

As justification for the proposed mergers, each party claimed that the acquisition of Safeway would result in financial benefits that would be passed on to consumers in the form of lower prices. These financial benefits would arise from supplier discounts due to the party's improved bargaining position in the input market, and lower costs resulting from economies of scale and the elimination or reduction of duplicated services.

The CC recognized, however, that the acquisition of Safeway by any of the four potential buyers could have substantial anti-competitive effects as well. In particular, it was concerned with the effects of an acquisition on competition and choice in the output market for groceries, and on relations between buyers and suppliers in the input market.

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139 Source material for this case is: Competition Commission, Safeway plc and Asda Group Limited (owned by Wal-Mart Stores Inc); Wm Morrison Supermarkets PLC; J Sainsbury plc; and Tesco plc: A report on the mergers in contemplation (2003); Dobson (2005); and Dobson and Chakraborty (2008).

140 See Competition Commission, Supermarkets: A Report on the Supply of Groceries from Multiple Stores in the United Kingdom, Cm 4842 (Oct. 2000), available at http://www.competition-commission.org.uk/rep_pub/reports/2000/446super.htm#full

141 Competition Commission Report at 6.2 and 6.3.

142 Asda's turnovers and profits are not reported.

The CC decided that one-stop shopping in grocery stores of 1,400 square metres and above was the relevant output product market for the proposed mergers. In terms of the geographic market definition, the CC looked at both local markets and the national market. It found that the acquisition of Safeway by either Tesco, Sainsbury's, or Asda would result in an intensification of the "conditions in which coordinated effects are expected to occur". The CC "[did] not expect that, following the merger, effective competition would be maintained or promoted".[143] as the number of national retailers decreased from four to three. In contrast, the CC believed the acquisition of Safeway by Morrisons would not result in a coordinated effect, since the number of national retailers in the market for one-stop shopping would remain at four. It did identify significant unilateral effects in numerous local markets regardless of the proposed transaction. It recommended that, in the case of a merger with Morrisons, divestiture of one-stop grocery stores in 48 regions and five smaller stores was an appropriate remedy to address concerns regarding a unilateral effect in local markets.

When defining the relevant input market, the CC found there to be little substitutability between products for retail and non-retail outlets, due to each outlet's different requirements for packaging, pack size, and product presentation. Also, since grocery retailer chains buy an extensive volume of products, the suppliers of those grocery products would not find alternative buyers easily. Accordingly, the CC concluded that other outlets for groceries, such as hospitals, schools and catering establishments, were not part of the relevant input market. Instead, the CC limited the input market to "all retailers of groceries with 8 percent or more of the market for the purchase of groceries for resale from all stores in the UK."

The CC's concerns regarding the effect of the merger on buyer power is nicely summarized:[144]

> We would in broad terms expect competitive prices to emerge where there was a reasonable balance of bargaining power as between competitive suppliers and competitive buyers; but would not expect them to emerge with such a degree of imbalance as exists in the one-stop grocery market. Our conclusions in the 2000 report in this respect were that this situation gave rise to effects adverse to the public interest and we believe that any of the proposed acquisitions would intensify this. We expect the acquisition of Safeway by any of the three parties to increase the successful acquirer's power to influence outcomes to its own advantage in a manner and to an extent that would not be possible in a more symmetrically competitive situation. The consequences may include waterbed effects or a further general weakening of the bargaining position of some suppliers. In the latter case, some grocery manufacturers are likely to find investment in new products or advanced manufacturing techniques no longer worthwhile. This will be especially exacerbated by the fact that suppliers are, generally speaking, likely to secure less disadvantageous conditions and prices with four national grocery retailers than with three. We expect that the acquisition of Safeway by Morrisons will have similar effects, albeit to a lesser degree. Suppliers will suffer less from four broadly national grocery retailers because there will be more scope to find large-scale alternative purchases, which implies a somewhat lesser degree of imbalance of negotiating strength. This may explain the generally more favourable reports of Morrisons which emerged from our surveys than those of the other three parties. For these reasons, the acquisition of Safeway by Morrisons would appear likely to bring about fewer detriments for suppliers than an acquisition by Asda, Sainsbury's or Tesco.

143 Competition Commission at 2.290, 2.414, and 2.472.

144 Competition Commission Report at 2.257.

The CC used survey evidence of suppliers to assess buyer power. Two key indicators of buyer power were the gross margins and prices paid to large suppliers for branded products. As in its 2000 investigation, the CC found that "bigger multiple grocery retailers obtained lower prices than their smaller rivals"[145] and that "The largest multiple grocery retailers did generate a lower gross margin for the supplier than the smaller chains."[146] Additional survey evidence was used to assess changes in buyer power since 2000 and the impact of the merger, including questions on changes in negotiating strength, the impact of previous mergers, the likelihood of a waterbed effect, the effect of the SCOP, and the anticipated effect of an acquisition of Safeway on prices, investment and innovation.

The CC determined that adverse effects on suppliers would be limited if Safeway was acquired by Morrisons. In addition, the CC found that some efficiencies would be realized by this acquisition. Given that an acquisition of Safeway by Morrisons was not expected to reduce competition in the output market (thanks to the divestiture remedy), savings from the merger were likely to be passed onto consumers. The CC found that any detriment to suppliers resulting from the merger would be offset by the benefits to consumers, and therefore, an acquisition of Safeway by Morrisons, with divestitures, was deemed acceptable.

6.1.2 Aetna

In 1999, the United States Department of Justice (DOJ) challenged a proposed transaction between Aetna, Inc. (Aetna) and The Prudential Insurance Company of America (Prudential).[147] At the time, Aetna was the largest health insurance company in the United States; Prudential ranked ninth. HMO plans offer employees of purchasers of health insurance access to networks of health providers within a local area, including physicians. Physicians negotiate rates for providing service with the HMO plan sponsor, the health care insurance provider (e.g. Aetna or Prudential). The DOJ was concerned the transaction would result in a substantial lessening of competition in two markets: (i) health maintenance organization (HMO) plans, the downstream market, and (ii) physician services in the Houston and Dallas areas, the upstream market. The merger was allowed to proceed subject to Aetna divesting specified assets of two previously acquired subsidiaries, one operating in the Houston area and the second in the Dallas region.

In the downstream market, post-transaction, Aetna's market shares would be 63% in Houston and 42% in Dallas. This, along with significant barriers to entry into the provision of HMO plans, was sufficient to suggest competitive concerns in the output market. In the input market, the DOJ was concerned that post-transaction, Aetna would be able to impose adverse price and non-price terms on physicians (i.e. its buying power would increase substantially). The DOJ believed that the enhanced exercise of market power for the provision of physician services would result in a decrease in the quantity and quality of health care available (i.e. harm patients in the downstream market).

The DOJ determined that buyers for physicians' services were limited and that it was very costly for physicians to relocate their practices to other geographic areas. Since the substitution alternatives for doctors were limited, a small but significant decrease in price for their services in either Houston or Dallas by a hypothetical monopsonist appeared to be profitable.

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145 Competition Commission Report at 6.65.

146 Competition Commission Report at 6.69.

147 Source material for this case: United States of America and the State of Texas v. Aetna, Inc. and The Prudential Insurance Company of America, Civil Action No.: 3-99 CV 1398-H, Complaint, Revised Impact Statement, and Revised Final Judgment available online at http://www.usdoj.gov/atr/cases/indx142.htm; and Schwartz (1999). The Revised Final Judgment was found to be in the public interest. See United States of America and the State of Texas v. Aetna, Inc. and The Prudential Insurance Company of America 1999 WL 1419046 (N.D. Texas).

The DOJ's analysis of the potential for monopsony power to be exercised post-transaction was based on two important features of the upstream markets: (i) the prevalence of price discrimination and (ii) switching costs. Aetna engaged in bilateral negotiations under which it set physician-specific rates. A physician's ability to find alternatives to Aetna was limited by switching costs arising from two factors: (i) their time cannot be stored and (ii) there were likely significant delays to switching or replacing Aetna HMO patients. The first factor means that if patients cannot be replaced quickly, the physician suffers a permanent loss. Replacing or retaining Aetna patients was likely not going to be swift or easy. To retain existing Aetna patients would require them (or their employers) to switch HMO providers. Attracting new patients would also take time because of patient loyalty and the position of HMO providers as middleman.

In the DOJ's analysis, there were two relevant market shares that determined Aetna's post-transaction ability to impose losses on, and thereby depress rates paid to, physicians. These were (i) Aetna's share of all patients in an area, since the smaller the number of non-Aetna patients, the smaller the pool of replacement patients; and (ii) Aetna's share of a physician's business, since the larger that share, the greater the dependence on Aetna and the greater the switching costs. Indeed, the DOJ found that the loss per patient increased with the number of patients that needed to be replaced, making a doctor significantly more vulnerable to demands to lower prices.

Based on these considerations, the DOJ determined that post-transaction Aetna would be able to decrease the reimbursement rates to a substantial number of physicians. The DOJ's concerns on both the downstream and upstream market were allayed by the two divestitures. Aetna's share of downstream patients would decrease by 15% in Dallas and 21% in Houston because of the divestitures.

6.1.3 Enso/Stora

In 1998 the European Commission was notified of the proposed merger between Stora Kopparberg Berslags AB (Stora) and Enso Oyj (Enso), two important European producers of pulp, paper and packaging board.[148] The proposed merger sparked anticompetitive concerns as both Stora and Enso held significant market shares in the market for liquid packaging board. However, the Commission concluded there was sufficient countervailing buyer power to offset the creation or strengthening of a dominant position that would result from the merger.

The Commission focused primarily on the market for liquid packaging board, a particular type of consumer packaging board. Consumer packaging board is used to package consumer goods for further downstream use, and is typically bought by converters who modify it in accordance with the specific type of consumer good their customers pack. Due to the wide variety of consumer goods that require packaging, there are many different types of consumer packaging board, each of which is considered to be either liquid packaging board (LPB) or non-liquid packaging board (non-LPB), depending on its specific end use. For example, packaging board that will eventually be used to construct milk or juice packages is considered LPB, while packaging board used for packing chocolate bars is considered non-LPB.

The Commission concluded there was no demand-side substitutability between LPB and non-LPB because of the higher absorption resistance required of LPB in comparison to non-LPB, as well as LPB's stricter bacteriological, food-law and environmental requirements. The Commission also noted there was little demand-side substitutability between LPB and other packaging materials, such as glass and plastic. Since converters are not final customers, they cannot switch to other packaging materials without forcing their own customers to undergo extensive investment in different filling and packing machinery. For this

148 Source material for this case: the European Commission in Enso/Stora Case No. IV/M. 1225 [1999] O.J. L254; Lofaro and Baker (2000); Korsnäs/AssiDomän Case No COMP/M.4057, and Karlsson (2006).

reason LPB customers do not switch back and forth between packaging materials in response to short-term price fluctuations. The Commission concluded that LPB was a distinct relevant market from non-LPB.

The geographic market for LPB was determined to be the European Economic Area (EEA) due to duties, transport costs, and non-tariff barriers such as environmental legislation, that made importing LPB into the EEA unattractive to customers. The Commission concluded the relevant market for the purpose of the case was the market for LPB in the EEA.

The supply-side of the market for LPB in the EEA consisted of four main producers: Stora and Enso, whose joint market share was between 50 and 70 percent, as well as Korsnäs and AssiDomän, each of whom had market shares between 10 and 20 percent. Barriers to entry were high due to the large fixed cost of building a board machine (between 300 and 400 million European Currency Units (ECU)) and an integrated long-fibre pulp mill, each of which was necessary for LPB production. Accordingly, the Commission concluded entrants would need secured contracts before undertaking any investment. With modest growth in demand (only 1 to 2 percent per year) and long-term relationships between buyers and incumbent LPB producers, securing contracts, and thus entry, seemed unlikely. Indeed, there had been no entry in to the LPB market in the EEA within the previous 10 years. In addition, the Commission found that supply-side substitution between LPB and non-LPB production by non-LPB producers was costly and not timely, though it was easier for LPB producers to switch some of their non-LPB capacity from the production of non-LPB to LPB.

The Commission did not, however, immediately conclude that the merger would create or strengthen a dominant position in the market for LPB due to the extremely high concentration and large barriers to entry. Instead, the Commission went on to examine the structure of the demand-side of the market which consisted of three main buyers: Tetra Pak, that dominated the market with an estimated market share between 60 and 80 percent; and Elopak and SIG Combibloc, each of which had a market share of between 10 and 20 percent. Thus, after the merger, the supply-side would mirror the structure of the demand-side of the market, with one large supplier and two smaller suppliers facing one large buyer and two smaller buyers.

In its investigation, the Commission acknowledged that LPB producers and buyers were mutually dependent on one another. Relationships tended to be long-term in nature, as switching a supplier was costly, technically demanding and typically lead to delays. Indeed, becoming a supplier of a specific type of LPB required substantial investment from both the producer and the buyer in terms of machinery, technical support and product trials. As evidence of the existence of mutual dependency, the Commission pointed out that Enso's longest customer relationship went back 40 years. Furthermore, Enso also had separate research and development units, each of which specialized in the development of LPB for Tetra Pak, Elopak, and SIG Combibloc respectively.

The Commission's investigation showed that LPB customers were able to exercise countervailing buyer power using two main strategies. First, buyers were able to threaten Stora Enso with switching some of their demand to other suppliers. Indeed, Tetra Pak bought more than 50 percent of its supplies from Stora Enso, which constituted the capacity of several board machines and represented more than 50 percent of the party's total output for the EEA. Due to the high rates of capacity utilization needed to achieve reasonable profits, Stora Enso would have to find another large customer to fill capacity if it were to lose Tetra Pak as a customer — a task that would not be easy accomplish in the short-term.

In addition, both Elopak and SIG Combibloc placed orders that were large enough to fill the capacity of a board machine. A switch to an alternative supplier such as Korsnäs or AssiDomän, who had the potential to switch their capacity to produce more LPB in the long-term, would be particularly harmful to Stora Enso. Furthermore, both Elopak and SIG Combibloc had in the past sourced LPB in the United

States, despite its higher cost, for strategic reasons (presumably to enhance their bargaining power). As duties were expected to decline in the near future, these sources would strengthen their bargaining positions over time. Since Stora Enso's unit costs increased with a reduction in capacity utilization, even a small loss of business from one of the major buyers would be significantly harmful to Stora Enso.

Second, due to its large volume of purchases, Tetra Pak had the ability to develop new capacity with new or existing suppliers if Stora Enso tried to exercise market power. Though switching suppliers was not a simple process for a buyer, the ability of customers such as Tetra Pak to endorse capacity expansion would significantly reduce the risk of entry for new suppliers.

Stora Enso had made considerable sunk investments in LPB production capacity, with the intention of supplying LPB for many years. If Stora Enso were to exercise its market power, it would earn excess profits for a couple of years while its large customers endorsed or supported entry or expansion in the supply-side of the market. Given that LPB capacity investments are sunk, and entrants and expanders would thus be committed to serving the market for many years, it seemed unlikely to the Commission that the short-term benefits of exercising market power would outweigh the long-term damage to Stora Enso's LPB sales.

A final consideration was recognition on the part of the three sellers that there was value to them in ensuring the continued prosperity of Korsnäs or AssiDomän to avoid becoming dependent on Tetra Pak.

Overall, the Commission concluded that although Stora and Enso had a large market position in the LPB market, and there was little potential for future competition, the demand-side of the market was as concentrated as the supply-side, and the countervailing buyer power that existed was enough to offset the possibility of the merging parties exercising (more) market power. The Commission, did, however, observe that the countervailing power was not equally distributed. To mitigate concerns that the weaker positions of Korsnäs or AssiDomän might not be as effective in constraining the market power of suppliers, a behavioural remedy was imposed that involved a price protection mechanism. Under this mechanism the changes in price for smaller customers must not be more than the price changes for its largest customer for price increases or less for price decreases.

In 2006 the Commission cleared a merger between the other two major suppliers of LPB, Korsnäs or AssiDomän, effectively creating a duopoly in supply of LPB. The Commission found that, if anything, the evidence since the Enso/Stora transaction supported a finding that countervailing power was in fact more effective than reflected in the clearance of that merger. In particular the Commission pointed to the ease with which buyers of LPB had shifted significant volumes of LPB between suppliers on short notice. The Commission also emphasized that it was not concerned about discrimination against smaller competitors of Tetra Pak since if effective at foreclosing them from the market, such discrimination would result in a monopsony that would not be in the interests of suppliers in the long run.

6.2 Predatory Bidding: Weyerhaeuser

In 2003, Ross-Simmons Hardwood Lumber Company filed suit under Section 2 of the *Sherman Act*, accusing Weyerhaeuser Company of monopolization and attempted monopolization of both the input market for alder sawlogs and the output market for alder lumber.[149] Ross-Simmons alleged that Weyerhaeuser had attempted to eliminate competitors by biding up the price of sawlogs. In the ensuing trial, the District Court denied Weyerhaeuser's proposed predatory-bidding jury instructions, which were

[149] Source material for this case: Weyerhaeuser Co. v. Ross-Simmons Harwood Lumber Co. Ltd., 127 S.Ct. 1070 (2007); Confederated Tribes of Siletz Indians of Oregon et al v. Weyerhaeuser Co., 411 F.3d 1030; Salop (2005), Kirkwood (2005), Hall (2006), Blair and Lopatka (2008), and Hylton (2008).

based on the test used in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*[150] for determining whether a firm had engaged in predatory-pricing. The jury returned a verdict in favor of Ross-Simmons, which was ultimately affirmed by the Court of Appeals for the Ninth Circuit. The Supreme Court granted certiorari and held that the standard set in *Brooke Group* for predatory-pricing also applied to predatory-bidding claims, thus reversing the decision of the Court of Appeals.

Both Weyerhaeuser and Ross-Simmons operated hardwood-lumber sawmills in the Pacific Northwest that acquire and process red alder sawlogs. The sawlogs used for production are obtained by purchasing them on the open bidding market, acquiring them through short- and long-term agreements with timberland owners, or harvesting them from the mill's own timberland. Typically, sawlogs make up 75 percent of a sawmill's total cost and mills are located within 100 miles of their sawlog sources.

Ross-Simmons began its operations in 1962 with a single mill in Longview, Washington. Weyerhaeuser, one of the largest manufacturers of hardwood lumber in the world, entered the Pacific Northwest alder sawlog market by acquiring Northwest Hardwoods, Inc. in 1980. Weyerhaeuser gradually increased its scope of operation, and by 2001, owned six hardwood sawmills in the Northwestern region and was processing approximately 65 percent of the alder logs available for sale in the region. Weyerhaeuser's market share in the market for all hardwood lumber in North America was less than 3 percent.

Between 1998 and 2001, both Ross-Simmons and Weyerhaeuser experienced declining profits as alder sawlog prices increased and finished alder hardwood prices fell simultaneously. During this time, Ross-Simmons suffered losses totaling nearly $4.5 million and ended up shutting down its mill completely in May 2001. On the basis of this price divergence, Ross-Simmons concluded that Weyerhaeuser must have increased its purchases. Moreover, Ross-Simmons alleged that Weyerhaeuser was "overpaying".[151]

The price divergence, however, could also be due to increased competition for alder logs, a reduction in their supply, and/or an increase in supply of hardwood lumber from other areas. Weyerhaeuser argued that the higher prices for sawlogs were a result of stiffer competition for inputs due to forecasts showing that in the near future there would be an inadequate supply of logs to sustain all of the existing saw mills and a decrease in sawlog supply. Moreover there was apparently no direct evidence that Weyerhaeuser had elevated its sawlog purchases during the alleged predation period.

Weyerhaeuser blamed Ross-Simmons' poor performance on its substandard equipment, inefficient operations, poor management and inadequate capital investment. Indeed, from 1990 to 2000, it appeared that Ross-Simmons had made little efficiency-enhancing investments. In comparison, during this same period, Weyerhaeuser had made over $75 million worth of capital investments in its Northwest mills. Weyerhaeuser claimed that these investments increased its production facility efficiency, creating more lumber and sales revenue from each log. Thus, Weyerhaeuser claimed it was willing to pay more for alder sawlogs than Ross-Simmons.

The District Court instructed the jury that in order to succeed on a claim for monopolization or attempted monopolization under Section 2 of the *Sherman Act*, Ross-Simmons was required to provide sufficient evidence that Weyerhaeuser had engaged in anticompetitive conduct. In particular, in reference to Ross-Simmons' predatory bidding and overbuying claims, the District Court instructed the jury as follows:

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150 Brooke Group Ltd. v. Brown & Williamson Tobacco Corp. 509 U.S. 209 (1993).

151 The evidence for the overpaying allegation was based on internal Weyerhaeuser documents.

> One of [Ross-Simmons's] contentions in this case is that [Weyerhaeuser] purchased more logs than necessary, in order to prevent [Ross-Simmons] from obtaining the logs it needed at a fair price. If you find this to be true, you may regard it as an anticompetitive act.[152]

Following the District Court's instructions, the jury found that Weyerhaeuser had indeed engaged in anticompetitive conduct and monopolized the market for alder sawlogs. The jury did not, however, find Weyerhaeuser liable for any violations in the output market as the relevant output market was determined to be the market for hardwood lumber, of which Weyerhaeuser did not have the ability to influence prices.[153]

In its evaluation, the Court of Appeals supported the District Court's denial of the *Brooke Group* standard. Specifically, the Court of Appeals observed that the *Brooke Group* Court had established a standard of high liability for predatory pricing in order to avoid chilling legitimate price competition that benefits consumers. In contrast, the Court of Appeals believed that predatory bidding did not necessarily result in consumer benefits or stimulate competition and therefore "the concerns the *Brooke Group* Court expressed about depriving consumers of the temporary benefit of low prices [did] not necessarily apply when predatory bidding [was] at issue."[154] Thus, the Court of Appeals concluded that the standard of liability for predatory bidding need not be as high as the standard for predatory pricing, and rejected Weyerhaeuser's claim. In contrast, as discussed above, the Supreme Court held that the test used in *Brooke Group* also applied to claims of predatory bidding.

6.3 Waterbed Effects and Buyer Power: United Kingdom Grocery Inquiry (2008)

In 2000 the Competition Commission (CC) in the United Kingdom issued its first in-depth report on the grocery sector. A major component of the investigation concerned the accumulation, exercise and effects of buyer power by the large supermarkets in procurement markets. Ongoing consolidation and entry into the convenience store sector by the major chains resulted in a second inquiry, launched in 2006 by the CC. The inquiry was completed in the spring of 2008 and, once again, competition issues in the supply chain, in particular buyer power, proved to be a key concern.[155]

The CC defined buyer power as a form of market power: "A grocery retailer exercising buyer power would obtain a better deal from its suppliers in terms of prices, product quality, or purchasing terms, for example, compared with grocery retailers that do not have buyer power."[156] As a consequence, a supplier is likely to have a smaller profit margin when trading with a buyer who has buyer power relative to a buyer who does not.

The CC concluded that all large grocery retailers, wholesalers and buying groups have buyer power, at least for some suppliers.[157] In reaching that conclusion, the CC looked at the size of grocery retailers, wholesalers and buying groups relative to suppliers; prices and margin data; the share of the retail price

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152 Confederated Tribes at 1036, fn 8.

153 The jury found that there was no distinct market for alder lumber due to competition from other hardwoods, such as oak and maple.

154 Confederated Tribes at 1038.

155 Competition Commission, *Market investigation into the supply of groceries in the UK 2008*.

156 Competition Commission, *Market investigation 2008* at 9.2.

157 Competition Commission, *Market investigation 2008* at 9.21.

earned by the grocery retailer and others in the supply chain for primary products; and documentary evidence between two of the supermarket chains and their suppliers.[158]

The CC found, based on a sample of 141 SKUs and 29 suppliers, that the four large grocery retailers paid on average between 4 and 6 percent less than the mean price. On the other hand, large wholesalers paid on average 2 to 3 percent above the mean, while smaller wholesalers paid 6 to 9 percent above the mean.

The CC considered in detail the existence of waterbed effects. The Association of Convenience Stores (ACS) raised the possibility of waterbed effects, similar to the model discussed above, that identified the potential for waterbed effects based on shifts in market shares.[159] The focus of the ACS concern was the effect of increases in buyer power of the large grocery stores on convenience stores through a waterbed effect.

The CC, while observing the coherence of the theoretical model showing the possibility of a waterbed effect, concluded that the retailing of groceries in the UK was not characterized by waterbed effects. The CC approached the assessment of waterbed effects from two perspectives. First, it considered the applicability of the market shifting model proposed by the ACS. Second, it looked at the available evidence to see if it was consistent with a waterbed effect.

The CC expressed concerns that the theoretical model proposed was not applicable because it did not incorporate the following:

(i) The model assumes competition in local markets between a convenience store and the grocery store. It ignores competition from other large grocery retailers. This means that the model understates the extent to which lower prices from the exercise of bargaining power by the large grocery stores will be passed on to consumers.[160]

(ii) The model assumes a fixed market size and therefore ignores that when prices in the retail market fall, sales downstream should expand. This means the model understates the welfare impact of lower prices and overestimates the effect on the bargaining power of the convenience store.[161]

(iii) The ACS model assumes a linear relationship between firm size and bargaining power. The evidence does not support that increases in relative firm size lead to ever larger differences in relative input prices.[162]

(iv) The data also suggest that the bargaining power of grocery stores was not uniform across suppliers. In particular, the data suggest that for primary brands order size has little effect on price, a factor that should weaken any waterbed effects.[163]

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158 Competition Commission, *Market investigation 2008* at 9.6.

159 See above at Section 4.4.2.

160 Competition Commission, *Market investigation 2008* at 5.29.

161 Competition Commission, *Market investigation 2008* at 5.30.

162 Competition Commission, *Market investigation 2008* at 5.31.

163 Competition Commission, *Market investigation 2008* at 5.32. It is not clear what the basis is for the distinction between primary and non-primary brands.

(v) There are potentially effective counter-strategies available to smaller buyers to obtain discounts similar to larger buyers. For instance, convenience stores can realize the advantages of size by switching to larger wholesalers. Wholesales can increase their size by forming buyer groups.[164]

(vi) The ACS analysis assumes linear pricing. The CC found that pricing was typically not linear, but multipart.[165]

The CC did not find empirical evidence consistent with a waterbed effect. They did not find unambiguous evidence of a decline in either the number or revenues of convenience stores. Nor did the CC find an increase in the disparity in input costs between small and large purchasers, increases in relative prices charged by small retailers, or a shift in demand away from small retailers to large retailers. Finally, survey evidence indicated that 93 percent of suppliers did not agree that there was a waterbed effect.[166]

The CC, however, did express concerns that the large grocery stores were transferring risk and unexpected costs back up the chain to their suppliers by retroactively renegotiating terms of supply. This evidence is consistent with the large groceries holding up their suppliers. The CC found that this raises concerns regarding the incentives for suppliers to invest and innovate. The CC recommendations include broadening the coverage of the SCOP to include more retailers, the creation of a stronger enforcement and monitoring institution (an ombudsman), and strengthening the SCOP to prohibit retroactive renegotiation of terms and conditions of supply.

164 Competition Commission, *Market investigation 2008* at 5.33.

165 Competition Commission, *Market investigation 2008* at Appendix 5.4 at 40.

166 Competition Commission, *Market investigation 2008* at Appendix 5.4 at 49 and 58.

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NOTE DE RÉFÉRENCE[1]

1. Introduction

Depuis une quinzaine d'années, on se préoccupe de plus en plus de certains comportements qui créent, préservent ou renforcent la position de l'acheteur, et notamment le pouvoir de monopsone. Cet intérêt accru pour une politique appropriée de promotion de la concurrence dans le contexte de la puissance de l'acheteur se reflète dans deux tables rondes précédentes de l'OCDE consacrées aux « pratiques exemplaires » : l'une en 1998 sur la *Puissance d'achat de la distribution multiproduits*[2] et l'autre en 2004 intitulée *Competition and Regulation in Agriculture: Monopsony Buying and Joint Selling*[3]. Une session consacrée au pouvoir de l'acheteur, avec un débat d'experts et six exposés, a eu lieu au 2000 Fordham Corporate Law Institute on International Antitrust Law & Policy[4], et l'American Antitrust Institute a organisé deux symposiums sur le pouvoir de l'acheteur[5]. En 2000, la Federal Trade Commission a tenu un atelier sur les primes de référencement et d'autres pratiques commerciales dans le secteur alimentaire[6] et a ensuite publié deux rapports internes sur le sujet[7]. En 2004, il y a eu également un débat sur le pouvoir de monopsone lors de l'atelier sur le contrôle des fusions parrainé conjointement par la division Antitrust du Département de la justice et la Federal Trade Commission[8]. L'intérêt à cet égard reste d'actualité. Dernier exemple, l'International Competition Network a créé un groupe d'étude sur « l'abus de position de négociation supérieure » et a organisé une session plénière spéciale sur ce thème lors de sa réunion annuelle du printemps 2008[9].

L'intérêt pour ce dossier est à la mesure des litiges et des mesures de contrôle. Une collusion entre acheteurs a été en cause dans des affaires concernant des myrtilles[10], des médicaments et des honoraires de pharmaciens[11], l'acquisition de feuilles de tabac[12], les services d'agents de voyage[13] et des entraîneurs de

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1 Préparée par Jeffrey Church, Département économie et Institut de recherche politique avancée, Université de Calgary, Calgary, Alberta, Canada. Mathew Reimer a contribué d'excellente manière aux recherches.

2 Cf. OCDE Table ronde sur la puissance d'achat de la distribution multiproduits (1998), disponible en ligne à l'adresse http://www.oecd.org/dataoecd/1/18/2379299.pdf.

3 Cf. OECD Roundtable on Competition and Regulation in Agriculture: Monopsony Buying and Joint Selling (2004), disponible en ligne à l'adresse http://www.oecd.org/dataoecd/7/56/35910977.pdf.

4 Cf. Hawk (2001).

5 Le premier en 2004. Le second, plus récemment, en 2007. Par la suite, cinq articles du premier, ainsi que trois autres, on été publiés dans l'*Antitrust Law Journal* 72(2). Les présentations du second symposium sont disponibles en ligne à l'adresse : http://www.antitrustinstitute.org/Archives/2007_Buyer_Power.ashx.

6 Cf. http://www.ftc.gov/bc/slotting/presentations/index.shtm.

7 Federal Trade Commission, *Report on the Federal Trade Commission Workshop on Slotting Allowances and Other Marketing Practices in the Grocery Industry* (2001) disponible en ligne à l'adresse http://www.ftc.gov/os/2001/02/slottingallowancesreportfinal.pdf et Federal Trade Commission, *Slotting Allowances in the Retail Grocery Industry: Selected Case Studies in Five Product Categories* (2003) disponible en ligne à l'adresse : http://www.ftc.gov/os/2003/11/slottingallowancerpt031114.pdf.

8 Cf. http://www.usdoj.gov/atr/public/workshops/mewagenda2.htm.

9 Cf. http://www.icn-kyoto.org/documents/abuse.html#questionnaire et http://www.icn-kyoto.org/agenda/index.html.

10 Peace v. Jasper Wyman & Son, CV-00-015 (Super. Ct. Me. Nov. 18, 2003).

11 Bellevue Drug Co. v. Advance PCS, CV 03-47431 (E.D. Pa. Mar. 2, 2004).

basket-ball au niveau universitaire aux États-Unis[14]. Des problèmes de création possible d'un pouvoir de l'acheteur ont été évoqués dans plusieurs affaires de fusion des deux côtés de l'Atlantique, notamment dans les secteurs du commerce de céréales[15], des soins de santé[16] et de la distribution au détail[17]. Les pratiques d'offres prédatrices visant à créer un pouvoir de monopsone étaient l'enjeu de la décision récente de la Cour suprême des États-Unis dans l'affaire *Weyerhaeuser*[18], tandis que la décision favorable à la Federal Trade Commission dans l'affaire Toys 'R' Us portait essentiellement sur l'utilisation de sa puissance d'achat par Toys 'R' Us pour augmenter les coûts de certains rivaux en aval et, partant, les exclure[19]. Enfin, une enquête récente principalement axée sur le pouvoir de l'acheteur et ses effets a été menée en Australie et au Royaume-Uni dans le secteur de la vente au détail de produits alimentaires[20].

La présente note de référence a pour objet de faire la synthèse de la doctrine économique sur le pouvoir de l'acheteur, et notamment sur les situations de monopsone et le pouvoir de négociation. Plusieurs définitions du pouvoir de l'acheteur sont envisagées et les relations entre monopsone, négociation et contre-pouvoir sont examinées à la section 2. Les sections 3 et 4 analysent les sources du monopsone et du pouvoir de négociation et leurs effets sur le bien-être. La section 5 aborde plusieurs problèmes de politique de la concurrence soulevés par le pouvoir de l'acheteur, en considérant plus particulièrement (i) les offres prédatrices d'acheteurs sur les marchés de facteurs ; et (ii) le pouvoir de l'acheteur dans le contrôle des fusions[21]. La section 6 analyse plusieurs affaires qui illustrent certains des problèmes que pose le pouvoir de l'acheteur pour l'application de la politique de la concurrence.

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12 Deloach v. Philip Morris Cos., No. 1:00CV01235, 2001 WL 724490 (E.D. Pa. 2004).

13 Hall v. United Airlines, 296 F. Supp. 2d 652 (E.D.N.C. 2003).

14 Law v. National Collegiate Athletic Association 134 F.3d 1010 (10th Circ. 1998).

15 United States v. Cargill Inc., No 1:99CV01875 (D.D.C).

16 United States v. Aetna, Inc. No. 3-99CV1398-H (N.D. Tex) et plus récemment Caremark Rx, Inc./Advance PCS, FTC File No. 031 0239 (11 février 2004).

17 Dans l'UE, cf. Keso/Tuko, J.O. L 110/53 (1997), Rewe/Meinl, J.O. L 274/1 (1999) et Carrefour/Promodes (Affaire M. 1684). Au Royaume-Uni, cf. Competition Commission, Safeway plc and Asda Group Limited (détenus par Wal-Mart Stores Inc.); Wm Morrison Supermarkets PLC; J Sainsbury plc; and Tesco plc A report on the mergers in contemplation (2003).

18 Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber. Co., 127 S. Ct. 1069 (2007).

19 Federal Trade Commission v. Toys "R" Us, 221 F. 3d 923.

20 Cf. Competition Commission, *Market investigation into the supply of groceries in the UK 2008*, et Australian Competition & Consumer Commission, *Report of the ACCC Inquiry into the Competitiveness of Retail Prices for Standard Groceries* (2008). L'enquête menée au Royaume-Uni fait suite à une enquête précédente. Cf. Competition Commission, *Report on the Supply of Groceries from Multiple Stores in the United Kingdom 2000*.

21 La présente note n'aborde pas deux autres problèmes liés au pouvoir de l'acheteur. Il s'agit de ceux que posent les groupements d'acheteurs et les restrictions verticales créées par les acheteurs. Pour une étude récente de l'impact des groupements d'acheteurs sur la concurrence, consacrée plus spécialement à deux aspects, la coordination plus étroite sur les marchés de facteurs, et quand et comment le pouvoir de l'acheteur incite les entreprises en aval à s'engager sur la voie de restrictions verticales nuisant aux consommateurs, veuillez consulter l'Office of Fair Trading (2007). Une autre étude récente des restrictions engendrées par les acheteurs a été réalisée par Dobson (2008). Cf. également Comanor et Rey (2000) pour une analyse des restrictions verticales créées par les acheteurs pour préserver le pouvoir de marché en aval en dissuadant l'entrée, et Marx et Shaffer (2007) pour une analyse des primes de référencement et du pouvoir de l'acheteur, qui estime que les entreprises en aval bénéficiant d'un pouvoir de l'acheteur peuvent

1.1 Points clés

1.1.1 Définitions

Le pouvoir de l'acheteur concerne la manière dont les entreprises en aval peuvent influencer les conditions d'échange avec les fournisseurs en amont. On fait une distinction entre le pouvoir de monopsone et le pouvoir de négociation. Un acheteur bénéficie d'un pouvoir de monopsone s'il peut, avec profit, ramener le prix payé sous les niveaux concurrentiels en limitant la demande. Le pouvoir de négociation fait référence à la marge de manœuvre dont l'acheteur dispose pour négocier avec ses fournisseurs. Le prix inférieur obtenu grâce au pouvoir de monopsone est obtenu par une réduction des achats et non, comme dans le cas du pouvoir de négociation, par la *menace* d'acheter moins. Le pouvoir de négociation est exercé uniquement lorsqu'en son absence les fournisseurs exerceraient un pouvoir de marché. Il s'agit d'un contre-pouvoir.

Les implications en matière de bien-être de ces deux types de puissance d'achat sont très différentes. Si l'on présuppose l'absence de toute discrimination de prix, les pouvoirs de monopsone et d'oligopsone engendreront une distorsion quantitative et une perte d'efficience sur les marchés *de facteurs*, ce qui portera probablement préjudice aux consommateurs sur les marchés d'aval. Les conséquences pour le bien-être sont moins claires, tout comme, dans ce cas, le rôle de la politique de la concurrence à l'égard du pouvoir de négociation. En effet, dans la mesure où le pouvoir de négociation exercé par les acheteurs est un facteur d'équilibre (c'est-à-dire qu'il compense totalement ou partiellement le pouvoir de marché des vendeurs), il peut accroître la production sur le marché d'amont et augmenter le bien-être des consommateurs sur le marché d'aval.

1.1.2 Pouvoir de monopsone

L'exercice du pouvoir de monopsone requiert une condition préalable : l'existence de rentes du fournisseur. Les rentes du fournisseur se présentent sous trois formes : rente ricardienne, quasi-rente ou monopole. L'impact de l'exercice du pouvoir de monopsone sur le bien-être dépend des types de rentes pouvant être obtenues.

On parle de rente ricardienne lorsque les facteurs de production utilisés par les fournisseurs se différencient en fonction de leur productivité. Les rentes ricardiennes donnent lieu à des courbes d'offre ascendantes *à long terme*. L'exercice du pouvoir de monopsone dépend de l'élasticité de l'offre. Plus l'offre est inélastique, plus il est possible d'exercer un pouvoir de monopsone. L'exercice du pouvoir de monopsone crée une distorsion quantitative sur le marché des produits intermédiaires et nuit généralement aux consommateurs sur le marché en aval, même si les prix de ces produits diminuent. Une entreprise en position de monopsone se comportera sur le marché du produit final comme si elle avait des coûts marginaux supérieurs à ceux d'une entreprise sans pouvoir de monopsone. Les consommateurs seront affectés en aval, même si le monopsoneur est une entreprise compétitive du marché en aval et que l'offre est parfaitement élastique. Si le monopsoneur détient également un pouvoir de marché sur le marché d'aval, la perte d'efficience et le préjudice causé aux consommateurs sont plus grands que dans le cas contraire.

Le monopsoneur peut être en mesure de proposer des offres « tout ou rien » aux différents fournisseurs. L'offre « tout ou rien » visant à maximiser les bénéfices correspond à la quantité concurrentielle pour un paiement total couvrant tout juste le coût de la fourniture. Par rapport à un prix uniforme, l'offre « tout ou rien » est plus efficiente, et comme elle implique des achats de facteurs plus importants, elle est plus satisfaisante pour les consommateurs du marché en aval. À moins d'accorder une

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utiliser ces primes pour exclure d'autres entreprises en aval. Pour une position inverse, cf. Klein et Wright (2007).

importance normative à la distribution de rentes ricardiennes au bénéfice des fournisseurs, l'impact des offres « tout ou rien » sur le bien-être est parfaitement clair : elles améliorent le bien-être. Faire obstacle aux offres « tout ou rien », par exemple en exigeant des prix uniformes, nuira aux consommateurs du marché en aval et réduira l'efficience. En outre, accorder plus de poids à la rente des producteurs par rapport aux consommateurs présente un danger, l'adoption de mesures qui finissent par restreindre la concurrence et l'innovation parmi les fournisseurs.

Pour identifier le pouvoir de monopsone dans la pratique, il convient de reconnaître que c'est l'existence d'alternatives pour les vendeurs qui détermine l'intensité du pouvoir de monopsone d'un acheteur. Si les vendeurs peuvent facilement trouver d'autres acheteurs (qui utilisent les facteurs à d'autres fins), d'autres acheteurs dans différentes zones géographiques (qui utilisent les facteurs à des fins similaires) ou d'autres acheteurs pour lesquels les biens peuvent être utilisés pour créer un produit intermédiaire différent, l'acheteur disposera d'un pouvoir de monopsone limité. Le marché à prendre en compte pour identifier le pouvoir de monopsone est constitué par le plus petit ensemble de produits dans la plus petite zone géographique, de telle sorte qu'un monopsoneur hypothétique dans cette zone serait en mesure de faire baisser les prix dans des proportions restreintes, mais néanmoins significatives et non transitoires.

Les quasi-rentes représentent la différence entre les recettes totales et les coûts évitables à court terme. À court terme, le monopsoneur peut obtenir une quasi-rente. À long terme, toute tentative d'exproprier les quasi-rentes de fournisseurs provoquera leur sortie : sachant qu'ils ne pourront récupérer leurs investissements, les fournisseurs ne réinvestissent pas. Ainsi, si le marché du facteur est concurrentiel, une entreprise en position de monopsone ne pourra exercer son pouvoir de monopsone à long terme, sauf en présence de rentes ricardiennes.

Dans le cas d'un monopole bilatéral, maximiser le bénéfice conjoint est préférable à toute autre situation dans laquelle les entreprises en amont et en aval feraient une offre « à prendre ou à laisser ». En effet, les deux entreprises internaliseront leurs marges respectives, ce qui augmentera la production en amont et en aval.

La création d'un contre-pouvoir pour compenser le pouvoir de monopole sur le marché en aval pourrait déboucher sur une augmentation de la production en amont et une baisse des prix en aval. Toutefois, il se peut qu'un tel contre-pouvoir ne parvienne pas à améliorer le bien-être s'il a l'un des résultats suivants : un échec des négociations, une coordination plus étroite des acheteurs sur d'autres marchés, l'expropriation de rentes ricardiennes ou de quasi-rentes ou un phénomène de frein à l'innovation en amont.

1.1.3 Pouvoir de négociation

Le pouvoir de négociation se définit généralement comme la position de l'acheteur dans ses négociations avec les vendeurs. Le pouvoir de négociation peut aider à comprendre la nature des échanges entre les fournisseurs de produits intermédiaires et les entreprises en aval si l'interface ou le cadre établi entre les partenaires commerciaux implique des négociations bilatérales. Dans ce contexte, il y a relativement peu d'entreprises en amont et en aval et elles négocient bilatéralement les conditions de la fourniture.

Les négociations porteront probablement sur le surplus marginal dont peuvent bénéficier l'acheteur et le vendeur. Le surplus est le gain supérieur à celui que l'acheteur et le vendeur pourraient réaliser par rapport à leurs options extérieures. Plus un acheteur est efficace dans ses négociations, plus son option extérieure est large et plus celle du vendeur est restreinte, plus le surplus marginal sera proportionnellement élevé pour l'acheteur. La valeur de l'option extérieure de l'acheteur dépend de sa

capacité et de sa volonté de choisir d'autres fournisseurs. De la même manière, la valeur de l'option extérieure du vendeur dépend de sa capacité et de sa volonté de choisir d'autres acheteurs.

Un acheteur disposera d'une puissance d'achat substantielle s'il (i) peut facilement recourir à d'autres fournisseurs, parrainer une nouvelle entrée ou s'auto-approvisionner sans subir des coûts irrécupérables substantiels et (ii) si cela constitue une passerelle vers le marché en aval. Si l'on part du principe que l'acheteur est en position de gardien et si l'on considère le rôle du pouvoir de marché en aval, il est utile de reconnaître que l'acheteur fournit des « services de distribution » au vendeur. Si l'acheteur est en position de gardien, il détient un pouvoir de marché — en tant que *vendeur* — sur le marché de la distribution dans une zone géographique donnée. C'est le cas, par exemple, si des entreprises en amont ne peuvent toucher les consommateurs finaux efficacement sans l'intervention de l'acheteur (c'est-à-dire que les entreprises en amont ont peu d'alternatives à l'acheteur pour accéder au marché). L'identification du pouvoir de l'acheteur nécessite une définition minutieuse du marché du produit d'aval pertinent et des marchés géographiques afin d'identifier le pouvoir de marché dans les services de distribution assurés par l'acheteur.

Dans l'optique du bien-être, deux questions se posent concernant le pouvoir de négociation. La première a trait aux effets de *l'exercice* du pouvoir de négociation sur le bien-être. La seconde fait référence aux effets sur le bien-être d'un *comportement qui crée, améliore ou maintient* un pouvoir de négociation. Ces deux questions sont liées. En effet, les effets sur le bien-être de l'exercice du pouvoir de négociation devraient guider l'évaluation des effets sur le bien-être d'un comportement qui crée un pouvoir de négociation. Toutefois, il ne suffit pas d'analyser les effets d'un prix inférieur (c'est-à-dire une ristourne accordée à un acheteur important). Une analyse d'équilibre est nécessaire. Ce genre d'analyse offre un avantage certain : les réponses d'autres entreprises (tant en amont qu'en aval) à la ristourne accordée à l'acheteur important déterminent les effets ultimes de l'exercice du pouvoir de négociation.

Les pouvoirs de négociation différents des acheteurs provoquent une discrimination de prix sur le marché en amont, au bénéfice des acheteurs les plus puissants qui doivent payer moins cher. La doctrine économique sur les effets de la discrimination de prix induite par des pouvoirs de négociation différents montre que de manière générale elle améliore l'efficience et profite aux consommateurs en aval. En situation d'efficience contractuelle, l'interdiction de la discrimination de prix n'améliore pas l'efficience et ne profite pas aux consommateurs des marchés en aval. Si les transactions sur les marchés en amont impliquent des prix de gros linéaires, les effets de la discrimination de prix sur le bien-être dépendent de la source du pouvoir de négociation. Si elle est basée sur la menace d'une intégration en amont par les acheteurs, la discrimination de prix nuira aux consommateurs à court terme, mais pas nécessairement à long terme, en fonction des incitations et de la capacité des entreprises en aval d'investir dans la réduction des coûts. Il est possible que l'effet de l'interdiction de discriminer par les prix réduise les incitations des entreprises à se lancer dans des réductions de coût, pénalisant les consommateurs à long terme. Si elle est basée sur une négociation bilatérale lorsque la menace d'intégration ne joue pas, la discrimination de prix a plus de chances de profiter aux consommateurs, sauf si un acheteur plus puissant se voit accorder des ristournes beaucoup plus importantes que ses rivaux et si les négociations entre le fournisseur et l'acheteur puissant en question déterminent le prix de gros commun.

Les comportements qui créent un pouvoir de marchandage pourraient susciter certains problèmes de concurrence si (i) les plus faibles prix de gros de l'acheteur important se traduisent par des prix inférieurs en aval, ce qui nuit à la rentabilité de ses concurrents et, partant, provoque leur sortie et une augmentation du pouvoir de marché de l'acheteur important en aval, néfaste pour les consommateurs finaux ; ou (ii) une ristourne accordée à un acheteur disposant d'un pouvoir de marché aboutit à une augmentation du prix de gros appliqué aux autres acheteurs, selon le principe des vases communicants. La hausse de prix pour les autres acheteurs se répercute sur leurs coûts en aval, conduisant à leur sortie ou les incitant à augmenter leurs prix en aval. Le scénario (i) pose problème puisque la contrepartie des gains immédiats et certains pour les consommateurs et est un préjudice potentiel à l'avenir. Toutefois, il y a un troisième résultat

possible : une ristourne plus forte pour un acheteur dont le pouvoir s'est accru fera baisser les prix sur le marché en aval parce que d'une part, d'autres entreprises en aval réagissent à la baisse de prix provoquée par la réduction des prix de gros imputable au pouvoir de l'acheteur et, d'autre part, parce qu'elles sont elles aussi en mesure de négocier un prix de gros inférieur. Il se peut que d'autres acheteurs soient à même d'appliquer des contre-stratégies qui éliminent ou réduisent toutes les asymétries de puissance d'achat au bénéfice des consommateurs.

Il peut être dans l'intérêt du fournisseur de réduire ses prix pour les entreprises de plus petite taille lorsqu'augmente la puissance d'achat d'une entreprise dominante en aval. En situation d'efficience contractuelle, à mesure que le pouvoir de l'acheteur augmente et que l'entreprise dominante en aval obtient une plus forte proportion des bénéfices conjoints, le fournisseur en amont peut se permettre de moins se concentrer sur la maximisation des bénéfices conjoints et davantage sur la rentabilité de la frange concurrentielle. Diminuer les prix de transfert pour les petits acheteurs a pour effet d'augmenter leur production et leurs bénéfices, ce qui entraîne une baisse des prix et une augmentation de la production sur le marché en aval. En outre, dans la mesure où les petites entreprises en aval se retrouvent en difficulté en raison des coûts inférieurs de leurs rivaux de plus grande taille, leur demande de facteurs de production diminue, ce qui a pour effet de tirer vers le bas le prix de ces facteurs.

Pour qu'il y ait un effet de vases communicants, l'évolution du pouvoir de l'acheteur doit déboucher sur une modification du prix de transfert unitaire payé par les entreprises concurrentes en aval. Les hypothèses qui envisagent la possibilité d'un effet de vases communicants présupposent que les acheteurs et vendeurs utilisent de simples contrats linéaires (c'est-à-dire que toutes les transactions interviennent pour un prix de gros unitaire négocié). Même si l'on observe un effet de vases communicants, les prix appliqués aux consommateurs sur le marché en aval peuvent néanmoins diminuer. L'impact sur les prix en aval dépend de l'interaction de trois éléments : (i) l'entreprise bénéficiant d'un pouvoir de l'acheteur accru aura tendance à réduire ses prix du fait de la baisse de ses coûts marginaux et (ii) ses concurrentes en aval auront intérêt en termes de maximisation des bénéfices (si leurs coûts restent inchangés) à réagir par une baisse de leurs prix. Cependant, (iii) l'effet de vases communicants implique que les entreprises rivales sont incitées à augmenter leurs prix en raison de la hausse de leurs coûts marginaux.

Trois théories usuelles cohérentes peuvent aboutir à un effet de vases communicants. Les deux premières impliquent une évolution de la structure du marché en amont. S'agissant de la première, si le renforcement du pouvoir de négociation d'un acheteur réduit la rentabilité de fournisseurs en amont, si cette moindre rentabilité, à son tour, engendre une rationalisation à long terme en amont, ce qui diminuera le nombre de fournisseurs, et si la réduction du nombre de fournisseurs renforce le pouvoir de négociation des fournisseurs restants, ce qui provoquera une augmentation des prix en amont payés par les rivaux en aval. S'agissant de la seconde, le renforcement du pouvoir de l'acheteur peut rendre l'entrée moins attrayante en élevant les barrières à l'entrée et dés lors en réduisant la profitabilité de la prestation aux petits acheteurs, conduisant à une augmentation du prix payé par ceux ci. Le point clé dans l'effet des vases communicants est que plus la demande est élevée de la part de celui qui détient un pouvoir d'achat, plus faible sera la demande de la part des autres acheteurs et donc plus grand sera le coût et le prix moyen d'approvisionnement des petits acheteurs.

La troisième théorie des vases communicants implique des changements dans les parts de marché. Une réduction des prix des produits intermédiaires a pour effet de diminuer les coûts marginaux de l'entreprise qui bénéficie d'un pouvoir de l'acheteur renforcé, ce qui se traduit par une augmentation de ses ventes en aval, dont une partie au détriment de ses rivaux. Cette modification des parts de marché diminue le pouvoir de négociation de ses rivaux en aval, en augmentant leurs prix de gros, accentuant ainsi encore davantage le différentiel de prix des facteurs, de taille du marché en aval et de pouvoir de négociation.

1.1.4 Mise en œuvre la politique de concurrence et pouvoir de l'acheteur

En cas d'offres prédatrices, l'acheteur augmente le volume de ses achats sur le marché en amont pour faire monter le prix des produits intermédiaires et réduire les bénéfices des acheteurs concurrents, les poussant ainsi à sortir du marché ou à se marginaliser et augmentant donc son pouvoir de monopsone. Il est naturel que la règle de responsabilité appliquée aux pratiques d'offres prédatrices reflète la règle de responsabilité liée aux prix d'éviction. La règle de responsabilité pour les offres prédatrices implique : (i) une tarification au-dessous des coûts de la *production* du prédateur, et (ii) une probabilité dangereuse de récupérer l'investissement dans la vente au-dessous des coûts. Comme pour les prix d'éviction, une norme moins stricte risque de freiner les hausses de prix proconcurrentielles sur les marchés de produits intermédiaires. L'argument en faveur de l'adoption de normes analogues sera d'autant plus fort, et le parallèle entre les offres prédatrices et les prix d'éviction d'autant plus marqué, si l'on admet que les effets sur les fournisseurs de produits intermédiaires dans un contexte d'offres prédatrices sont symétriques par rapport aux effets des prix d'éviction sur les consommateurs en aval. Si la politique de la concurrence vise à protéger les acteurs du marché contre les comportements anticoncurrentiels, le préjudice causé par les pratiques offres prédatrices aux fournisseurs de produits intermédiaires justifie pleinement la mise en œuvre des deux volets de l'arrêt *Brooke Group* lorsque des offres prédatrices sont en cause.

Une fusion entre acheteurs pourrait créer, renforcer ou maintenir un pouvoir de monopsone classique ou un pouvoir de négociation. Si elle renforce le pouvoir de monopsone, l'effet sur le bien-être est de réduire les prix et les quantités sur le marché en amont. En outre, l'entreprise fusionnée agira comme si ses coûts marginaux sur le marché en aval avaient augmenté, ce qui réduira la production et fera monter les prix sur le marché en aval.

En revanche, si la fusion renforce le pouvoir de négociation, la situation n'est pas aussi simple. Si le renforcement du pouvoir de négociation permet à l'acheteur de limiter davantage l'exercice du pouvoir de marché en amont et s'il réduit les dépenses marginales consenties par l'acheteur lorsque l'utilisation de facteurs s'accroît, il pourrait être bénéfique pour le niveau des échanges, aussi bien sur le marché des produits intermédiaires que sur le marché de production en aval, et le renforcement du pouvoir de l'acheteur est une source de gains d'efficience liés à la fusion. Toutefois, il se peut qu'un pouvoir de l'acheteur renforcé ne soit pas aussi bénéfique, en fonction des ajustements d'équilibre réalisés par les fournisseurs et les autres acheteurs.

La présence d'un pouvoir de négociation peut représenter un pouvoir compensateur qui atténue la possibilité d'une augmentation du pouvoir de marché découlant de la fusion. En cas de fusion de vendeurs, pour faire valoir efficacement l'argument tiré du pouvoir compensateur, il faut démontrer que le pouvoir de l'acheteur reste suffisant après l'opération pour entraver toute hausse des prix des vendeurs. Si les options extérieures des acheteurs puissants restent inchangées malgré l'opération, il se peut que les vendeurs soient incapables d'augmenter leurs prix après l'opération.

Si un pouvoir compensateur remplace la perte de concurrence découlant d'une fusion de vendeurs, cette substitution est basée sur des considérations à court terme (à savoir la capacité de contenir les hausses de prix). Reste à savoir si ce pouvoir compensateur sera aussi efficient à long terme. Il faut se demander, en particulier, si le pouvoir compensateur est aussi efficace que la concurrence entre les vendeurs pour empêcher l'inefficience X et pour promouvoir l'innovation et réduire les coûts. La performance du secteur à long terme pourrait être fonction de la réponse à deux interrogations : (i) les caractéristiques du secteur impliquent-elles que l'innovation est davantage favorisée par la concurrence entre les vendeurs que par la coopération entre les vendeurs et les acheteurs ? (ii) l'innovation est-elle favorisée ou freinée par une structure de marché verticale équilibrée dans laquelle les acheteurs et les vendeurs sont relativement égaux ?

2. Pouvoir de l'acheteur : définitions et problèmes de lutte contre les pratiques anticoncurrentielles

On se demandera dans cette section comment définir le pouvoir de l'acheteur et on présentera les problèmes spécifiques que pose le pouvoir de l'acheteur du point de vue de la lutte contre les pratiques anticoncurrentielles.

2.1 Définitions

Les problèmes liés au pouvoir de l'acheteur et à ses effets se posent généralement dans le cadre d'opérations sur des biens intermédiaires, ou sur des marchés de facteurs, dans lesquelles une entreprise en amont (le fournisseur) vend à une entreprise en aval (l'acheteur). Dans le contexte le plus simple, l'entreprise en aval utiliserait les produits intermédiaires pour produire et vendre aux consommateurs d'un marché en aval. En fin de compte, le pouvoir de l'acheteur concerne donc la manière dont l'entreprise en aval peut influencer les termes de l'échange avec ses fournisseurs en amont. Toutefois, comme on l'a souligné « on ne peut en vouloir à un lecteur occasionnel de publications sur le pouvoir de l'acheteur de se perdre face aux définitions du pouvoir de l'acheteur »[22].

Ces publications distinguent le pouvoir de monopsone et le pouvoir de négociation : la distinction entre les différents types de pouvoir de l'acheteur se base sur la source de chacun de ces pouvoirs. Les auteurs distinguent deux types d'environnement ou cadres d'échange. Le premier est une interface de marché dans laquelle les acteurs des deux côtés du marché interagissent pour fixer un prix, lequel, en l'absence de discrimination de prix, sera payé par tous les acheteurs et perçu par tous les vendeurs. Le second est un environnement d'échange où les fournisseurs et les acheteurs sont relativement peu nombreux et où les conditions de l'échange sont fixées par des négociations bilatérales[23].

Avec une interface de marché, un acheteur détient un pouvoir de monopsone s'il peut ramener de façon rentable le prix payé au-dessous du niveau concurrentiel ou de la valeur du produit marginal[24]. Cette définition établit un parallélisme avec celle de la définition usuelle du pouvoir de marché : une entreprise bénéficiant d'un pouvoir de marché peut, de manière rentable, augmenter ses prix au-dessus du niveau concurrentiel ou du coût marginal. Par exemple, Noll définit ainsi le pouvoir de l'acheteur[25] :

> Un acheteur bénéficie d'un pouvoir de marché s'il peut forcer les vendeurs à réduire leurs prix au-dessous du niveau qui s'appliquerait dans le cadre d'un marché concurrentiel. En conséquence, le pouvoir de l'acheteur découle d'un monopsone (un seul acheteur) ou d'un l'oligopsone (quelques acheteurs), lesquels sont les pendants du monopole et de l'oligopole.

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22 Voir Chen (2008, p. 2).

23 Voir Inderst et Mazzarotto (2008, pp. 1954-1955) ou le chapitre 14 du Report of the ACCC Inquiry into the Competitiveness of Retail Prices for Standard Groceries by the Australian Competition & Consumer Commission (2008) disponible en ligne sur : http://www.accc.gov.au/content/index.phtml?itemId=838251 pour de plus amples informations sur cette distinction.

24 Le produit marginal pour une entreprise correspond au produit marginal du facteur (l'augmentation de la production qui est fonction de l'achat d'une unité supplémentaire du facteur) multipliée par la valeur de la production de l'entreprise. Si le marché en aval de l'entreprise est concurrentiel, son produit marginal est simplement le produit du prix de la production et du produit marginal du facteur ou de la valeur de son produit marginal.

25 Voir Noll (2005, p. 589).

Comme pour le pouvoir de marché, on observe un pouvoir de monopsone si le côté acheteur du marché est à ce point concentré que les acheteurs se reconnaissent le pouvoir d'imposer les prix au marché. Ils savent que s'ils restreignent la demande et achètent moins, les prix baisseront et que s'ils augmentent leurs achats, les prix augmenteront. Le monopsone et l'oligopsone caractérisent la capacité d'un acheteur d'exercer un pouvoir de marché, l'intensité du pouvoir de marché dépendant du nombre et de la concentration des acheteurs.

Dans un cadre de négociation, le pouvoir de l'acheteur est lié à la capacité de ce dernier de s'approprier le surplus du fournisseur. Dans cette situation, les différences en termes de pouvoir de l'acheteur se reflètent dans les différences observées dans chaque ristourne négociée[26]. Dans ce contexte, plusieurs définitions du pouvoir de l'acheteur ont été proposées et notamment « le pouvoir de négociation d'un acheteur à l'égard des fournisseurs avec lesquels il traite »[27], le pouvoir de négociation d'un acheteur dépendant de sa capacité de menacer de façon crédible d'imposer un coût d'opportunité — sous forme de préjudice ou de manque à gagner — si aucune concession ne lui est accordée[28].

Le pouvoir de négociation se distingue du pouvoir de monopsone. Le prix inférieur obtenu grâce au pouvoir de monopsone résulte d'une réduction des achats et pas, comme dans le cas du pouvoir de négociation, par la *menace* d'acheter moins[29]. En outre, le pouvoir de négociation ne peut être exercé lorsque les fournisseurs sont concurrentiels. Il est impossible de pousser les fournisseurs à pratiquer des prix inférieurs au coût marginal. Le pouvoir de négociation peut être exercé uniquement dans le cas où, en son absence, les fournisseurs utiliseraient leur pouvoir de marché.

On peut d'emblée constater que les effets sur le bien-être de ces deux types de pouvoir de l'acheteur vont être très différents. Si l'on présuppose l'absence de toute discrimination de prix, les pouvoirs de monopsone et d'oligopsone créeront une distorsion des quantités et une perte d'efficience sur le marché *des produits intermédiaires*, ce qui portera probablement préjudice aux consommateurs sur les marchés en aval. Les conséquences sur le bien-être sont moins claires, tout comme le rôle de la politique de la concurrence vis-à-vis du pouvoir de négociation. En effet, dans la mesure où le pouvoir de négociation exercé par les acheteurs est un facteur d'équilibre (c'est-à-dire qu'il compense totalement ou partiellement

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26 Voir Inderst et Mazzarotto (2008, p. 1955).

27 Voir Inderst et Mazzarotto (2008, p. 1954).

28 Voir Kirkwood (2005, p. 637). Dans un projet de document destiné à la Table ronde de l'OCDE sur le pouvoir de l'acheteur dans la distribution multiproduits, le Secrétariat de l'OCDE indique ce qui suit :

> Un détaillant est considéré comme bénéficiant d'un pouvoir de l'acheteur si, par rapport à au moins un fournisseur, il peut menacer de manière crédible d'imposer un coût d'opportunité à long terme (préjudice ou suppression d'un avantage) qui, si la menace était mise à exécution, serait très disproportionné par rapport à tout coût d'opportunité à long terme pour lui-même. Par disproportionné, nous entendons une différence relative plutôt qu'un coût d'opportunité absolu. Par exemple, le distributeur A exerce un pouvoir de l'acheteur sur le fournisseur B si une décision de déréférencer les produits de B aboutit à une diminution des bénéfices de A de 0.1 % et si cette diminution s'élève à 10 % pour B.

Toutefois, dans le document définitif, l'OCDE utilise une définition plus générale : Le pouvoir de l'acheteur est « la capacité d'un acheteur à influencer les conditions auxquelles il achète des marchandises ». Voir la Table ronde de l'OCDE sur le pouvoir de l'acheteur dans la distribution multiproduits http://www.oecd.org/dataoecd/1/18/2379299.pdf.

29 Voir Chen (2008).

le pouvoir de marché des vendeurs), il peut accroître la production sur le marché en amont et augmenter le bien-être des consommateurs sur le marché en aval[30].

2.2 Problèmes de concurrence

La politique de la concurrence implique d'identifier et de sanctionner les comportements des entreprises qui créent, maintiennent ou renforcent le pouvoir de marché qui, à son tour, réduit le bien-être. Les comportements anticoncurrentiels sont ceux qui nuisent à ce point à la concurrence que le bien-être du consommateur ou le bien-être global s'en voit réduit[31]. Comme indiqué dans la section précédente, les deux types de pouvoir de l'acheteur engendrent des effets potentiels très différents. On examinera dans les deux sections suivantes la logique économique de chaque type de pouvoir de l'acheteur, et en particulier les conditions nécessaires à leur exercice et leurs effets sur le bien-être. Toutefois, il faut au préalable évoquer deux questions fondamentales, à savoir :

(i) L'exercice du pouvoir de monopsone porte-t-il préjudice aux consommateurs en aval ? Si ce n'est *pas* le cas, doit-on interdire un comportement qui crée, maintient ou renforce un pouvoir de monopsone ? Suffit-il d'avoir un comportement qui crée un pouvoir de monopsone et qui cause un préjudice concurrentiel sur le marché en amont (c'est-à-dire une inefficience sur le marché des produits intermédiaires) ?

(ii) Comment l'exercice du pouvoir de négociation peut-il être contraire au droit de la concurrence ? Si son exercice ne donne pas lieu à un préjudice anticoncurrentiel, pourquoi le pouvoir de négociation ou les comportements qui le renforcent peuvent-ils poser des problèmes de conformité au droit de la concurrence ?

3. Pouvoir de monopsone

Si le monopsoneur doit se contenter de proposer un prix commun, une des conditions nécessaires à l'exercice rentable du pouvoir de monopsone est l'existence de rentes économiques positives pour les fournisseurs[32]. L'exercice rentable du pouvoir de monopsone implique le transfert de ces rentes des fournisseurs à l'acheteur. Les rentes sont positives si les recettes globales dépassent le montant nécessaire aux fournisseurs pour produire la quantité de biens vendus. Il y a trois types de rentes qui rendent les fournisseurs vulnérables face au pouvoir de monopsone :

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30 John Kenneth Galbraith a présenté et développé le concept de contre-pouvoir pour décrire la manière dont le pouvoir de marché des acheteurs peut apparaître en réaction à l'exercice du pouvoir de marché par les vendeurs. Voir Galbraith (1952).

31 Le surplus du consommateur mesure les gains qui reviennent aux consommateurs. C'est la somme, pour toutes les unités, de la différence entre ce qu'un consommateur était disposé à payer pour une unité et ce qu'il a réellement payé pour cette unité. Un critère de bien-être global est appliqué par l'évaluation des changements en termes de surplus total. Le surplus total est la somme des surplus du producteur et du consommateur. Le surplus du producteur est la différence entre les recettes et les coûts évitables : il permet de mesurer les gains qui reviennent aux entreprises. Lorsque les économistes soulignent l'inefficience d'un comportement, ils veulent simplement dire qu'il aboutit à une réduction du surplus total. Étant donné que les surplus du consommateur et du producteur reflètent, en unités monétaires, les changements en termes de bien-être, lorsque le surplus total diminue en raison d'une évolution particulière, ceux qui en profitent, les gagnants, ne peuvent dédommager ceux qui en pâtissent, les perdants, tout en conservant leur statut privilégié de gagnants. Tout changement améliorant l'efficience provoque une augmentation du surplus total, ce qui implique que les gagnants pourraient dédommager les perdants tout en améliorant leur situation. Cela ne signifie pas que ce dédommagement sera payé, mais uniquement que le changement crée suffisamment de richesses pour en ouvrir la possibilité.

32 Les développements qui suivent s'inspirent de Noll (2005).

- Les rentes *ricardiennes*. On parle de rentes ricardiennes lorsque les facteurs de production utilisés par les fournisseurs se différencient en fonction de leur productivité. Des facteurs de production plus performants impliquent des coûts de production inférieurs pour l'entreprise qui les utilise. Sur les marchés en amont concurrentiels, le fournisseur marginal (ou unité) est l'entreprise (ou unité) dont les coûts marginaux sont parfaitement égaux au prix. Les entreprises (ou unités) à coûts inférieurs bénéficient ainsi d'une rente basée sur ce niveau inférieur de leurs coûts et sur une plus forte productivité. La rente obtenue par unité est la différence entre le prix reçu et le coût marginal des produits. Les rentes ricardiennes se caractérisent par des courbes d'offre ascendantes à long terme.

- Les quasi-rentes. Les quasi-rentes représentent la différence entre les recettes totales et les coûts évitables à court terme. La différence entre les coûts évitables à long terme (lorsque tous les facteurs de production sont variables) et les coûts évitables à court terme sont les dépenses irrécupérables. Si l'entreprise bénéficie de recettes au moins aussi importantes que ses coûts évitables (à court terme), elle poursuivra ses activités. À long terme, cependant, elle doit récupérer ou compter récupérer la totalité de ses coûts, et notamment ses dépenses irrécupérables, pour rester en activité.

- Les courbes d'offre à court terme sont ascendantes si la productivité marginale diminue en raison de l'utilisation croissante d'au moins un facteur variable. Pour l'unité marginale fournie, son prix est égal aux coûts marginaux. Toutes les unités inframarginales fournies procurent des quasi-rentes ou des surplus de producteur qui représentent la différence entre le prix reçu et le coût marginal de l'unité inframarginale. À court terme, l'exercice du pouvoir de monopsone peut transférer une partie de ces quasi-rentes à l'acheteur, mais pas à long terme. Pour que le pouvoir de monopsone se maintienne à long terme, il doit être basé sur un transfert de rentes ricardiennes ou de rentes de monopole.

- Bénéfices de monopole. Si les fournisseurs en amont disposent d'un pouvoir de marché, ils peuvent bénéficier de rentes de monopole. Les rentes de monopole sont la différence entre les recettes totales et les coûts d'opportunité de tous les facteurs de production, les coûts d'opportunité comprenant les rentes ricardiennes.

- Les questions de bien-être soulevées par l'exercice du pouvoir de monopsone dépendent du type de rentes obtenues.

3.1 Rentes ricardiennes

Les effets du pouvoir de monopsone peuvent être déterminés facilement si l'on envisage le cas de figure le plus simple : l'entreprise en aval est en position de monopsone sur le marché en amont, mais écoule sa production sur un marché en aval concurrentiel. Cela correspondrait à des marchés en amont locaux caractérisés par l'existence d'un seul acheteur, avec des marchés en aval beaucoup plus larges, sur lesquels l'acheteur de chaque marché en amont local est en concurrence avec tous les autres acheteurs. La limitation du nombre d'entreprises en amont sur chaque marché local pourra être due à des économies d'échelle, et la faible étendue géographique du marché à des coûts de transport élevés. Par exemple, le marché en amont pourrait concerner un bien agricole, l'acheteur pourrait être une entreprise de transformation alimentaire, les entreprises de ce secteur se faisant une concurrence en aval sur les marchés des produits alimentaires[33].

[33] Cet exemple est extrait de Noll (2005, p. 597).

Ce modèle peut faire l'objet d'une généralisation à trois égards : en introduisant (i) un pouvoir de marché pour l'acheteur en aval, (ii) la concurrence pour l'acheteur sur le marché en amont et (iii) un pouvoir de marché pour le vendeur en amont. Ce dernier scénario nous amène tout naturellement à examiner le pouvoir de l'acheteur sous l'angle du pouvoir de négociation.

3.1.1 Pouvoir de monopsone en amont et concurrence en aval

Imaginons une entreprise en situation parfaite de monopsone en amont qui est preneuse de prix sur les marchés en aval. Une entreprise voulant maximiser son profit utilisera un facteur de production jusqu'à ce que son bénéfice marginal soit égal à ses coûts marginaux. Pour l'entreprise en question, l'avantage offert par l'achat d'une unité supplémentaire est son produit marginal. Il correspond à la production supplémentaire provenant de l'achat d'une unité supplémentaire d'un facteur multipliée par la recette marginale réalisée sur le marché en aval. La structure du marché en aval détermine le produit marginal : si l'entreprise en situation de monopsone est preneuse de prix sur le marché en aval, le produit marginal est tout simplement le prix reçu en aval[34].

Un acheteur en situation de concurrence sur le marché en amont alignerait la valeur de son produit marginal sur le prix du facteur[35]. Mais le monopsoneur reconnaît que pour obtenir une unité du facteur supplémentaire lorsque la courbe d'offre est ascendante, il faut une augmentation du prix du facteur, pas seulement pour l'unité marginale, mais pour toutes les unités. En conséquence, l'augmentation des dépenses d'une entreprise en position de monopsone liée à l'achat d'une unité supplémentaire du facteur tient au prix payé pour l'unité marginale plus l'augmentation des dépenses (prix supérieur) pour ses unités inframarginales (les unités qu'elle achetait déjà). L'augmentation des dépenses liée aux unités inframarginales est égale à l'achat total des achats multiplié par la hausse de prix nécessaire pour obtenir la fourniture de l'unité marginale. Pour l'entreprise en position de monopsone, l'augmentation totale des dépenses liée à l'achat d'une unité supplémentaire est son coût marginal du facteur. Pour ce type d'entreprise, le coût marginal du facteur est supérieur au coût du facteur (à concurrence de l'augmentation des dépenses liée aux unités inframarginales) et par conséquent, les dépenses liées à une unité supplémentaire sont plus élevés pour le monopsoneur que pour l'acheteur opérant dans un environnement concurrentiel. Étant donné que l'avantage offert par l'achat d'une unité supplémentaire du facteur est identique, mais la dépense est supérieure, une entreprise en position de monopsone achètera moins sur le marché en amont (il y a donc une distorsion quantitative). Le monopsoneur achète donc moins pour réduire le prix qu'il paie. Cela a deux effets : (i) une partie des rentes ricardiennes est transférée des fournisseurs à l'acheteur et (ii) le niveau des échanges est inefficient. L'exercice du pouvoir de monopsone réduit le gain total des échanges, mais le monopsoneur en profite davantage ; ses bénéfices augmentent.

Le bien-être global est réduit par la distorsion quantitative. Tout comme l'exercice du pouvoir de marché sur les marchés en aval, l'exercice du pouvoir de marché sur les marchés en amont aboutit à une perte sèche. Elle représente la réduction de la valeur de la production due à une mauvaise affectation des ressources. Elle correspond, par unité de facteur, à la différence entre la valeur du produit marginal et le coût de la fourniture du facteur. Cette différence, appliquée à toutes les unités qui font l'objet d'une

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34 Dans ce cas, le produit marginal est qualifié de « valeur du produit marginal ».

35 Dans ce cas $VMP = P * MP = w$, où w est le prix du facteur, MP le produit marginal et P le prix en aval. Dans une autre formulation, on aurait $P = w / MP = MC$, où MC représente le coût marginal, la condition bien connue de maximisation du profit pour une entreprise preneuse de prix. Le coût marginal est l'augmentation du coût due à une augmentation de la production. Il est égal au taux de variation du coût divisé par le taux de variation de la production. L'augmentation de la production nécessite l'utilisation d'une unité supplémentaire du facteur, ce qui a pour effet d'augmenter la production au taux MP et le coût au taux w.

distorsion quantitative (différence entre le niveau de production en situation de concurrence et la quantité inférieure liée au pouvoir de monopsone), représente la perte sèche sur le marché du facteur.

Sur le marché en aval, les effets du pouvoir de monopsone sont facilement identifiables. Pour une entreprise en position de monopsone, le coût marginal de la production en aval est supérieur à celui d'une entreprise preneuse de prix sur le marché en amont. Pour le monopsoneur, le coût marginal est égal au coût marginal du facteur divisé par le produit marginal du facteur. Le coût marginal d'un preneur de prix sur le marché du facteur est égal au prix en amont divisé par le produit marginal du facteur. Le coût marginal du facteur était supérieur au prix du facteur ou au prix pratiqué en amont, le pouvoir de monopsone a pour effet d'augmenter le coût marginal de l'entreprise sur le marché en aval et, partant, de réduire sa production[36].

Il convient de souligner que le pouvoir de monopsone a des effets néfastes pour les consommateurs en aval, même s'il se traduit par une baisse du prix en amont. La raison est évidente. Le monopsoneur achète moins de facteurs et approvisionne donc moins le marché en aval. Cela entraîne une réduction de la production en aval et une augmentation des prix, au détriment des consommateurs sur le marché en aval.

Une variante intéressante et controversée de cette analyse consisterait à supposer en outre que les concurrents de l'entreprise en position de monopsone en aval ont des coûts moyens constants (avec une courbe d'offre sectorielle parfaitement élastique). La controverse réside dans le fait de savoir si, dans ces conditions, le pouvoir de monopsone nuit aux consommateurs en aval. Certains observateurs considèrent que ce n'est pas le cas étant donné que les prix en aval sont déterminés par les coûts des concurrents de l'entreprise en position de monopsone[37]. Cela implique que, selon le critère du bien-être des consommateurs, le pouvoir de monopsone n'a aucune influence sur ce bien-être, même s'il crée une perte sèche sur le marché en amont.

Toutefois, Noll est d'un avis différent[38]. Dans les conditions évoquées, l'entreprise en position de monopsone réduit ses achats de facteurs plus productifs et produit moins pour le marché en aval. Pour prévenir tout effet sur la production sur le marché en aval, les concurrents du monopsoneur doivent augmenter leur production pour compenser la réduction de la production. Pour ce faire, ils utilisent des facteurs moins productifs (par définition, puisque les coûts des entreprises rivales sont supérieurs). Toutefois, ces facteurs étant moins productifs, leur utilisation accrue par les concurrents en aval est supérieure à leur utilisation réduite par l'entreprise qui se trouve en position de monopsone. En conséquence, le coût d'opportunité du bien en aval a augmenté (il faut davantage de facteurs, ce qui implique une plus forte réduction de la production du bien représentant la meilleure solution de remplacement), ce qui provoque une augmentation du *prix réel* du bien en aval (ce à quoi il faut renoncer pour une unité supplémentaire) et une dégradation de la situation des consommateurs en aval. En d'autres termes, le prix nominal du bien en aval ne changera pas, mais, pour les consommateurs, le prix nominal du produit constituant la meilleure solution de rechange augmentera.

Le débat sur la nécessité d'effets en aval comme préalable à l'application des règles de concurrence dans le cas de comportements qui créent un pouvoir de monopsone s'est plutôt concentré sur l'objectif même des lois sur la concurrence. Par exemple, M. Rosch, membre de la Federal Trade Commission,

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36 Cette situation se vérifie, quelle que soit la structure du marché en aval. La maximisation des bénéfices en aval nécessite une production avec laquelle le produit marginal est égal au coût marginal. Si les coûts marginaux augmentent, une entreprise qui recherche la maximisation de ses bénéfices réduira sa production jusqu'à ce que les recettes marginales atteignent le niveau des coûts marginaux.

37 Voir, par exemple, Blair et Harrison (1993, p. 41), Jacobson et Dorman (1992, p. 161) et, plus récemment, Salop (2005, p. 673) et Rosch (2007).

38 Voir Noll (2005, pp. 599-600).

plaide pour le critère du bien-être du consommateur : la responsabilité en droit de la concurrence nécessite un pouvoir de marché sur les consommateurs d'un marché en aval[39]. Werden, analysant les travaux préparatoires et la jurisprudence des États-Unis, considère que le Sherman Act n'exige pas l'existence d'un préjudice subi par le consommateur sur le marché en aval[40]. Werden conclut de son étude que « les vendeurs victimisés par les ententes ou les monopoles » sont protégés par le *Sherman Act* et devraient l'être au vu de l'intention du législateur[41]. Il fait remarquer que les tribunaux américains ont mis en exergue la protection du processus concurrentiel parce qu'il défend les intérêts des consommateurs, mais que cela ne signifie pas que l'objectif unique est le bien-être des consommateurs. Werden considère plutôt que l'analyse des effets d'un comportement sur le bien-être des consommateurs favorise une identification claire des effets de ce comportement sur le processus concurrentiel[42]. Le bien-être du consommateur est un moyen pour une fin, mais certainement pas une fin.

Par conséquent, à certains égards, ce débat est un faux débat. Les consommateurs subissent un préjudice du fait du pouvoir de monopsone. Ainsi, que l'on adopte un critère de bien-être total ou un critère de bien-être du consommateur, l'exercice du pouvoir de monopsone n'est pas souhaitable. En revanche, le débat peut porter sur la capacité à identifier le marché portant préjudice aux consommateurs et l'ampleur de ce préjudice.

3.1.2 Monopsone en amont et monopole en aval

Dans ce cas de figure, l'entreprise en position de monopsone détient un pouvoir de marché aussi bien en amont qu'en aval. Pour maximiser son profit dans l'utilisation du facteur, le monopsoneur devra avoir un coût marginal du facteur égal à son produit marginal. La recette marginale étant inférieure au prix — pour inciter les consommateurs à acheter une unité supplémentaire sur le marché en aval, le monopsoneur en aval doit réduire ses prix sur toutes les unités vendues — l'avantage que l'entreprise en position de monopsone peut tirer de l'achat d'une unité supplémentaire est inférieur à celui d'une entreprise en situation de concurrence. En conséquence, une entreprise en position de monopsone détenant un pouvoir de marché en aval réduira davantage ses achats de l'unité que si elle était preneuse de prix en aval. Subsidiairement, étant donné que le coût marginal effectif du monopsoneur sur le marché en aval est supérieur, le coût marginal du monopoleur sera plus élevé s'il est monopsoneur que s'il est preneur de prix sur le marché du facteur et, tout naturellement, il pratiquera un prix supérieur et vendra moins sur le marché en aval. Un renforcement du pouvoir de monopsone lorsque les entreprises détiennent un pouvoir de marché en aval sera nocif pour le surplus total et pour les consommateurs en aval.

3.1.3 Oligopsone en amont

En présence d'un oligopsone en amont, il y aura concurrence entre quelques acheteurs pour le facteur de production. Si le nombre de grands acheteurs est limité et si la courbe d'offre est ascendante, on devrait s'attendre (dans un contexte statique) à un équilibre de Nash pour les achats du facteur. En pareille situation, chaque acheteur fixe la valeur de son produit marginal à un niveau égal à l'espérance de coût marginal, tout en reconnaissant que le prix du facteur dépend de l'ensemble des achats de tous les acheteurs. En équilibre de Nash, ils exerceront un pouvoir de marché de l'acheteur, dont l'intensité dépendra de la valeur du produit marginal, du nombre d'acheteurs concurrents et de l'élasticité de l'offre. Les acheteurs étant preneurs de prix sur le marché en aval, l'équilibre de Nash pour les achats d'un facteur

39 Voir Rosch (2007).

40 Voir Werden (2007).

41 Voir Werden (2007, p. 735).

42 Voir Werden (2007, p. 736).

est symétrique à l'équilibre de Nash en quantité sur le marché en aval lorsque les vendeurs sont preneurs de prix sur le(s) marché(s) en amont.

3.1.4 Monopsone collusoire

L'équilibre de Nash en situation d'oligopsone ne maximisera pas les bénéfices des acheteurs. Dans l'équilibre de Nash, chaque acheteur vise une valeur de son produit marginal égale à son coût marginal du facteur et le coût marginal du facteur de chaque entreprise intègre les effets de la hausse des prix due à l'achat d'une unité supplémentaire du facteur, mais uniquement sur les unités inframarginales. Dans l'équilibre de Nash, chaque acheteur ne prendra pas en compte le fait qu'à la marge la hausse du prix nécessaire pour l'achat d'une unité supplémentaire augmentera également les dépenses de chacun de ses rivaux. Par rapport au niveau d'achat du facteur maximisant les bénéfices des acheteurs en aval, ces derniers ont tendance à suracheter et à réduire ainsi leurs bénéfices. Ils seront enclins, comme les oligopoleurs, à coordonner les achats, à exercer un pouvoir de marché collectif et à augmenter leurs bénéfices en réduisant les achats totaux et le prix du facteur.

Au niveau sectoriel, les effets sur les dépenses relatives aux unités inframarginales sont intégrés dans le coût marginal du facteur pour une entreprise en position de monopsone pur ou de monopsone collusoire qui cherche à maximiser les bénéfices globaux de l'acheteur. Naturellement, le fait que les entreprises ne peuvent pas internaliser les effets de l'achat d'une unité supplémentaire sur les bénéfices de leurs rivales explique, en général, pourquoi au moins un acheteur aura tendance à tricher par rapport au résultat d'un monopsone collusoire.

Par conséquent, comme dans le cas de l'oligopole, les entreprises en position d'oligopsone s'efforçant de coordonner les achats et d'exercer un pouvoir de marché collectif devront être capables de résoudre les deux problèmes suivants : (i) elles doivent s'entendre sur le résultat collusoire et (ii) elles doivent appliquer cet accord en faisant en sorte que le manque à gagner en cas de non-respect de l'accord, compte tenu de la sanction future, soit supérieur au gain que peut procurer la tricherie. Comme dans le cas de l'oligopole, moins il y a d'entreprises, plus les prix sont transparents et moins le facteur est différencié, plus ces difficultés seront faciles à surmonter pour les entreprises en position d'oligopsone. Moins l'offre est élastique et plus il y a d'obstacles à l'achat, plus la collusion rapportera[43].

3.1.5 Offres « tout ou rien »

Le monopsoneur peut être en mesure de formuler ce que l'on appelle des offres « tout ou rien ». Dans le cadre d'une telle offre, le monopsoneur convient de payer un prix unitaire pour toutes les unités achetées à un certain fournisseur, mais il spécifie le nombre total d'unités qu'il va acheter. Dans ce contexte, la courbe d'offre normale d'un fournisseur, qui détermine le prix nécessaire pour obtenir la fourniture de l'unité marginale, est remplacée par une courbe d'offre « tout ou rien », qui détermine le prix que le fournisseur doit recevoir pour accepter de fournir toutes les unités demandées. À ce prix, le fournisseur atteint tout juste son seuil de rentabilité sur la base du volume total, contrairement à une courbe d'offre normale, pour laquelle le seuil de rentabilité est atteint à la marge (le prix est égal au coût marginal). Le prix d'une quantité totale fournie, indiqué par la courbe d'offre « tout ou rien », est inférieur au prix de la dernière unité de cette quantité totale spécifié par la courbe d'offre normale. Dans le cadre de la courbe

[43] Voir Blair et Durrance (2008) pour une étude des facteurs qui rendent la coordination plus ou moins difficile en situation d'oligopsone, ou Church et Ware (2000) pour une analyse des facteurs qui rendent la coordination plus ou moins difficile en situation d'oligopole.

d'offre « tout ou rien », la rente réalisée sur les premières unités produites subventionne les unités plus onéreuses produites à la marge, sur lesquelles le fournisseur perd s'il accepte une offre « tout ou rien »[44].

Dans une telle configuration, le monopsoneur choisira la quantité qui maximise les bénéfices totaux de l'échange (à savoir la quantité pour laquelle la valeur du produit marginal est égale au coût marginal de production). Toutefois, il ne paiera pas le prix concurrentiel pour cette quantité concurrentielle, mais le prix auquel que le fournisseur atteindra juste son seuil de rentabilité. Ce prix moyen peut être nettement inférieur au coût marginal de la dernière unité.

Les effets sur le bien-être des offres « tout ou rien » maximisant les bénéfices sont intéressants. La situation de monopsone se traduit par une simple redistribution : il n'en résulte aucune inefficience. La quantité socialement optimale du facteur est donc produite et vendue, mais l'entreprise en situation de monopsone bénéficie d'une plus forte part de la rente du fournisseur. En effet, le fournisseur se retrouve avec une rente égale à zéro. Par rapport à un prix uniforme, une offre « tout ou rien » s'avère donc plus efficiente et, étant donné qu'elle entraîne une augmentation des achats du facteur, elle est d'autant plus bénéfique pour les consommateurs sur le marché en aval (une partie des gains découlant du prix inférieur sur le marché en amont sera répercutée sur les consommateurs en aval). À moins qu'on accorde une importance normative à la distribution des rentes ricardiennes revenant aux fournisseurs, l'impact sur le bien-être des offres « tout ou rien » est parfaitement clair : elles améliorent le bien-être. Faire obstacle aux offres « tout ou rien », par exemple en exigeant des prix uniformes, nuira aux consommateurs du marché en aval et réduira l'efficience. En outre, à vouloir attribuer plus de poids aux rentes des producteurs par rapport aux consommateurs, on risque d'adopter des mesures qui finiront par restreindre la concurrence et l'innovation parmi les fournisseurs[45].

3.1.6 Mesurer le pouvoir de monopsone

Pour mesurer l'intensité du pouvoir de marché exercé par un vendeur, on utilise généralement l'indice de Lerner. Dans le cas d'une entreprise en situation de monopole, on peut facilement démontrer que :

$$L = \frac{P - MC}{P} = \frac{1}{\eta}$$

où l'indice de Lerner est la marge (le prix moins le coût marginal) exprimée en pourcentage du prix égal est à l'inverse de l'élasticité de la demande (η). Dans le cas d'une entreprise en position de monopsone, la situation inverse équivalente est l'Indice du pouvoir de l'acheteur (IPA)[46] :

$$\lambda = \frac{VMP - w}{w}$$

où w est le prix du facteur et VMP la valeur du produit marginal. Dans un marché concurrentiel $VMP = w$ et $\lambda = 0$. Pour une entreprise en position de monopsone, on peut facilement démontrer que

$$\lambda = \frac{1}{\varepsilon}$$

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44 Voir Blair et Harrison (1993, pp. 73-75) pour de plus amples informations sur la courbe d'offre « tout ou rien ».

45 Voir Noll (2005, pp. 621-622 et 624).

46 Voir Blair et Harrison (1993).

où ε est l'élasticité de l'offre. Ainsi, comme pour le monopoleur, la capacité du monopsoneur d'exercer le pouvoir de marché de l'acheteur dépend de la volonté et de la capacité de l'autre versant du marché à trouver des alternatives. Dans le cas d'un monopsoneur, moins l'offre est élastique et moins l'offre est sensible aux prix, plus grand sera le pouvoir de monopsone. Cela paraît logique ; en effet, pour contrôler l'exercice du pouvoir de monopsone, les fournisseurs doivent réduire leur offre. Cela porte préjudice à l'entreprise en position de monopsone, car elle perd sa marge ($VMP - w$) sur les unités qui ne sont plus disponibles à la vente lorsqu'elle réduit les prix.

S'il existe une « frange concurrentielle » de petits acheteurs qui font concurrence sur le marché du facteur à un acheteur important, le pouvoir de marché de l'acheteur que peut exercer l'entreprise dominante sera limité, non seulement par l'élasticité de l'offre des vendeurs sur le marché en amont, mais également par la frange de petits acheteurs. Plus la demande de cette frange est élastique, plus ses achats augmentent à mesure que les prix diminuent et plus il sera difficile pour l'entreprise dominante d'exercer un pouvoir de marché de l'acheteur. La réduction de sa demande et, partant, de ses bénéfices, lorsqu'elle tente de faire baisser les prix, sera d'autant plus importante que les fournisseurs peuvent choisir d'autres options et vendre à la frange concurrentielle. Il est possible de démontrer que l'IPA dans le cas d'un acheteur dominant est[47]

$$\lambda = \frac{s}{\varepsilon + \eta_f (1 - s)}$$

où s est la part des achats de l'acheteur dominant et η_f est l'élasticité de la demande des acheteurs concurrentiels de la frange. Comme on devait s'y attendre, l'exercice du pouvoir de marché par une entreprise en position de monopsone est inversement proportionnel à l'élasticité de l'offre et à l'élasticité de la demande de la frange.

À l'équilibre, on observera une corrélation entre la part de marché de l'entreprise dominante et son exercice du pouvoir de marché. Plus sa part des achats est importante, plus l'IPA sera élevé. Toutefois, il ne s'agit pas d'une relation de causalité, car tant l'IPA que s sont endogènes. En revanche, cela implique que plus l'avantage de l'entreprise dominante est marqué par rapport à la frange d'acheteurs, plus son pouvoir de marché est important. La raison de la domination de l'acheteur dominant réside sans doute dans le fait que son produit marginal du facteur est sensiblement plus élevé que la valeur de la recette marginale de la frange d'acheteurs (parce qu'il est plus efficient et/ou parce que son utilisation du facteur a une valeur finale plus élevée).

Dans le cas d'un oligopsone avec marché en aval concurrentiel, l'IPA de chaque acheteur est :

$$\lambda_i = \frac{s_i}{\varepsilon}$$

où s_i est la part des achats par l'entreprise *i.* À partir de cette expression, il est possible de démontrer que l'exercice du pouvoir de monopsone sur le marché (λ) est égal à une moyenne pondérée du pouvoir de monopsone de chaque entreprise,

$$\lambda = \sum_{i=1}^{N} \lambda_i s_i = \frac{HHI}{\varepsilon}$$

47 Voir Blair et Harrison (1993, p. 51) ou Blair et Durrance (2008, p. 406) pour la dérivation de l'IPA.

où les pondérations sont les parts des achats de chaque entreprise et $HHI = \sum_{i=1}^{N} s_i^2$ est l'indice de Herfindahl-Hirschman basé sur la part des achats lorsqu'il y a N acheteurs[48].

3.1.7 Identifier le pouvoir de monopsone

Le pouvoir de monopsone, basé sur le pouvoir de marché des acheteurs, est l'inverse du pouvoir de monopole, qui se fonde sur le pouvoir de marché des vendeurs. Le pouvoir de monopsone peut être déduit d'éléments de preuve indirects ou mesuré directement. Dans de rares cas, lorsqu'une entreprise a déjà exercé un pouvoir de monopsone, son existence peut être démontrée directement. En effet, il peut y avoir des preuves empiriques qui attestent de la capacité de l'entreprise à faire baisser les prix de manière rentable au-dessous du niveau de concurrence. En général, pour faire la preuve directe de l'exercice d'un pouvoir de marché, il faut des données fiables sur le niveau de prix concurrentiel, qui pourra être comparé au prix observé. La difficulté est que seuls les prix effectifs sont observés et pas les niveaux de prix concurrentiels. Obtenir des estimations fiables des prix de concurrence peut être très difficile, voire impossible.

La solution indirecte consiste à définir le marché pertinent et à évaluer les parts de marché, les barrières à l'entrée et d'autres facteurs entrant en ligne de compte. Dans le cas du pouvoir de monopsone, il convient d'apporter certains ajustements pour refléter le pouvoir de marché, mais l'approche fondamentale paraît solide. Il y a deux ajustements fondamentaux :

(i) *Définition du marché.* Le test du monopoleur hypothétique doit être adapté pour devenir le test du monopsoneur hypothétique. Le marché pertinent lorsqu'on veut identifier le pouvoir de monopsone est le plus petit ensemble de produits dans la plus petite zone géographique tel que le monopsoneur hypothétique dans cette zone soit en mesure de faire baisser les prix dans des proportions restreintes, mais néanmoins significatives et non transitoires. Le prix de base serait le niveau de concurrence dans un contexte rétrospectif et, en général, le prix actuel dans un environnement prospectif, sauf si l'on peut raisonnablement s'attendre à une augmentation du prix du facteur.

La définition du marché vise à spécifier un ensemble d'actifs productifs sur lesquels un acheteur pourrait exercer son pouvoir de monopsone. Pour identifier le pouvoir de monopsone dans la pratique, il convient de reconnaître que c'est l'existence d'options pour les vendeurs qui détermine l'ampleur du pouvoir de monopsone d'un acheteur. Si les vendeurs peuvent facilement trouver d'autres acheteurs (qui utilisent le facteur à d'autres fins), d'autres acheteurs dans des zones géographiques différentes (qui utilisent le facteur à des fins similaires) ou d'autres acheteurs pour lesquels les actifs peuvent être utilisés pour produire un facteur différent, l'acheteur disposera d'un pouvoir de monopsone limité.

(ii) Barrières à l'entrée. Les barrières à l'entrée à prendre en compte sont celles qui font que l'entrée sur le marché des achats du facteur n'interviendra pas au bon moment, ne sera pas probable ou ne sera pas suffisante.

[48] Cette expression de la moyenne pondérée de l'exercice du pouvoir de marché de l'acheteur est le pendant de l'expression de la moyenne pondérée du pouvoir de marché du vendeur en cas de concurrence de petit nombre à la Cournot. Voir Church et Ware (2000, p. 239).

3.2 Quasi-rentes

À court terme, le monopsoneur peut être en mesure d'obtenir des quasi-rentes. Les fournisseurs n'auraient probablement pas réalisé leurs dépenses irrécupérables s'ils avaient pu prévoir que leurs quasi-rentes seraient confisquées par une entreprise en position de monopsone. À long terme, toute tentative de priver les fournisseurs de leurs quasi-rentes provoquera leur sortie : en effet, sachant qu'ils ne pourront récupérer leurs dépenses d'investissement, les fournisseurs ne réinvestissent pas. Ainsi, si le marché du facteur est concurrentiel, un monopsoneur ne pourra pas exercer son pouvoir de monopsone à long terme, sauf si l'on se trouve en présence de rentes ricardiennes et s'il peut s'engager à ne confisquer aucune quasi-rente[49]. En effet, sauf en l'absence de quasi-rentes ou si l'entreprise en position de monopsone peut s'engager à ne pas confisquer les quasi-rentes, il n'y aura probablement pas d'offre à long terme. Les fournisseurs qui anticipent une exploitation potentielle du pouvoir de monopsone refuseront d'investir dans des actifs irrécupérables et décideront soit de sortir du marché, soit de ne pas y entrer. Cela a des conséquences négatives évidentes pour l'efficience et le bien-être des consommateurs. En outre, à moins que des mécanismes parfaits soient en place pour se protéger contre cette confiscation, ce qui est improbable, les fournisseurs peuvent rechigner à entrer sur le marché ou se protéger par un sous-investissement.

Une issue différente pourrait être observée à long terme : à mesure que les fournisseurs sortent du marché, ceux qui y restent pourraient développer un pouvoir de marché. Ce pouvoir de marché peut rétablir un certain équilibre face au pouvoir de marché de l'acheteur, de telle sorte que les fournisseurs seraient en mesure de récupérer au moins leur coût de fourniture moyen à long terme. Par rapport à un secteur concurrentiel en amont et à l'absence de pouvoir de monopsone, l'évolution de la structure sectorielle vers une situation d'oligopole en amont et un pouvoir de monopsone en aval sera sans doute inefficiente et nuira aux consommateurs sur le marché en aval[50].

3.3 Monopole bilatéral

Il reste à analyser le monopole bilatéral. Dans le cas de figure le plus simple, il y a un seul vendeur sur le marché en amont et un seul acheteur, qui est également en position de monopole, sur le marché en aval. Si l'acheteur est en mesure de faire des offres « à prendre ou à laisser » au vendeur, le résultat sera identique à celui d'un monopsone pur et simple. L'entreprise en position de monopsone fixe alors le prix de monopsone et l'entreprise en amont agit en tant que preneur de prix. Si l'entreprise en position de monopole en amont est en mesure de proposer une offre « à prendre ou à laisser », elle pourra maximiser son profit en fixant le prix correspondant et l'entreprise en aval agira en tant que preneur de prix et choisira les quantités à acheter. Toutefois, aucun de ces résultats ne permet de maximiser les profits conjoints. Lorsque l'entreprise en position de monopsone en amont est en mesure de formuler une offre « à prendre ou à laisser », l'entreprise en aval ne tient pas compte du fait que pour chaque unité qu'elle vend en aval,

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49 Les incitations à la confiscation des quasi-rentes et au hold-up, ainsi que le degré auquel certains contrats et d'autres mécanismes (tels que l'échange d'otages et l'investissement dans une réputation de comportement non opportuniste) atténuent la tendance à l'opportunisme, comptent parmi les principaux thèmes de l'économie des coûts de transaction. Voir Church et Ware (2000) chapitre 3 pour une introduction et des références.

50 Voir Grimes (2005) pour une analyse approfondie de la vulnérabilité des fournisseurs au phénomène de hold-up dans un secteur concurrentiel en raison de la spécificité temporelle et du manque d'élasticité de l'offre. On parle de spécificité temporelle lorsque la séquence des performances est cruciale pour réaliser de la valeur. La spécificité temporelle implique que les retards ou menaces de retard peuvent être des stratégies de hold-up très efficaces étant donné que l'option extérieure sera faible. Voir Masten (1996) ou Church et Ware (2000, p. 72). Voir *infra* pour davantage d'informations sur l'importance des options extérieures et de la négociation des quasi-rentes.

l'entreprise en position de monopsone en amont réalise une marge positive[51]. De la même manière, lorsque l'entreprise en position de monopole en aval formule une offre « à prendre ou à laisser », l'entreprise en amont ne tient pas compte du fait que pour chaque unité vendue à ce prix, l'entreprise en aval réalise une marge positive.

En raison de leur interdépendance réciproque et du fait qu'aucune d'entre elles n'est probablement capable de formuler une offre « à prendre ou à laisser », les deux entreprises auront tendance à se comporter de manière très différente[52]. L'hypothèse est qu'elles maximiseront les bénéfices conjoints par un choix de quantité approprié et qu'elles négocieront ensuite un prix de transfert répartissant le surplus. La quantité qui maximise le surplus conjoint est celle pour laquelle la recette marginale en aval est égale au coût marginal en amont[53]. Si l'entreprise en amont bénéficie de la totalité du pouvoir de négociation, le prix maximum que l'entreprise en aval est disposée à payer ne lui procurera aucun bénéfice : il s'agit de sa valeur de production moyenne. En revanche, si l'entreprise en aval bénéficie de l'ensemble du pouvoir de négociation, le prix minimum que l'entreprise en amont est disposée à accepter est celui qui ne procure aucun bénéfice : il s'agit de son coût de production moyen.

Lorsque les deux entreprises maximisent leurs bénéfices conjoints, elles internalisent les marges perdues réciproques en déterminant la quantité optimale du facteur à négocier. Cela signifie que la maximisation des bénéfices conjoints implique un niveau de production du facteur qui excède l'une ou l'autre des possibilités d'offre « à prendre ou à laisser » évoquées ci-dessus. Cette augmentation de la production accroît aussi bien l'efficience que le bien-être des consommateurs finaux, étant donné qu'elle correspond à une augmentation de la production en aval.

3.4.1 Contre-pouvoir

Il ne faut pas perdre de vue que dans les modèles classiques de monopsone, la diminution du prix du facteur découlant de l'exercice du pouvoir de monopsone n'est pas répercutée sur les consommateurs. L'exercice du pouvoir de monopsone n'est pas efficient et nuit aux consommateurs sur le marché en aval[54]. Néanmoins, selon le modèle de monopole bilatéral, le pouvoir de monopsone, créé en réaction au pouvoir de monopole en amont, *pourrait* améliorer l'efficience et profiter aux consommateurs en aval.

Par rapport au monopole en amont et aux acheteurs concurrentiels, si les acheteurs décident de fusionner ou de se coordonner d'une manière ou d'une autre pour agir comme un monopsoneur, il est possible que la production en amont augmente et, partant, la production en aval. L'entreprise en position de monopole en amont maximiserait ses bénéfices en alignant sa recette marginale (basée sur la demande dérivée des acheteurs concurrentiels) sur son coût marginal. Si les acheteurs peuvent se coordonner et exercer un pouvoir de monopsone, leur position ne peut que s'améliorer. Après tout, ils pourraient simplement accepter le prix de monopole[55]. Toutefois, lorsqu'ils peuvent se coordonner et exercer un pouvoir de monopsone, ils seront en mesure d'obtenir de meilleurs résultats s'ils peuvent négocier une réduction du prix et une augmentation de la production sur le marché en amont. Cette expansion de la

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51 C'est ce que l'on appelle communément le problème de la double marge. Voir Church (2008, pp. 466-1468) pour un examen de cette question.

52 Voir Noll (2005, p. 602) ou Office of Fair Trading (1998, pp. 17-18).

53 Il est à noter que nous sommes partis du principe qu'une unité de produits intermédiaires en amont est nécessaire pour produire une unité de production en aval et qu'il n'y a pas d'autres coûts de production en aval.

54 Il y a toutefois une exception : si l'entreprise en position de monopsone formule des offres « tout ou rien ». Dans ce cas, le résultat est identique à celui d'un marché concurrentiel en amont.

55 Voir Noll (2005, p. 607).

production sur le marché en amont aboutirait à une augmentation de la production sur le marché en aval, à une réduction des prix et donc à une amélioration de l'efficience, bénéfique pour les consommateurs en aval.

La création d'un contre-pouvoir de marché en réponse au pouvoir de marché initial décrit au paragraphe précédent peut s'avérer bénéfique sur le plan social parce qu'il s'agit d'une force qui compense, du moins en partie, le pouvoir de marché initial du monopoleur en amont[56].

Néanmoins, il y a au moins quatre raisons de se montrer prudent avant d'admettre que la création d'un contre-pouvoir améliore l'efficience et profite aux consommateurs en aval[57] :

(i) Échec des négociations. Si les entreprises en position de monopole et de monopsone ne peuvent arriver à un accord concernant la répartition des bénéfices conjoints, les négociations et la transaction peuvent échouer.

(ii) Retombées sur d'autres marchés. La coordination entre les acheteurs ne sera pas nécessairement limitée au marché du facteur qui fait l'objet d'un monopsone. En effet, la coordination sur ce marché peut réduire les coûts de coordination sur *d'autres* marchés des produits intermédiaires ou sur des marchés en aval, créant ainsi un pouvoir de marché originel en aval ou sur un autre marché du facteur. En particulier, cela posera probablement un problème si le produit en amont est nécessaire à la production en aval et si le marché géographique en aval est identique au marché géographique en amont, de telle sorte que l'ensemble d'acheteurs en amont est similaire à l'ensemble de vendeurs en aval.

(iii) Maîtrise du monopole bilatéral. Les rentes de monopole ne sont pas les seules rentes qui peuvent être transférées dans le cadre de l'exercice du pouvoir de monopsone. La coordination des acheteurs peut déboucher sur des tentatives réussies d'obtenir des quasi-rentes ou des rentes ricardiennes, toutes deux pouvant aisément aboutir à une réduction des échanges sur le marché en amont et nuire aux consommateurs des marchés en aval.

(iv) Concurrence schumpétérienne. Si la position de monopole en amont est imputable à une innovation fructueuse ou découle, d'une manière ou d'une autre, du processus concurrentiel, les avantages offerts par le monopole récompensent des performances supérieures en termes de compétitivité. Les efforts visant à réduire l'ampleur de cette récompense (par une coordination efficace des acheteurs) peuvent dissuader les entreprises de se faire concurrence pour acquérir une position de monopole basée sur une efficience accrue ou un produit supérieur. Alors que la création d'un pouvoir de monopsone peut accroître l'efficience à court terme, les coûts à long terme peuvent se révéler supérieurs.

Dans cette analyse, le marché en aval est supposé concurrentiel. Les ouvrages modernes sur le contre-pouvoir examinent les effets d'une augmentation du pouvoir de l'acheteur sur la concurrence tant sur le marché en amont que sur le marché *en aval*. Ce sera le thème de la section qui suit.

4. Pouvoir de négociation

Le pouvoir de l'acheteur peut également être envisagé du point de vue du pouvoir de négociation. Le pouvoir de négociation se définit généralement comme la position de l'acheteur dans ses négociations avec les vendeurs. Le pouvoir de négociation peut aider à comprendre la nature des échanges entre les

[56] Voir Galbraith (1952).

[57] Voir Noll (2005, pp. 607-609).

fournisseurs de produits intermédiaires et les entreprises en aval si l'interface ou le cadre établi entre les partenaires commerciaux implique des négociations bilatérales. Dans ce contexte, il y a relativement peu d'entreprises en amont et en aval et elles négocient bilatéralement les conditions de l'offre. Par exemple, les négociations peuvent porter sur des ristournes, les acheteurs en position de force négociant de meilleures conditions. Dans ce cas, les prix inférieurs ne s'appliquent pas à l'ensemble du marché et ne sont pas obtenus en réduisant les achats. Les acheteurs négocient des remises individuelles basées sur la menace d'une réduction des volumes achetés, mais dans le but de maintenir ou d'accroître leurs achats.

Cette section est consacrée aux différents modes de négociation des conditions de l'échange, au rôle et aux éléments déterminants du pouvoir de l'acheteur, ainsi qu'aux effets sur le bien-être de la discrimination en matière de prix du facteur en fonction du pouvoir de l'acheteur. Il convient de souligner que les remises accordées aux acheteurs importants ne proviennent pas nécessairement du pouvoir de négociation. Elles pourraient se fonder sur l'efficience associée à de gros volumes. On s'intéresse ici aux ristournes qui ne sont pas liées aux coûts, dites « non justifiables »[58].

4.1 Comprendre le pouvoir de négociation

On utilise souvent un exemple simple pour illustrer le cadre des négociations bilatérales, ainsi que les éléments déterminants et les effets du pouvoir de négociation[59]. Une entreprise en aval (l'acheteur) et une entreprise en amont (le vendeur) entrent en négociations, le vendeur devant fournir le bien en amont à l'acheteur. Supposons que *la valeur pour l'acheteur s'il obtient le facteur du vendeur soit égale à V*. Il s'agit du bénéfice net des ventes en aval rendu possible si le facteur du vendeur est acheté. Pour le vendeur, le coût de fourniture du facteur est égal à *C*. Ainsi, le bénéfice conjoint pouvant être obtenu en cas de transaction entre le vendeur et l'acheteur est *V*-*C*[60]. Les deux entreprises discutent de la manière de se répartir le surplus. Supposons que le paiement de l'acheteur au vendeur soit égal à *W*. La question est donc : comment se détermine *W* ? Si le vendeur jouit de la totalité du pouvoir de négociation, $W = V - C$ et le vendeur s'approprie le surplus de l'opération. Si l'acheteur bénéficie de la totalité du pouvoir de négociation, $W = C$ et l'acheteur s'approprie la totalité du surplus de l'opération.

Toutefois, supposons que si l'acheteur ne traite pas avec ce vendeur, il attende un bénéfice V_B de l'achat du facteur (ou d'un facteur différent) à un autre vendeur. En outre, supposons que le vendeur puisse réaliser un bénéfice net V_S s'il traitait avec un autre acheteur. V_B et V_S représentent le gain de rupture ou le gain de l'option extérieure. L'acheteur refusera un *W* dont le gain est inférieur à V_B et le vendeur rejettera un *W* dont le gain est inférieur à V_S. Ils préféreront mettre un terme aux négociations et exercer leur option extérieure.

Cela signifie que le surplus disponible à répartir par la négociation représente le surplus marginal qui peut être réalisé grâce à une transaction supérieure aux options extérieures combinées des parties. Ce surplus marginal est égal à $V - V_B - V_S$. L'efficience du pouvoir de négociation de l'acheteur et du vendeur détermine la manière dont il sera réparti. Le partage du surplus net est une mesure a posteriori de leur efficience de négociation relative. Supposons que la part de l'acheteur soit égale à λ. La part du surplus

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58 Il se peut également que les acheteurs en aval soient preneurs de prix, mais que le fournisseur en amont s'engage dans une discrimination de prix maximisant les bénéfices. Voir *infra* au par. 4.3.1.

59 Voir Inderst et Mazzarotto (2008, pp. 1954-1955) ou l'Australian Competition & Consumer Commission, *Report of the ACCC Inquiry into the Competitiveness of Retail Prices for Standard Groceries* (2008) Annexe I.

60 Dans l'analyse du monopole bilatéral ci-dessus, *V*-*C* est égal au bénéfice maximisé si le niveau du facteur est tel que la recette marginale en aval est égale au coût marginal de la fourniture.

marginal revenant à l'acheteur est donc $\lambda\left(V - V_B - V_S\right)$, $W = (1-\lambda)(V - V_B) + \lambda V_S$ et les bénéfices de l'acheteur sont égaux à $V_B + \lambda(V - V_B - V_S)$[61]. Plus l'acheteur négocie efficacement (cette efficacité étant représentée par λ), plus son option extérieure est étendue et plus l'option extérieure du vendeur est limitée, plus la valeur de *W* sera faible et plus la part de bénéfices obtenue par l'acheteur sera importante.

4.1.1 Complications

L'exemple simple de la section précédente ignore deux complications de taille :

(i) Il part du principe que l'acheteur et le vendeur négocient une seule unité du facteur produit et donc son prix ou que l'acheteur et le vendeur ont déterminé le volume des échanges qui maximise les bénéfices conjoints et qu'ils négocient donc le paiement total de l'acheteur au vendeur. L'objet des négociations aura des conséquences pour l'effet du pouvoir de l'acheteur sur les marchés en aval. À moins que les effets du pouvoir de l'acheteur sur les négociations ne réduisent le coût marginal de l'acheteur pour approvisionner le marché en aval, le niveau du pouvoir de l'acheteur n'aura aucune influence sur le marché en aval. Si un pouvoir de l'acheteur accru entraîne une augmentation des remises sur les prix de gros, l'acheteur sera enclin à augmenter l'offre et à réduire ses prix sur le marché en aval. Si un pouvoir de l'acheteur accru aboutit uniquement à un paiement forfaitaire fixe inférieur au fournisseur en amont ou à des frais de référencement plus élevés, il n'aura aucun impact sur les incitations de l'acheteur sur le marché en aval, du moins à court terme[62]. Ainsi, la nature des contrats entre les entreprises en amont et en aval est fondamentale pour évaluer les effets du pouvoir de l'acheteur.

Autre point important : l'intensité de la concurrence en aval. En effet, elle détermine le degré auquel toute réduction du coût marginal sera répercutée sur le consommateur sous forme de baisse des prix. Même une entreprise en position de monopole diminuerait ses prix en aval lorsque ses coûts marginaux diminuent[63].

On sait que lorsque les entreprises en amont et en aval bénéficient d'un pouvoir de marché, l'utilisation de prix de gros simples crée un problème de double marge. On sait aussi que certains contrats non linéaires plus complexes internalisent l'externalité liée à la tarification linéaire (prix de gros simples) et permettent d'obtenir une maximisation conjointe des profits, comme dans l'exemple de l'utilisation d'un tarif binôme, où le prix unitaire est égal au coût marginal en amont et le paiement fixe est la part des bénéfices conjoints obtenue par le fournisseur en amont. Toutefois, les entreprises peuvent toujours utiliser, du moins en partie, des contrats prévoyant un prix de gros supérieur au coût marginal, créant ainsi pour l'entreprise en amont et l'entreprise en

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61 La solution appliquée pour résoudre le problème de négociation est celle de Nash. Elle a été formulée par Nash (1950). Plus récemment, une théorie moderne de la négociation a démontré que la solution de négociation de Nash permettait d'équilibrer les négociations non coopératives ordinaires. Voir Binmore, Rubinstein et Wolinsky (1986).

62 Selon la nature de la concurrence sur le marché en aval et selon que les autres entreprises bénéficient ou non d'une ristourne similaire, une réduction des coûts fixes aboutira ou non à une diminution des prix sur un marché en aval à long terme. Si c'est le cas, les effets d'une diminution des coûts fixes seront analogues à ceux d'une réduction d'économies d'échelle et si cette réduction des coûts moyens améliore l'entrée à long terme, la réduction des coûts fixes sera répercutée, dans une certaine mesure, sur les consommateurs finaux.

63 Voir van Dijk et Verboven (2008, pp. 2342-2433) pour une analyse des éléments déterminants de la répercussion.

aval une marge qui les encourage à développer leur chiffre d'affaires. Par conséquent, une double marginalisation peut être instaurée pour faire face aux situations de double aléa moral[64].

(ii) Il oublie que les acheteurs et les vendeurs peuvent être engagés dans plusieurs négociations bilatérales. Un acheteur peut être en train de négocier avec plusieurs vendeurs et un vendeur avec plusieurs acheteurs. On peut en tenir compte en reconnaissant que les options extérieures sont endogènes dans ces circonstances[65]. En effet, le nombre de solutions attrayantes pour l'acheteur ou le vendeur renforcera probablement leur option extérieure. Comme on le verra dans la section suivante, l'intensité de la concurrence entre les vendeurs qui veulent approvisionner un acheteur ou entre les acheteurs désirant acheter auprès d'un vendeur est un déterminant essentiel du pouvoir de l'acheteur.

4.2 Sources du pouvoir de négociation

Le cadre évoqué dans la section qui précède identifie trois facteurs qui déterminent le pouvoir de négociation. Il s'agit de l'option extérieure de l'acheteur, de l'option extérieure du vendeur et de l'efficacité relative des négociations. Dans le contexte des relations entre les détaillants du secteur alimentaire et leurs fournisseurs, les déterminants de ces trois facteurs ont été abondamment étudiés[66].

4.2.1 Option extérieure de l'acheteur

Plus l'option extérieure de l'acheteur est large, plus son pouvoir de négociation est important. La valeur de son option extérieure dépendra de sa capacité et de sa volonté de se tourner vers d'autres fournisseurs. Les facteurs suivants influencent sa capacité et sa volonté de s'adresser à d'autres fournisseurs, augmentant ainsi la valeur de son option extérieure.

(i) *Taille de l'acheteur*. La taille d'un acheteur peut être un déterminant important de la valeur de son option extérieure. En particulier, plus l'acheteur est de grande taille, plus il sera facile pour lui d'élargir son gisement de fournisseurs potentiels[67]. Plus l'acheteur est de grande taille, moins il est onéreux, sur une base unitaire, de changer de fournisseur si ce changement comporte un coût fixe. Le coût fixe à supporter pour la recherche d'autres sources d'approvisionnement pourrait être lié à une intégration verticale en aval et à la production en interne des produits intermédiaires, au coût de changement de fournisseur (identifier un autre fournisseur et négocier avec lui) ou au coût de parrainage d'un nouveau fournisseur en acceptant de prendre en charge une partie ou la totalité de ses coûts d'entrée. Finalement, plus l'acheteur est de grande taille, plus il sera incité à investir dans l'information concernant les autres possibilités d'approvisionnement.

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64 Voir Church (2008, p. 1468). De plus, de faibles prix de gros peuvent entraîner une concurrence agressive en aval : les prix de gros supérieurs découragent la concurrence parce qu'ils augmentent les coûts des acheteurs en aval. Voir Bonanno et Vickers (1988) sur les incitations à fixer des prix de gros supérieurs au coût marginal pour décourager la concurrence.

65 Les travaux récents de Björnerstedt et Stennek (2007) démontrent que les marchés des produits intermédiaires peuvent être efficients lorsqu'il y a plusieurs acheteurs et plusieurs vendeurs engagés dans des négociations bilatérales interdépendantes. Ils démontrent également que les quantités à l'équilibre sont identiques à celles que l'on observerait dans un marché en amont concurrentiel.

66 Ce qui suit est basé sur plusieurs études, notamment Inderst et Mazzarotto (2008), Inderst et Shaffer (2008), Spector (2008), Dobson (2005), Bloom (2001), Collins (2001) et Australian Competition & Consumer Commission, *Report of the ACCC Inquiry into the Competitiveness of Retail Prices for Standard Groceries* (2008).

67 Les ouvrages de référence en la matière sont Katz (1987) et Scheffman et Spiller (1992).

(ii) *Concurrence en amont.* Si les fournisseurs potentiels de facteurs de qualité similaire sont nombreux, l'option extérieure de l'acheteur sera relativement large. En particulier, si l'acheteur peut compter sur de nombreuses solutions concurrentes pour accéder aux facteurs d'un fournisseur, il bénéficiera d'une large option extérieure. En revanche, si la possibilité d'accéder à d'autres produits intermédiaires s'avère coûteuse ou difficile, l'option extérieure de l'acheteur sera réduite. Dans le secteur de la distribution, une large option extérieure correspondrait à une grande variété de produits substituables et à l'absence de marque que le fournisseur doit impérativement avoir en stock[68].

(iii) *Taille relative de l'acheteur et du fournisseur.* Si l'acheteur est de taille importante par rapport au vendeur, et donc si le fournisseur est soumis à une contrainte en termes de capacité ou à un coût marginal croissant, plus l'acheteur sera de grande taille, plus son option extérieure sera large. Dans ce cas, le coût marginal du fournisseur d'un gros acheteur augmente moins que proportionnellement par rapport à la taille de l'acheteur. La logique veut en effet que les petits acheteurs négocient à la marge, où les coûts sont plus élevés, tandis que les gros acheteurs négocient de plus gros volumes pas à la marge, le coût marginal moyen étant alors inférieur. En conséquence, les gros acheteurs sont en mesure de négocier les plus fortes ristournes[69].

Des résultats récents indiquent qu'en cas de concurrence entre les fournisseurs, ces derniers seront dans l'incertitude quant aux acheteurs avec lesquels ils traiteront en définitive. Par conséquent, en présence d'économies d'échelle, les gros acheteurs auront un avantage étant donné que le coût marginal escompté pour leurs approvisionnements sera inférieur[70].

4.2.2 Option extérieure du vendeur

Plus l'option extérieure du vendeur est large, plus son pouvoir de négociation est grand. La valeur de son option extérieure dépendra de sa capacité et de sa volonté de se tourner vers d'autres acheteurs. Les facteurs suivants limitent la capacité et la volonté d'un vendeur de s'adresser à d'autres acheteurs, réduisant ainsi la valeur de son option extérieure.

(i) Taille relative *de l'acheteur et du vendeur.* Si le fournisseur est soumis à une contrainte de capacité ou si son coût marginal est croissant, plus l'acheteur est de grande taille, plus l'option extérieure du vendeur sera réduite. Un gros acheteur pourra exercer son pouvoir de négociation sur le fournisseur parce que ce dernier éprouvera des difficultés à trouver des acheteurs disposés à payer autant pour les volumes achetés par le gros acheteur. En retirant ses ordres, un gros acheteur est en mesure « d'infliger une perte plus que proportionnelle » au fournisseur[71].

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68 Voir Rey (2001). Rey constate que dans le contexte de la distribution, les options extérieures offertes par le déréférencement d'une marque dépendent de la nature de cette marque ; les consommateurs changeront de détaillant si la marque est « indispensable » ; sinon, ils adopteront une autre marque.

69 Voir Inderst et Wey (2007) et Chipty et Snyder (1999). Raskovich (2003) appelle la relation entre le pouvoir de l'acheteur et la forme des fonctions du fournisseur un effet relatif. Il identifie également un effet de taille absolu : si un acheteur est assez important pour être un pivot, il aura alors moins de pouvoir d'achat que des acheteurs plus modestes qui ne sont pas des pivots. Un acheteur pivot se définit comme un acheteur suffisamment important pour que si le vendeur ne parvient pas à un accord avec lui, le fournisseur sorte du marché.

70 Voir Smith et Thanassoulis (2008).

71 Voir Inderst et Wey (2007, p. 653).

(ii) *Pouvoir de marché en aval.* L'option extérieure du vendeur va diminuer s'il est difficile de remplacer l'acheteur. Ce cas de figure se présentera si la concurrence est limitée sur le marché en aval. Dans un cas extrême, supposé important dans le secteur de la distribution, l'acheteur agit comme un gardien. Un gardien est un détaillant qui dispose d'un pouvoir de marché significatif sur le marché en aval parce qu'il n'existe aucune autre option pour la distribution. Sans accès au détaillant, le fournisseur ne peut assurer une distribution efficiente de son produit.

Si l'on part du principe que le distributeur est un gardien et si l'on considère le rôle du pouvoir de marché en aval, il convient de reconnaître que le distributeur fournit un service au fabricant. Par conséquent, c'est vraiment le détaillant qui fournit le bien en amont, ce que l'on appelle la distribution, à l'entreprise en aval, le fabricant. Dans son rôle de gardien, le détaillant dispose d'un pouvoir de marché — en tant que *vendeur* — pour la distribution dans une zone géographique donnée.

(iii) *Dépendance financière* Dans le cas d'une rupture des négociations, si le fournisseur n'est pas suffisamment capitalisé (c'est-à-dire s'il est « financièrement fragile »), il se peut qu'il ne dispose pas des ressources nécessaires pour survivre pendant qu'il recherche des marchés alternatifs. Par conséquent, son option extérieure sera relativement faible.

Lorsqu'on analyse les facteurs qui influencent l'option extérieure de l'acheteur et du vendeur, leur taille relative peut se révéler essentielle pour le pouvoir de l'acheteur. Par exemple, si la fin des relations entraîne un manque à gagner de 0.1 % pour l'acheteur, mais de 10 % pour le vendeur, l'acheteur disposera probablement d'un pouvoir de négociation. Le coût relatif des concessions sera également déterminant pour la répartition du surplus. Si une concession s'avère onéreuse pour une entreprise, cette dernière bénéficiera d'un pouvoir de négociation accru. Un tel coût pourrait compromettre la capacité à mener des négociations serrées.

En outre, certains facteurs qui élargissent l'option extérieure de l'acheteur réduisent également l'option extérieure du vendeur. Cela se vérifie en particulier pour les conditions de concurrence en amont et en aval. Le pouvoir de l'acheteur sera plus important (et le pouvoir de négociation du vendeur sera réduit d'autant) si l'acheteur bénéficie d'un pouvoir de marché en aval et s'il y a de multiples options concurrentes en amont. Inversement, si le vendeur jouit d'un pouvoir de marché et s'il y a beaucoup de concurrents en aval, le pouvoir de l'acheteur sera moindre. La valeur des options extérieures est étroitement liée au concept général de politique de la concurrence que représente le pouvoir de marché : dans les deux cas, ce qui intervient, c'est la volonté et la capacité d'un partenaire commercial de changer d'interlocuteur lorsqu'il doit faire face à une modification préjudiciable des conditions de l'échange.

4.2.3 Efficience des négociations

La troisième source potentielle de pouvoir de l'acheteur est liée à la capacité de l'acheteur de s'approprier une plus forte proportion du surplus marginal. Deux facteurs ont été mis en évidence[72]. Premièrement, le partenaire commercial qui se montre le plus patient aura probablement un avantage. Si l'acheteur représente une grande partie des transactions d'un fournisseur, si les échanges avec le fournisseur ne représentent pas une forte proportion des bénéfices de l'acheteur et si le fournisseur n'a aucune marge de manœuvre financière, l'acheteur sera probablement plus patient que le fournisseur (c'est-à-dire sera disposé à attendre et à prolonger les négociations). L'urgence relative du côté du fournisseur donnera un avantage à l'acheteur dans les négociations. Deuxièmement, un gros acheteur sera plus enclin à investir dans l'information afin de réduire l'asymétrie de l'information. Certains modèles de négociation laissent à penser qu'une entreprise peut tirer des avantages de certaines informations privées. Par exemple, un

[72] Voir Inderst et Mazzarotto (2008, p. 1632).

vendeur considérera qu'il est avantageux de gonfler la valeur *affichée* de son option extérieure si sa valeur est inconnue de l'acheteur. Cela signifie que, dans ses négociations avec l'acheteur, le vendeur aura tendance à tenter de faire croire à l'acheteur que son option extérieure est supérieure à sa valeur réelle. L'investissement dans l'information réalisé par l'acheteur peut éliminer l'éventuel avantage de négociation du vendeur du fait de l'incertitude de l'acheteur quant à l'option extérieure du vendeur.

4.2.4 Identifier un pouvoir de négociation substantiel

Dans un rapport récent rédigé pour l'Office of Fair Trading (2007) du Royaume-Uni, RBB a proposé un cadre permettant d'identifier le « pouvoir de l'acheteur substantiel ». Le pouvoir de l'acheteur substantiel semble indiquer que l'acheteur peut influencer les conditions d'échange *pour le marché.* Ce cadre implique l'utilisation d'un test de monopole hypothétique pour définir les marchés pertinents en amont et en aval. Un acheteur disposera d'un pouvoir substantiel si (i) s'il peut facilement « se tourner vers d'autres fournisseurs, parrainer une nouvelle entrée ou assurer lui-même son approvisionnement sans avoir à supporter des coûts irrécupérables substantiels »[73] et (ii) si l'acheteur est en position de gardien du marché en aval. Un acheteur est en position de gardien d'un marché s'il bénéficie d'un pouvoir de marché dans des services de distribution (voir *supra).* C'est le cas, par exemple, si des entreprises en amont ne peuvent toucher efficacement les consommateurs finaux sans l'intervention de l'acheteur (c'est-à-dire que les entreprises en amont ont peu d'interlocuteurs possibles autres que l'acheteur pour accéder au marché). Pour qualifier un acheteur de gardien, RBB étudie sa part des achats sur le marché en amont ou le circuit de distribution, les barrières à l'entrée sur le marché en aval et la taille des autres acheteurs.

Si le pouvoir de l'acheteur provient de son rôle de gardien, ce qui est plus important que sa part des achats sur le marché en amont est précisément son *pouvoir de marché* et donc la part de marché sur le marché en aval pertinent[74]. L'identification du pouvoir de l'acheteur nécessite une définition précise et minutieuse du marché du produit d'aval pertinent et des marchés géographiques afin de déterminer quel est le pouvoir de marché dans les services de distribution assurés par l'acheteur[75].

4.3 Les effets du pouvoir de négociation sur le bien-être

Deux questions se posent à propos des effets du pouvoir de négociation sur le bien-être. La première concerne les effets de *l'exercice* du pouvoir de négociation. La seconde a trait aux effets des *comportements qui créent, améliorent ou maintiennent* un pouvoir de négociation. Ces deux questions sont liées. En effet, les effets sur le bien-être de l'exercice du pouvoir de négociation devraient guider l'évaluation des effets sur le bien-être des comportements qui créent le pouvoir de négociation.

4.3.1 L'exercice du pouvoir de négociation

Le pouvoir de négociation joue uniquement si les fournisseurs bénéficient d'un pouvoir de marché. Des vendeurs concurrentiels n'accorderont jamais de ristournes au-dessous de leur coût marginal. De prime abord, il apparaît donc que l'exercice du pouvoir de négociation, dans la mesure où il aboutit à une baisse des prix du facteur et à une augmentation du volume des échanges, contribue à une plus grande efficience. En outre, si l'augmentation de volume du facteur et la réduction de son prix entraîne une augmentation de la production et une diminution des prix sur le marché en aval, les consommateurs de ce marché

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73 Office Fair Trading (2007, par. 1.21).

74 Voir Bloom (2001, pp. 402-404) à propos du pouvoir de marché sur les marchés en aval comme source du pouvoir de l'acheteur.

75 Voir Schwartz (2004) en ce qui concerne l'importance d'une définition adéquate du marché pour l'évaluation du pouvoir de l'acheteur.

bénéficieront également de l'exercice du pouvoir de négociation par les acheteurs. Toutefois, il ne suffit pas d'analyser les effets du prix inférieur (c'est-à-dire une ristourne accordée à un gros acheteur). Il faut en effet effectuer une analyse d'équilibre. Ce genre d'analyse offre un avantage certain : les réactions des autres entreprises (tant en amont qu'en aval) à la ristourne accordée au gros acheteur déterminent les effets ultimes de l'exercice du pouvoir de négociation.

Le pouvoir de négociation différent des acheteurs est à l'origine d'une discrimination de prix sur le marché en amont. De très nombreuses études sont consacrées à l'économie de la discrimination de prix, mais la plupart évaluent les incitations et les effets de cette discrimination lorsque le vendeur l'applique entre les consommateurs finaux. Par conséquent, ces travaux partent du principe que la demande est indépendante. Dans le cas de la discrimination de prix sur les marchés de facteurs, si les acheteurs se font concurrence sur les marchés en aval, la demande sera interdépendante. Il y a très peu d'études sur la discrimination de prix exercée par une entreprise en position de monopole sur les marchés de produits intermédiaires[76]. Il y en a encore moins qui envisagent la discrimination de prix exercée par un monopoleur sur les marchés de produits intermédiaires où les prix sont fixés par des négociations bilatérales avec les acheteurs[77].

Discrimination de prix sur le marché des produits intermédiaires sans pouvoir de l'acheteur

En cas d'oligopole sur le marché en aval, les entreprises se font concurrence en termes de quantités fournies (c'est-à-dire qu'elles sont concurrentes selon le modèle Cournot), et si chaque acheteur est soumis à une offre « à prendre ou à laisser » individualisée provenant de l'entreprise en position de monopole en amont (le vendeur détient la totalité du pouvoir de négociation), les études montrent que la discrimination de prix sera sans doute inefficace, mais pas nécessairement préjudiciable pour le consommateur en aval.

Dans une situation de discrimination de prix, le monopoleur pousserait les prix facturés aux entreprises en aval performantes à la hausse et ferait pression à la baisse sur les prix facturés aux entreprises inefficientes. Cela s'explique par le fait que les entreprises en aval bénéficiant d'un avantage de coût ont une demande relativement inélastique. Pour comprendre les effets de la discrimination de prix, supposons que la production en aval implique des proportions fixes entre le facteur fourni par le monopoleur et un facteur extérieur. L'efficience des entreprises en aval diffère en termes de quantités de chacun des deux facteurs nécessaires pour produire une unité.

Si les entreprises en aval sont ordonnées (de telle sorte que si une entreprise utilise une quantité inférieure du facteur fourni par le monopole par rapport à une rivale, elle utilise alors moins de facteur extérieur), par rapport à une situation de prix uniforme, la discrimination de prix laissera, dans le meilleur des cas, la production totale et le surplus total en aval inchangés. S'il n'y a aucune différence dans l'utilisation du facteur fourni par le monopole, la production totale en aval reste inchangée, mais le bien-être global diminue. Le bien-être global diminue étant donné que la discrimination de prix transfère une partie de la production des entreprises efficientes aux entreprises inefficientes[78]. S'il n'y a aucune différence dans l'utilisation du facteur extérieur, mais uniquement dans l'utilisation du facteur fourni par le monopole, la production totale diminue sur le marché en aval et l'efficience est réduite[79]. Lorsque la seule différence intervient dans l'utilisation du facteur fourni par le monopole, les effets de la discrimination de prix sont plus néfastes puisque le monopoleur est davantage incité à augmenter ses prix appliqués aux entreprises efficientes afin d'en tirer un bénéfice, accroissant ainsi leurs coûts marginaux et réduisant la production.

76 Voir Katz (1987), DeGraba (1990), Yoshida (2000), Valletti (2003), Beard, Kaserman et Stern (2008).

77 Voir Katz (1987), O'Brien et Shaffer (1994), O'Brien (2008) et Inderst et Valletti (2008a).

78 Voir Katz (1987) et DeGraba (1990).

79 Voir Yoshida (2000).

Lorsque la demande est linéaire, la discrimination de prix améliorera le bien-être si et seulement si (i) il y a une corrélation négative relativement extrême avec l'efficience d'une entreprise dans son utilisation du facteur fourni par le monopole et du facteur qui en résulte et (ii) la production totale diminue. Naturellement, si la production totale diminue, cela porte préjudice aux consommateurs finaux[80]. Si la production totale *augmente* dans une situation de discrimination de prix, le préjudice découlant de l'inefficience productive sera supérieur au gain pour les consommateurs et le bien-être diminuera[81].

En revanche, si le marché en aval est concurrentiel, la discrimination de prix pourra être bénéfique pour les consommateurs et améliorer l'efficience. Le monopoleur en amont sera incité à augmenter la demande adressée aux entreprises efficientes, car la marge disponible pouvant être obtenue est la plus importante pour chaque unité fabriquée par l'entreprise en aval efficiente. Le fait d'appliquer un prix inférieur à l'entreprise efficiente et un prix supérieur à l'entreprise inefficiente modifie leurs parts de marché en aval, ce qui pourrait augmenter les profits du fournisseur en position de monopole.[82] Si les marchés en aval sont concurrentiels, cela peut accroître la production totale, en réduisant les prix sur le marché en aval et en améliorant l'efficience.

Discrimination de prix sur le marché des produits intermédiaires avec pouvoir de l'acheteur

Les effets du pouvoir de l'acheteur sur le modèle de discrimination de prix dans les marchés de produits intermédiaires inversent la principale constatation de l'analyse de la section précédente en situation de prix linéaires : alors que les gros acheteurs payaient plus cher que les petits acheteurs, ils paient maintenant moins cher. Les études à ce sujet envisagent les trois situations suivantes :

(i) des contrats « à prendre ou à laisser » proposés par le fournisseur en position de monopole, une tarification linéaire sur le marché de gros et des acheteurs ayant la possibilité de procéder à une intégration en amont ;

(ii) des contrats non linéaires et des négociations bilatérales ;

(iii) une tarification linéaire, des négociations bilatérales et des acheteurs ayant la possibilité de procéder à une intégration en amont.

Dans le plus simple des cas, (i), l'exercice du pouvoir de l'acheteur se limite à la possibilité d'intégration en amont si l'offre « à prendre ou à laisser » du fournisseur en position de monopole n'est pas assez attrayante. Dans les cas (ii) et (iii), les conditions de l'échange sont déterminées conformément à la solution de négociation de Nash (voir *supra*), à deux différences près : la nature des contrats en amont et, dans la situation (iii) si le résultat de la négociation est suffisamment faible, le plus gros acheteur peut procéder à une intégration en amont.

Contrats « à prendre ou à laisser », tarification linéaire et menace d'intégration.

Imaginons tout d'abord le cas de deux acheteurs en aval, dont un seul a une possibilité d'intégration en amont, et d'un fournisseur en amont en position de monopole[83]. Cela pourrait être le cas si l'entreprise ayant une possibilité d'intégration est un gros acheteur, si sa rivale est de taille modeste et si le gros

80 Voir Valletti (2003). La plupart des résultats sont basés sur une demande linéaire en aval, mais Valleti a démontré qu'ils restent souvent valables lorsque la demande est concave ou pas trop convexe.

81 Voir Yoshida (2000).

82 Voir Beard, Kaserman, et Stern (2008).

83 Voir Katz (1987).

acheteur est une entreprise multimarchés, au contraire de son rival. Par exemple, le gros acheteur pourrait participer à de nombreux marchés contre un seul concurrent différent à chaque occasion (par exemple, une chaîne de magasins présente sur de nombreux marchés géographiques qui s'oppose à une seule entreprise indépendante sur chaque marché). S'il est rentable pour le monopole en amont d'appliquer un prix tel que la chaîne de magasins n'a pas intérêt à procéder à une intégration, dans ce cas, par rapport à une tarification uniforme, la production totale en aval diminuera et le bien-être en pâtira si le monopole se livre à une discrimination de prix. Si l'augmentation du prix du petit acheteur accroît le bénéfice du gros acheteur lorsqu'il ne procède pas à une intégration, le fournisseur monopoleur, en situation de discrimination de prix, augmentera les prix appliqués aux deux entreprises par rapport aux prix uniformes. Ce n'est que si la discrimination de prix empêche une intégration en amont inefficiente (c'est-à-dire si l'acheteur intégré est relativement inefficient dans la production en amont) que la discrimination de prix sera plus efficiente, même si elle peut toujours nuire aux consommateurs du marché en aval.

Toutefois, supposons que les deux entreprises en aval aient une possibilité d'intégration en amont, mais que leur degré d'efficience diffère. Dans le cadre d'une offre « à prendre ou à laisser », le monopole en amont fixera son prix de manière que chacune soit indifférente à l'intégration ou la non-intégration (la contrainte d'indifférence s'applique). Dans ce cas, l'acheteur au coût marginal le plus faible aura un avantage : sa contrainte d'indifférence s'appliquera à un prix de gros inférieur à celui de son rival moins efficient[84]. Le prix de l'entreprise inefficiente dépassera le prix uniforme optimal, qui à son tour sera supérieur au prix des produits intermédiaires de l'entreprise efficiente en situation de discrimination de prix. Le surplus du consommateur augmentera à court terme si l'on interdit la discrimination de prix. À long terme, en revanche, cette interdiction peut porter préjudice aux consommateurs parce qu'elle réduit l'incitation des entreprises inefficientes –et peut être également les entreprises efficientes, à investir dans la réduction des coûts. L'entreprise la moins efficiente, en particulier, est toujours incitée à réduire ses investissements. Si l'entreprise inefficiente investit, cela allège la contrainte d'indifférence de l'entreprise efficiente, rendant son intégration moins probable, ce qui a pour effet d'augmenter le prix uniforme appliqué aux deux entreprises si la discrimination de prix est interdite.

Contrats non linéaires et négociations bilatérales

La deuxième situation envisagée fait intervenir un monopoleur négociant des contrats non linéaires avec des duopoleurs en aval qui produisent un produit différencié. Dans ces circonstances, un duopoleur en aval est d'autant plus incité à négocier un prix marginal inférieur pour le facteur, car cela lui confère un avantage concurrentiel en aval sur son rival. Tel est particulièrement le cas si les négociations entre un fabricant et un fournisseur sont privées : dans ce cas, l'entreprise rivale en aval ne connaît pas les conditions des contrats négociés par une entreprise et le fournisseur. Le résultat à l'équilibre est que le contrat négocié entre le fournisseur et une entreprise en aval maximise leurs bénéfices conjoints, le prix de l'autre entreprise en aval étant considéré comme donné. Par conséquent, le fournisseur en position de monopole et chaque entreprise en aval ont tout intérêt à agir comme s'ils se trouvaient dans une situation de monopole bilatéral, c'est-à-dire à fixer le prix de transfert au niveau du coût marginal pour maximiser leurs bénéfices conjoints. Les bénéfices conjoints sont divisés entres les deux entreprises sur la base des frais fixes payés par l'entreprise en aval au fournisseur. Le montant des frais fixes, et donc la division des bénéfices conjoints, seront fonction des pouvoirs de négociation relatifs[85].

Lorsqu'on envisage d'interdire la discrimination de prix, il y a trois possibilités : (a) les frais fixes sont interdits et les deux fournisseurs doivent payer le même prix de gros (transfert) ; (b) les frais fixes et le prix de gros appliqués à chaque entreprise doivent être identiques ; et (c) les prix de gros doivent être

84 Voir Inderst et Valletti (2008a).

85 Raisonnement basé sur O'Brien et Shaffer (1994).

identiques, mais les frais fixes peuvent varier. Dans les trois cas, l'interdiction de la discrimination de prix a pour effet d'augmenter les prix au détail en aval, de nuire aux consommateurs et de réduire le bien-être. Ce qui n'est pas surprenant, puisque la solution de négociation obtenue en l'absence d'interdiction aboutissait à une tarification efficiente sur le marché des produits intermédiaires.

Dans l'hypothèse (a), le monopoleur en amont réagit à l'interdiction des frais fixes en augmentant ses prix de gros pour en dégager des profits. Cela crée une double marginalisation. Dans l'hypothèse (b), l'incitation à négocier des prix inférieurs disparaît étant donné que les prix inférieurs des produits intermédiaires doivent être partagés. En revanche, le monopole fixe des prix de gros supérieurs au coût marginal pour restreindre la concurrence en aval entre les deux entreprises et tirer des bénéfices grâce aux frais fixes. Dans la troisième possibilité (c), le monopole en amont n'est pas contraint d'appliquer des frais fixes uniformes. Par conséquent, il utilise le prix de gros pour limiter la concurrence en aval, le portant ainsi au-dessus du coût marginal, et des frais fixes spécifiques à l'entreprise afin de dégager une rente.

Négociations bilatérales, tarification linéaire et menace d'intégration

La troisième situation généralise la première en supposant que le fournisseur en position de monopole s'engage dans des négociations bilatérales avec les deux entreprises en aval au lieu de supposer que le fournisseur en position de monopole formule des offres « à prendre ou à laisser », mais le gros acheteur peut procéder à une intégration en amont[86]. Les effets de la discrimination de prix se feront ou non sentir si les négociations bilatérales aboutissent à un résultat susceptible de déclencher une intégration en amont. Si c'est le cas, le résultat est identique à celui de la première situation. Toutefois, si les négociations bilatérales aboutissent à un résultat préféré par le gros acheteur (l'obligation d'intégration n'est pas contraignante), les effets de la discrimination de prix sur le bien-être sont très différents.

Le pouvoir de négociation des acheteurs dépend de leur efficience en la matière, de la valeur de leurs options extérieures et de la valeur de l'option extérieure du vendeur. Plus ils feront preuve d'efficience dans leurs négociations, plus la valeur de leur option extérieure sera élevée et plus la valeur de l'option extérieure du vendeur sera faible, plus leur prix de gros sera faible. Si ces trois facteurs sont identiques pour les deux acheteurs, ils obtiendront chacun le même prix de gros. Un acheteur obtiendra une ristourne par rapport à son rival en aval s'il dispose d'un avantage pour l'un ou l'autre de ces trois facteurs (une option extérieure plus large, une option extérieure du vendeur plus faible ou une plus grande efficience en matière de négociation). Plus l'avantage est important, plus la ristourne sera élevée. Cette ristourne peut augmenter parce que son prix de gros est davantage réduit que celui de son rival ou parce que son prix de gros diminue et que celui de son rival augmente[87].

Si la discrimination de prix est interdite et si le prix de gros doit être commun, les résultats dépendent de la répartition du pouvoir de l'acheteur. Si les deux acheteurs sont symétriques, l'interdiction de la discrimination de prix augmentera les prix des produits intermédiaires pour les deux entreprises. En effet, l'interdiction de la discrimination de prix influence les coûts des concessions (les effets sur le profit d'une évolution néfaste du prix de gros) des acheteurs et du vendeur. Elle réduit les coûts des concessions de l'acheteur, car s'il accepte un prix de gros supérieur, cela ne représentera aucun désavantage concurrentiel étant donné que son rival devra également payer un prix de gros supérieur. De plus, elle augmente les coûts des concessions du fournisseur, car s'il accepte un prix de gros inférieur, ce prix sera accordé à tous les acheteurs. En conséquence, l'interdiction de la discrimination de prix améliore la position de négociation relative du vendeur et affaiblit celle des acheteurs.

86 Voir O'Brien (2008).

87 O'Brien (2008) n'étudie pas les conditions dans lesquelles le prix de l'acheteur dont le pouvoir de négociation est inférieur augmente ou diminue et aucun de ses constats n'en dépend.

Si le pouvoir de négociation des acheteurs est asymétrique, les effets d'une interdiction de la discrimination de prix dépendent de l'acheteur avec lequel le fournisseur négocie. S'il s'agit de l'acheteur le plus faible, le prix des produits intermédiaires soumis à l'interdiction dépassera le prix de gros moyen en son absence. Si les entreprises en aval se font concurrence sur les quantités et si la technologie en aval est à proportions fixes (une unité de produits intermédiaires nécessaire pour une unité de production), la production totale, et donc le bien-être des consommateurs et l'efficience, seront supérieurs dans un contexte de discrimination de prix.

Si le fournisseur négocie avec l'acheteur se trouvant dans la position la plus favorable, les effets de l'interdiction de la discrimination de prix sont ambigus. Si l'acheteur en question bénéficie d'un pouvoir de négociation nettement plus important que celui de son rival en aval, le prix de gros uniforme sera situé au-dessous du niveau du prix moyen des produits intermédiaires dans un contexte de discrimination de prix. Dans le cas contraire, le prix uniforme sera supérieur au prix moyen des produits intermédiaires en situation de discrimination de prix.

Les effets sur le bien-être de la discrimination de prix dans les marchés de produits intermédiaires lorsque les acheteurs jouissent d'un pouvoir de l'acheteur

Les rares études consacrées aux effets sur le bien-être de la discrimination de prix sur les marchés de produits intermédiaires dans un contexte de pouvoir de l'acheteur montrent que ces effets sont très différents des situations où il n'y a pas pouvoir de l'acheteur. Si les contrats sont conclus dans des conditions d'efficience, l'interdiction de la discrimination de prix n'est pas optimale et ne profite pas aux consommateurs des marchés en aval. Si les transactions sur les marchés en amont impliquent des prix de gros linéaires, les effets de la discrimination de prix sur le bien-être dépendent de la source du pouvoir de négociation. Si elle est basée sur la menace d'une intégration verticale en amont, la discrimination de prix nuira aux consommateurs à court terme, mais pas nécessairement à long terme, en fonction des incitations à investir pour réduire les coûts et des possibilités qui s'offrent dans ce domaine. Si elle est basée sur une négociation bilatérale et que la menace d'intégration n'est pas prise au sérieux, la discrimination de prix a plus de chances de profiter aux consommateurs, sauf si l'acheteur le plus puissant se voit accorder des ristournes beaucoup plus importantes que ses rivaux et si les négociations entre le fournisseur et cet acheteur puissant déterminent le prix de gros commun.

4.3.2 Les effets du pouvoir de négociation sur la concurrence

On a examiné dans la section précédente les effets sur le bien-être de l'exercice du pouvoir de l'acheteur. Cette analyse introduit la présente section consacrée aux comportements qui améliorent, augmentent ou maintiennent le pouvoir de l'acheteur. Le statut légal de ces comportements devrait dépendre de leurs effets. Sauf dans les cas où l'exercice du pouvoir de l'acheteur implique la possibilité d'intégration en amont, l'exercice du pouvoir de l'acheteur est généralement considéré, mais pas toujours, comme bénéfique pour les consommateurs et l'efficience. Cela justifie une extrême prudence avant d'interdire un comportement simplement parce qu'il confère un pouvoir à l'acheteur.

Sous cette réserve, il y a deux situations où les comportements qui créent un pouvoir de l'acheteur pourraient poser des problèmes de concurrence :

(i) les plus faibles prix de gros de l'acheteur important font baisser les prix en aval, ce qui nuit à la rentabilité de ses concurrents et provoque donc leur sortie et une augmentation du pouvoir de marché de l'acheteur important en aval, aux dépens des consommateurs finaux[88]. L'analyse ci-

[88] À supposer que les barrières à l'entrée soient suffisamment élevées pour empêcher toute rentrée lorsque le gros acheteur important tente d'exercer son pouvoir de marché accru en aval.

dessus présuppose que les petits acheteurs restent actifs sur le marché en aval. Dans le cas contraire, cette analyse est inappropriée.

(ii) une ristourne accordée à un acheteur disposant d'un pouvoir de marché aboutit à une augmentation du prix de gros appliqué aux autres acheteurs ; c'est l'effet de « vases communicants »[89]. L'augmentation du prix pour les autres acheteurs se répercute sur leurs coûts en aval, en les conduisant à sortir du marché ou à augmenter leurs prix en aval. Dans tous les cas, le résultat est une hausse des prix et un renforcement du pouvoir de marché en aval pour le gros acheteur. Dans la mesure où la part de marché de ses rivaux se réduit parce que les coûts de leurs produits intermédiaires augmentent et parce que ces mêmes coûts diminuent pour le gros acheteur, le résultat du pouvoir de l'acheteur pourrait être un cercle vertueux pour l'entreprise qui jouit de ce pouvoir et un cercle vicieux pour ses concurrentes en aval et, en fin de compte, pour les consommateurs sur le marché en aval.

La possibilité qu'un comportement se révèle anticoncurrentiel parce qu'il a un effet de vases communicants se reflète dans les *directives de la Commission européenne sur l'applicabilité de l'article 81 du traité CE aux accords de coopération horizontale*[90] :

> l'une des principales préoccupations suscitées par une situation de puissance d'achat est que la baisse des prix ne soit pas répercutée en aval sur les clients, et qu'elle entraîne une augmentation des coûts pour les concurrents des acheteurs sur les marchés de vente des produits, dans la mesure où soit les fournisseurs tenteront de compenser les réductions de prix consenties à un groupe de clients en augmentant les prix facturés aux autres clients, soit l'accès des concurrents à des fournisseurs efficients sera réduit.

En outre, dans son enquête relative à une fusion de grandes surfaces, la Commission de la concurrence du Royaume-Uni a également étudié l'impact négatif que peut avoir sur la concurrence le phénomène de vases communicants[91].

Il y a une troisième possibilité : l'octroi d'une plus forte ristourne à un acheteur dont le pouvoir s'est accru fera baisser les prix sur le marché en aval car, d'une part, d'autres entreprises en aval réagissent à la baisse de prix due à la réduction des prix de gros découlant du pouvoir de l'acheteur et, d'autre part, ces entreprises sont également en mesure de négocier un prix de gros inférieur. Il se peut que d'autres acheteurs soient en mesure d'appliquer des contre-stratégies qui éliminent ou réduisent toutes les asymétries du point de vue de la puissance d'achat, et ce au profit des consommateurs.

Le premier scénario qui favorise un pouvoir de marché en aval à long terme suscite également des difficultés dans l'optique de la politique de la concurrence. La théorie du préjudice anticoncurrentiel part de l'hypothèse qu'un gain d'efficience, malgré ses avantages immédiats pour les consommateurs, provoque

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89 Cette expression trouve son origine dans l'observation du principe des vases communicants.

90 Journal officiel C 3 du 06.01.2001, p. 2, paragraphe 126. Voir également l'exemple au paragraphe 135. Disponible en ligne sur : http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2001:003:0002:0030:EN:PDF.

91 Voir Competition Commission, Safeway plc and Asda Group Limited (owned by Wal-Mart Stores Inc.) ; Wm Morrison Supermarkets PLC ; J Sainsbury plc ; et Tesco plc A report on the mergers in contemplation (2003), par. 2.218. Disponible en ligne sur http://www.competitioncommission.org.uk/rep_pub/reports/2003/481safeway.htm#full.

sur les marchés en aval des changements structurels qui aboutissent à une augmentation du pouvoir de marché. Les concurrents en aval sont exclus uniquement à cause de leur incapacité de faire face à un concurrent plus efficient, et pas à cause de pratiques de prédation ou d'exclusion. En l'absence d'effet d'exclusion des concurrents en aval, on peut se demander si le comportement qui a créé le pouvoir de l'acheteur doit ou non être prohibé par le droit de la concurrence[92].

Avec le second scénario, il est possible que l'augmentation du pouvoir de l'acheteur nuise directement à un concurrent, portant ainsi préjudice aux consommateurs en aval. On peut alors parler d'effet de vases communicants. Dans la section suivante, nous examinerons les possibilités d'effet de vases communicants. La discrimination de prix basée sur le pouvoir de l'acheteur sur un marché de produits intermédiaires étant préjudiciable uniquement en cas de menace d'intégration en amont, il n'est pas surprenant de constater que ce phénomène est à l'origine de théories cohérentes relatives à l'effet de vases communicants.

4.4 L'économie du pouvoir de négociation : les effets sur le prix au détail

Les études consacrées aux effets de l'augmentation du pouvoir de négociation en termes d'équilibre sont très peu nombreuses. Démêler ces effets de l'augmentation du pouvoir de négociation peut être relativement délicat si l'augmentation du pouvoir de l'acheteur provient d'une fusion, qui a également des conséquences pour le pouvoir de marché en aval. Tandis que l'augmentation du pouvoir de l'acheteur fait baisser le prix en amont, l'augmentation du pouvoir de marché en aval pousse le prix en aval à la hausse.

Par exemple, imaginons une situation dans laquelle un monopole en amont fournit un oligopole en aval[93]. Supposons que les acheteurs soient tous symétriques et envisageons ce qui se produit si leur pouvoir de l'acheteur est augmenté par une fusion entre deux d'entre eux. Une telle fusion devrait limiter l'option extérieure du monopole en amont, réduisant ainsi son pouvoir de négociation et, partant, le prix en amont. Toutefois, ce résultat dépend de la nature de la concurrence en aval. Si le marché en aval n'est pas très concurrentiel, la diminution du nombre d'entreprises en aval aboutit à une augmentation du pouvoir de marché. Cela signifie que si un vendeur échoue dans ses négociations avec une entreprise en aval, son option extérieure s'élargira étant donné que l'élimination d'une autre entreprise en aval augmentera les bénéfices des entreprises restantes. Le résultat est donc une *augmentation* du prix de gros. Ce n'est que s'il y a une concurrence relativement forte en aval que le renforcement du pouvoir de l'acheteur sous l'effet d'une fusion aboutira à une réduction du prix de gros et du prix en aval. Dans ces conditions, les bénéfices du monopoleur en amont sont très fortement amputés et il peut réagir en refusant d'approvisionner toutes les entreprises en aval sauf une, ce qui fera monter les prix et réduira la variété.

La symétrie des entreprises en aval et le fait que le pouvoir de l'acheteur de toutes ces entreprises augmente du fait de la fusion conduisent à s'interroger sur la valeur générale des résultats. Le problème, en définitive, tient aux effets d'un pouvoir de l'acheteur asymétrique sur les prix de gros spécifiques aux entreprises. Il y a deux écoles dans la littérature spécialisée qui étudient les effets des ristournes spécifiques aux entreprises découlant d'un pouvoir de négociation asymétrique.

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92 Voir la contribution de l'Antitrust Division Submission à la Table ronde de l'OCDE sur les fusions conglomérales ayant des effets de portefeuille(2001), disponible sur : http://www.usdoj.gov/atr/public/international/9550.pdf pour les difficultés à appliquer une politique de la concurrence qui améliore le bien-être, en tirant parti sur des comportements qui créent des efficiences sans inciter à l'exclusion ou à la prédation.

93 Voir von Ungern-Sternberg (1996) et Dobson et Waterson (1997) ; von Ungern-Sternberg part de l'hypothèse suivante: un fournisseur en position de monopole, une concurrence en aval à la Cournot avec un produit homogène et des négociations de type Nash sur le marché en amont. L'approche de Dobson et Waterson est similaire, à ceci près que les produits en aval sont différenciés et que la concurrence porte sur les prix.

4.4.1 Anti-effets de vases communicants

Certains font valoir qu'une analyse du contre-pouvoir doit prendre en compte deux éléments. Premièrement, il faut garder à l'esprit les tailles asymétriques des acheteurs. Dans de nombreux cas où le pouvoir de l'acheteur pose problème, on trouve une entreprise dominante en aval dont les seules contraintes sont imposées par des entreprises de taille plus réduite. Ces dernières sont considérées comme une frange concurrentielle qui réagit au prix en aval fixé par l'entreprise dominante. Deuxièmement, en ce qui concerne les contrats entre les fournisseurs et les entreprises en aval, il ne faut pas se limiter à une simple tarification linéaire, mais s'intéresser à des formules plus générales.

Dans un environnement contractuel permettant l'utilisation de tarifs binômes, par exemple, le monopole en amont et l'entreprise dominante qui maximisent les bénéfices conjoints peuvent instaurer une tarification efficiente, laquelle implique un prix de transfert du facteur égal au coût marginal. Les négociations entre le fournisseur de produits intermédiaires et l'entreprise dominante portent sur la répartition des bénéfices. Le renforcement du pouvoir de l'acheteur, l'entreprise dominante obtenant par exemple une plus forte proportion des bénéfices conjoints, ne peut influencer la concurrence en aval parce que l'augmentation du pouvoir de négociation ne modifie en rien son coût marginal.

Toutefois, en réponse à un renforcement du pouvoir de négociation, le fournisseur en position de monopole en amont est incité à réduire le prix unitaire appliqué à la frange concurrente en aval[94]. À mesure que le pouvoir de l'acheteur augmente et que l'entreprise dominante en aval obtient une plus forte proportion des bénéfices conjoints, le monopole en amont peut se permettre de moins se concentrer sur la maximisation des bénéfices conjoints et davantage sur la rentabilité de la frange concurrentielle. Une diminution du prix de transfert pour cette frange a pour effet d'augmenter sa production et ses bénéfices, ce qui fait baisser les prix et augmente la production sur le marché en aval. Le fournisseur en position de monopole obtient des bénéfices supérieurs de la frange concurrentielle en aval en augmentant la partie fixe de son tarif binôme. Cet exemple explique également la raison pour laquelle les entreprises en amont ont intérêt à maintenir un grand nombre d'acheteurs en aval pour éviter une dépendance excessive et la création d'un pouvoir de l'acheteur ou son renforcement.

Les ouvrages consacrés aux fusions verticales évoquent également un effet anti-vases communicants. Ils montrent qu'une fusion verticale n'aboutit pas nécessairement à une hausse des prix des produits intermédiaires pour les entreprises non intégrées. Certes, l'entreprise fusionnée est incitée à réduire son offre sur le marché en amont étant donné qu'elle bénéficie de prix plus élevés, mais il est difficile de savoir si le résultat à l'équilibre sera effectivement un prix supérieur. Les coûts inférieurs de l'entreprise fusionnée, grâce à l'internalisation de la double marginalisation, contractent la part de marché de ses rivaux non intégrés sur le marché en aval. En conséquence, leur demande de produits intermédiaires diminue, poussant leur prix à la baisse[95]. De même que dans le cas du pouvoir de l'acheteur, dans la mesure où les petites entreprises en aval se retrouvent en difficulté en raison des coûts inférieurs de leurs rivaux de plus grande taille, leur demande de produits intermédiaires diminue, ce qui a pour effet de tirer leurs prix vers le bas.

Les petits acheteurs en aval pourraient également voir leur situation d'améliorer si la présence d'un gros acheteur, jouissant d'un pouvoir de l'acheteur, rend la collusion en amont plus difficile. Cela pourrait être le cas si la présence d'un gros acheteur encourage les vendeurs à offrir un prix inférieur et à ne pas se conformer au prix coordonné. Si les vendeurs ne peuvent imposer une discrimination de prix entre les

94 Voir Chen (2003).

95 Voir Church (2008, p. 1477).

acheteurs en aval, les petits acheteurs bénéficieront des prix inférieurs acceptés par les vendeurs afin de rendre ces entorses moins rentables[96].

4.4.2 Effets de vases communicants

Pour qu'il y ait effet de vases communicants, il faut que la modification du pouvoir de l'acheteur aboutisse à une modification du prix de transfert unitaire payé par les entreprises rivales en aval. Les hypothèses lorsqu'on envisage la possibilité d'un effet de vases communicants sont les suivantes : les acheteurs et vendeurs utilisent de simples contrats linéaires (c'est-à-dire que toutes les transactions se concluent à un prix de gros unitaire négocié). Les théories diffèrent selon la manière dont les différences de pouvoir de l'acheteur entraînent une hausse du prix en amont payé par les rivaux en aval. Deux sont dynamiques et impliquent des modifications de la structure du marché et du pouvoir de marché en amont. La troisième théorie analyse uniquement la manière dont l'évolution du pouvoir de l'acheteur en aval influence les parts de marché en aval, en ayant des effets négatifs sur le pouvoir de négociation des entreprises concurrentes en aval[97].

Même en cas d'effet de vases communicants, les prix appliqués aux consommateurs du marché en aval peuvent diminuer. L'impact sur les prix en aval dépend de l'interaction de trois effets : (i) l'entreprise bénéficiant d'un pouvoir de l'acheteur accru aura tendance à réduire ses prix du fait de la diminution de ses coûts marginaux et (ii) pour ses rivales en aval, il sera intéressant en termes de maximisation des bénéfices (si leurs coûts restent inchangés) de réagir en réduisant leurs prix, mais (iii) l'effet de vases communicants implique que les entreprises rivales sont poussées à relever leurs prix en raison de la hausse de leurs coûts marginaux.

Le résultat de ces trois théories de l'effet de vases communicants maximisant les bénéfices dépend de la concurrence ou du moins de la concurrence potentielle en amont. Avant d'examiner ces trois théories cohérentes concernant les effets possibles de vases communicants, il est important de comprendre qu'aucune d'entre elles ne dépend de l'intuition suivante, généralement acceptée.

On prétend que le prix appliqué aux entreprises rivales doit augmenter si un acheteur puissant obtient une ristourne, parce que le fournisseur doit augmenter sa marge pour couvrir ses coûts fixes. Cette explication n'est pas satisfaisante. En effet, si en augmentant ses prix après la ristourne, le vendeur maximise ses bénéfices, augmenter ses prix avant la ristourne aurait dû avoir le même effet de maximisation des bénéfices. Avec la dynamique mise en place, il se peut que d'autres entreprises en aval exigent une ristourne similaire[98]. De plus, le vendeur est alors obligé d'augmenter ses prix pour les autres acheteurs afin d'atteindre son seuil de rentabilité. Toutefois, cela implique une absence de pouvoir de marché qui est en contradiction avec les effets de vases communicants[99].

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96 Voir Snyder (1996) pour une formalisation de cet argument.

97 Trois contributions récentes se penchent sur les effets de vases communicants dans le cadre d'un modèle économique formel. Il s'agit de Majumdar (2006), Inderst (2007) et Inderst et Valletti (2008b). Ces travaux sont étudiés de manière approfondie dans Dobson et Inderst (2008).

98 Le fait d'accorder une ristourne à un acheteur augmente la rentabilité des ristournes accordées à d'autres acheteurs étant donné que cela réduit l'option extérieure du vendeur. En effet, le vendeur réalise désormais des marges inférieures sur les ventes à la première entreprise en aval qui a bénéficié d'une ristourne.

99 Voir Dobson et Inderst (2008, p. 342).

Hypothèse dynamique : Modifier la structure du marché en amont

L'hypothèse dynamique est basée sur la logique suivante : (i) le renforcement du pouvoir de négociation d'un acheteur réduit la rentabilité des fournisseurs en amont, (ii) ce qui suscite à long terme une rationalisation en amont, laquelle diminue le nombre de fournisseurs, diminution qui (iii) renforce le pouvoir de négociation des fournisseurs restants, ce qui fait monter les prix en amont payés par les rivaux en aval, et (iv) la consolidation en amont n'est pas suffisante pour éliminer les termes préférentiels négociés par l'acheteur en position de force.

Pour que cette hypothèse ait un sens, la concurrence en amont doit être telle que les fournisseurs dégagent une rentabilité proche du niveau concurrentiel. De surcroît, cela pose problème parce que l'acheteur n'a pas nécessairement intérêt à faire tellement pression sur les fournisseurs que leur survie à long terme soit remise en cause. Toutefois, on peut considérer que cette situation pourrait se présenter en raison de l'asymétrie d'information concernant la rentabilité des fournisseurs, que les gros acheteurs en aval sont confrontés au dilemme du prisonnier (chacun y gagne en s'appropriant les quasi-rentes avant ses rivaux, alors que tous y gagneraient à long terme si personne ne s'approprait les quasi-rentes) et, enfin, que la consolidation pourrait finir par profiter aux gros acheteurs et nuire aux petits acheteurs de telle sorte que les bénéfices du gros acheteur seraient supérieurs dans le cas d'un marché en amont plus concentré[100].

Renforcement des barrières à l'entrée en amont

Le renforcement du pouvoir de l'acheteur pourrait rendre l'entrée moins attrayante en accentuant les barrières à l'entrée et en réduisant ainsi la rentabilité des ventes aux petits acheteurs, ce qui augmentera le prix payé par les petits acheteurs[101]. Par exemple, imaginons une chaîne de détaillants présente sur de nombreux marchés géographiques locaux. Sur chaque marché local est également implanté un distributeur indépendant. La concurrence en aval porte sur les quantités. Il y a deux fournisseurs en amont et la production en amont nécessite un certain coût fixe irrécupérable et un certain coût marginal par unité. Supposons que la chaîne de détaillants formule ses offres et signe les contrats avec des fournisseurs avant que les arrangements commerciaux entre les fournisseurs et les distributeurs indépendants soient finalisés. Supposons également qu'après la conclusion du ou des contrats entre la chaîne et les fournisseurs, un marché au comptant permette d'approvisionner les distributeurs indépendants.

En raison des économies d'échelle, la chaîne signera des contrats avec un seul des fournisseurs potentiels. L'entreprise qui obtiendra ce contrat saura que dans la concurrence pour l'approvisionnement des détaillants locaux, elle remportera le marché avec un prix égal au coût moyen de sa rivale : celle-ci ne participera pas avec un prix qui ne lui permettra pas de récupérer ses coûts fixes. Pour l'attribution des volumes de la chaîne de magasins, cela signifie que le fournisseur gagnant est prêt à proposer un prix égal au coût marginal. Le soumissionnaire gagnant sait qu'il récupérera ses coûts fixes auprès des fournisseurs locaux, sur la base du prix le plus bas que son concurrent est disposé à offrir pour entrer sur le marché.

L'élément déterminant dans un effet de vases communicants est que plus les marchés sur lesquels la chaîne de magasins opère sont nombreux, plus la demande est réduite sur le marché au comptant, et plus les volumes sont limités sur ce marché, plus il est onéreux en termes de coût moyen et de prix d'approvisionner les détaillants indépendants. L'expansion de la chaîne de magasins (au moyen d'une fusion) sur les marchés locaux a pour effet d'augmenter les coûts des rivaux, réduisant ainsi leur part de marché.

100 Voir Kirkwood (2005, p. 650) et Dobson et Inderst (2008, p. 345).

101 Voir Majumdar (2006).

L'impact sur le bien-être d'une augmentation de la taille de la chaîne de magasins dépend de l'impact net des changements observés dans les trois types de marchés locaux : (i) en l'absence de chaîne, le bien-être diminue à mesure que les coûts des deux détaillants locaux augmentent, (ii) dans les marchés où la chaîne s'est développée, la production des entreprises acquises augmente, celle du détaillant local concurrent diminue et (iii) dans le marché où la chaîne était déjà présente, la production diminue en raison de la hausse des coûts de l'entreprise locale concurrente[102].

Modification des parts de marché

Une autre source possible d'effet de vases communicants tient aux conséquences, pour le pouvoir de négociation, d'une modification de la part de marché due à des prix de gros différents[103]. Une réduction des prix des produits intermédiaires a pour effet de diminuer le coût marginal de l'entreprise dont le pouvoir de l'acheteur se renforce, ce qui accroît ses ventes en aval, en partie aux dépens de ses rivaux. Cette modification de la part de marché diminue le pouvoir de négociation de ses rivaux en aval, ce qui fait augmenter leurs prix de gros, accentuant ainsi encore davantage les différences de prix des produits intermédiaires, de taille du marché en aval et de pouvoir de négociation.

La relation entre la taille du marché en aval et le pouvoir de négociation repose sur la capacité de l'acheteur de recourir à un autre fournisseur pour éviter l'exercice du pouvoir de négociation par un fournisseur. Si le changement de fournisseur ou l'intégration verticale implique des coûts fixes, plus l'acheteur est de grande taille, moins il lui en coûtera de recourir à une autre source, plus son coût moyen de changement de fournisseur sera bas et plus son pouvoir de négociation sera important[104]. En revanche, plus un acheteur est petit, moins son option extérieure sera attrayante, plus son pouvoir de négociation sera limité et plus élevé sera le prix qu'un fournisseur pourra appliquer avant que le petit acheteur en question soit indifférent entre poursuivre ses achats ou exercer son option extérieure.

Pour illustrer la possibilité d'un effet de vases communicants, supposons qu'il y ait plusieurs marchés géographiques locaux avec une concurrence entre deux entreprises, l'une d'entre elles pouvant faire partie d'une chaîne de distribution. La concurrence sur chaque marché local porte sur les prix entre produits différenciés[105]. Il y a un fournisseur en position de monopole sur le marché en amont qui peut appliquer une discrimination de prix. Avec le prix qu'il applique à chaque entreprise en aval, le monopoleur est indifférent entre accepter ce prix ou investir dans les frais fixes nécessaires pour assurer l'autofourniture. Les investissements dans l'autofourniture impliquent que le coût marginal de l'entreprise en aval doit correspondre au coût marginal de l'entreprise en amont. Le monopoleur en amont peut exclure cette option. S'il fixe ses prix au coût marginal, il vaut mieux que les entreprises en aval les acceptent car dans ce cas elles ne devront pas supporter les frais fixes liés à l'option de fourniture extérieure. Cela signifie que le monopoleur peut augmenter ses prix au-dessus du coût marginal jusqu'à ce que l'acheteur se montre indifférent. L'indifférence de l'entreprise en aval définit la limite supérieure du prix de gros pour cette entreprise.

On observe un effet de vases communicants lorsqu'on compare deux structures de marché différentes. Dans la première, toutes les entreprises participent à un seul marché. Dans la seconde, il y a une chaîne de distribution (entreprise multimarchés) qui est active sur plus d'un marché local. Un effet de vases

102 Dans le cas d'une demande linéaire, Majumdar (2006) démontre que le bien-être global diminue toujours.

103 Voir Inderst (2007) et Inderst et Valletti (2008b).

104 Voir Katz (1987).

105 On part du principe que la différenciation sur chaque marché local suit le modèle classique d'Hotelling, les entreprises étant situées à l'extrémité de l'intervalle unitaire et les préférences des consommateurs étant réparties de manière uniforme sur tout l'intervalle unitaire.

communicants apparaît parce que le prix payé par l'entreprise multimarchés diminue et que le prix payé par l'entreprise locale sur les marchés où la chaîne est présente augmente.

On comprend aisément pourquoi le prix pour l'entreprise multimarchés diminue. La rentabilité de la fourniture extérieure a augmenté, car elle permet de répartir les frais fixes de démarrage sur plusieurs marchés. Pour empêcher l'entreprise multimarchés d'exercer cette option, le fournisseur en amont en position de monopole doit diminuer son prix de gros. Autre caractéristique : le coût moyen de la fourniture extérieure a diminué, ce qui nécessite une baisse du prix du monopoleur pour rester compétitif.

Toutefois, la modification du prix de gros reçu par l'entreprise multimarchés influe également sur la contrainte d'indifférence du détaillant local concurrent. Toutes choses étant égales par ailleurs, la diminution du prix de gros pour l'entreprise multimarchés entraîne une augmentation de sa part de marché et une réduction de celle de sa rivale. Cela a pour effet d'augmenter le coût moyen de l'entreprise concurrente désireuse d'accéder à une source d'approvisionnement extérieure. Toutefois, pour que cela ménage au grossiste en position de monopole une possibilité d'augmentation de son prix, l'effet sur la contrainte d'indifférence doit être asymétrique. C'est-à-dire que la diminution du prix des produits intermédiaires de la chaîne doit avoir un impact *plus important* sur le bénéfice extérieur du détaillant local que s'il continue à s'approvisionner auprès du monopole. C'est seulement si ce différentiel se crée que le monopole en amont pourra augmenter son prix de gros.

Un effet asymétrique est observé parce que l'effet de la diminution du coût marginal de l'entreprise multimarchés sur les profits de l'entreprise locale dépend du niveau du coût marginal de cette dernière. Plus le coût marginal d'une entreprise est bas, plus marqué sera l'effet d'une diminution du coût marginal d'une rivale sur les bénéfices de l'entreprise. Cela signifie qu'une entreprise efficiente souffrira davantage de la diminution du coût marginal d'une rivale qu'une entreprise inefficiente. Étant donné que le coût marginal de la fourniture extérieure est inférieur au prix de gros du monopoleur, la réduction du profit extérieur est plus importante si le coût de la chaîne diminue à la suite d'une augmentation de son pouvoir de l'acheteur.

Plus le différentiel entre les prix de gros sera important, plus l'effet de vases communicants sera marqué. Si ce différentiel est faible, l'augmentation du pouvoir de l'acheteur entraînera la réduction de *tous* les prix au détail. L'entreprise multimarchés baisse ses prix parce que son coût marginal a diminué : lorsque l'effet de vases communicants est faible, l'entreprise locale concurrente répondra à l'intensification de la concurrence en aval par une baisse de ses prix. En revanche, si le différentiel existant est important, une augmentation du pouvoir de l'acheteur peut aboutir à une augmentation du prix du concurrent local et à une diminution du bien-être du consommateur. Un différentiel de prix de gros important se traduira par une faible part de marché pour l'entreprise locale.

L'augmentation de la taille de l'acheteur et, partant, de son pouvoir de l'acheteur, peut tenir à une expansion du marché géographique, mais elle peut aussi s'expliquer par des investissements de réduction de coûts[106]. Lorsqu'une entreprise en aval diminue son coût marginal ou améliore la qualité de son produit, elle exerce un effet différentiel sur la contrainte d'indifférence pour l'entreprise qui détermine son prix en amont. Si elle réduit son coût ou améliore la qualité de son produit, ses gains augmenteront davantage en exerçant son option extérieure qu'en continuant à s'approvisionner auprès du monopole en amont si, comme c'est généralement le cas, une réduction du coût marginal accroît davantage les bénéfices de l'entreprise lorsque ce coût est déjà faible. En conséquence, pour dissuader l'entreprise d'exercer son option extérieure, le monopoleur doit baisser son prix de gros. La réduction du coût marginal de la première entreprise en aval assouplit la contrainte d'indifférence de sa concurrente de telle sorte que le monopole en amont peut maintenant augmenter ses prix (comme indiqué ci-dessus).

106 Voir Inderst (2007).

Cela implique que la croissance par acquisition et la croissance par investissement dans la réduction des coûts ou l'amélioration de la qualité sont complémentaires. Plus les coûts d'une entreprise sont bas, plus elle est incitée à se développer sur d'autres marchés par des acquisitions, et plus les marchés sur lesquels une entreprise opère sont nombreux, plus elle sera incitée à investir dans la réduction des coûts. Le problème est que l'exercice du pouvoir de l'acheteur provoque un « processus rampant de concentration » qui affaiblit la concurrence et fait monter les prix en aval.

4.5 L'économie du contre-pouvoir : les effets des investissements en amont

Selon une autre théorie s'efforçant d'expliquer le préjudice dû à l'exercice du pouvoir de l'acheteur, ce pouvoir freine l'incitation des entreprises en amont à innover et à investir. Cet argument est une variante du problème classique du hold-up[107]. Si un fournisseur prévoit que l'acheteur sera en mesure, grâce à son pouvoir de négociation, d'obtenir une partie substantielle des profits de la transaction et, en particulier, de rendre les investissements non rentables, il sous-investira. Bien que le risque de hold-up soit plus élevé pour les fournisseurs, le problème du hold-up pourra dans certains cas être réglé plus efficacement en présence d'un gros acheteur. Par exemple, un tel acheteur peut être plutôt incité à se forger une réputation de comportement non opportuniste, ou il peut être disposé à financer, au moins en partie, les investissements des fournisseurs.

Des travaux théoriques récents montrent que le pouvoir de l'acheteur peut résulter d'une réduction inefficiente de la variété des produits[108]. Une autre série de travaux soulignent l'importance de la rivalité entre les acheteurs, qui minimise leur pouvoir de négociation et augmente la part de profit obtenue par les fournisseurs en amont. Ces travaux démontrent qu'une augmentation du pouvoir de l'acheteur réduit la part des fournisseurs et diminue ainsi leur incitation à investir dans la recherche et le développement ou dans la qualité[109].

Les relations entre le pouvoir de l'acheteur et l'incitation des entreprises en amont à investir sont complexes[110]. Les fournisseurs confrontés à un acheteur plus puissant ont davantage intérêt à innover et à investir si cela permet de neutraliser une partie de la puissance d'achat accrue. En particulier, en réduisant ses coûts ou en faisant en sorte que son produit soit plus attrayant, un fournisseur peut affaiblir l'option extérieure de l'acheteur en rendant ses concurrents plus rentables. Par conséquent, il est essentiel d'opérer une distinction entre les effets d'un pouvoir de l'acheteur accru sur les incitations à des investissements et innovations de type incrémental (ce qui peut s'avérer positif) et sur les décisions d'investissement de type non incrémental (nouveau produit ou décision de rester sur le marché ou d'en sortir), ces incitations étant fonction du niveau absolu des profits[111].

5. Mise en œuvre des règles de concurrence et pouvoir de l'acheteur

Cette section examine certaines questions de mise en œuvre des règles de concurrence que soulèvent les comportements qui améliorent, maintiennent ou créent un pouvoir de marché des acheteurs. On analysera (i) les pratiques d'offres d'éviction visant à créer un pouvoir de monopsone et le critère de responsabilité approprié ; et (ii) les conséquences du pouvoir de l'acheteur pour le contrôle des fusions.

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107 Voir Church et Ware (2000, chapitre 3) pour une introduction et des références.

108 Voir Chen (2004) et Inderst et Shaffer (2007).

109 Voir Battigalli, Fumagalli et Polo (2007).

110 Voir Inderst et Wey (2007).

111 Voir Inderst et Wey (2007) ou Inderst et Mazzarotto (2008).

5.1 Offres d'éviction

En cas d'offres d'éviction, l'acheteur accroît ses achats sur le marché en amont afin de faire monter le prix du facteur et de réduire les profits des acheteurs concurrents, favorisant ainsi leur sortie ou leur marginalisation et renforçant son pouvoir de monopsone. Le prix d'éviction se fonde sur le comportement similaire d'un vendeur qui augmente la production et baisse ses prix en aval afin de réduire la rentabilité de ses rivaux dans le but de favoriser leur sortie ou leur marginalisation et de renforcer ainsi son pouvoir de marché. Les offres d'éviction sont le pendant des prix d'éviction : les deux pratiques impliquent des prix qui entraînent des pertes — certaines — aujourd'hui en contrepartie de la possibilité de renforcer le pouvoir de marché et d'augmenter les bénéfices à l'avenir[112].

5.1.1 Critères de responsabilité

Un élément important est le critère de responsabilité à appliquer pour constater une monopolisation par offres d'éviction. Dans l'affaire *Weyerhaeuser,* la Cour suprême des États-Unis a jugé que pour qu'il y ait offre d'éviction, un double critère devait être rempli, à savoir celui exigé dans l'affaire de prix d'éviction *Brooke Group*[113]. Pour que la responsabilité soit reconnue dans une affaire de prix d'éviction, conformément à la jurisprudence *Brooke Group,* le demandeur doit démontrer : (i) que le prix du prédateur était inférieur à une mesure appropriée des coûts[114], et (ii) que le prédateur présentait une « probabilité dangereuse de récupérer son investissement avec des prix inférieurs aux coûts »[115].

Dans l'affaire *Weyerhaeuser,* la Cour suprême des États-Unis a jugé que deux conditions devaient être remplies pour qu'il y ait offre d'éviction : (i) un prix inférieur au coût de la *production* du prédateur et (ii) une probabilité dangereuse que le prédateur récupère son investissement dans des prix inférieurs aux coûts en exerçant un pouvoir de monopsone[116]. Si le prédateur applique un prix inférieur au coût sur le marché en aval, cela signifie que la recette perçue pour la production réalisée à partir du produit intermédiaire (dont le prix est gonflé) est inférieur au coût de produits intermédiaires supplémentaires. Quant à savoir si la symétrie entre les offres d'éviction et la position de monopsone et les prix d'éviction et le monopole justifie les mêmes critères de responsabilité, cela dépend de la justification du critère dans le cas des prix d'éviction et de la validité de cette justification en cas d'offres d'éviction.

La justification du double test bipolaire dans le cas des prix d'éviction se base sur une analyse des coûts des erreurs, de la probabilité d'erreur et du coût des mesures d'application[117]. Il y a deux erreurs possibles : (i) le prédateur est condamné par erreur en étant jugé coupable de prédation, alors qu'il ne s'est pas livré à des pratiques de prix préjudiciables ; (ii) le prédateur est absous par erreur en étant jugé non coupable de prédation, alors qu'il s'est livré à des pratiques de prix préjudiciables. Pour donner un résultat optimal, les mesures d'application du droit de la concurrence doivent minimiser le coût attendu des erreurs et de l'exécution. S'attaquer à des pratiques de prix sera optimal si le préjudice attendu de l'absence d'action (disculpation par erreur) est supérieure à la perte attendue de l'action (condamnation par erreur),

112 Weyerhaeuser Company v. Ross-Simmons Hardwood Lumber Co., Inc. 127 S. Ct. 1069, 1077.

113 Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209.

114 *Brooke Group*, par. 222.

115 *Brooke Group*, par. 224.

116 *Weyerhaeuser*, par. 1078.

117 Voir *Brooke Group* et *Weyerhaeuser*. Pour une analyse approfondie du cadre théorique décisionnel, voir Hylton (2008).

plus les frais d'exécution[118]. Étant donné que la réduction des prix profite aux consommateurs et qu'elle fait partie intrinsèque du processus concurrentiel, toute politique optimale doit prendre en compte la possibilité qu'une condamnation par erreur freine la concurrence par les prix. En outre, il se peut que les coûts attendus d'une disculpation par erreur ne soient pas élevés pour deux raisons : (i) l'a priori selon lequel les prix d'éviction sont rarement appliqués et ont encore moins de chances d'être couronnés de succès et (ii) même si une entreprise y parvient, il est toujours possible que son pouvoir de marché s'érode sous l'effet de certaines évolutions du marché, une correction étant donc possible.

L'argumentation en faveur d'un critère prix-coût découle de la difficulté, dans le cadre d'un procès, de déterminer si un prix supérieur au coût est prédateur ou légitime et du risque d'entraver la concurrence. Le critère de récupération, le deuxième élément, signifie que la prédation doit être rationnelle et causer un préjudice concurrentiel aux consommateurs. Si le prix inférieur au coût n'augmente pas le pouvoir de monopole de façon à porter préjudice aux consommateurs, on ne peut le considérer comme prédateur. Il est peu probable qu'un tel prix persiste, car il se corrige de lui-même : les entreprises qui perdent de l'argent sont forcées soit de modifier leur stratégie, soit de sortir du marché. De plus, cela profite aux consommateurs.

Pour se prononcer sur l'applicabilité du critère *Brooke Group* aux pratiques d'offres d'éviction, la Cour suprême a souligné le fait qu'il y avait de nombreuses raisons liées à la concurrence ou l'efficience pour lesquelles une entreprise pouvait faire monter les prix des produits intermédiaires et surenchérir sur les concurrents. La Cour a expressément fait état des éléments suivants[119] : (i) le présumé prédateur pourrait être plus efficient ; (ii) il pourrait y avoir des chocs différentiels sur la demande favorisant le présumé prédateur ; (iii) le présumé prédateur pourrait surestimer la demande ; (iv) le présumé prédateur pourrait utiliser une nouvelle technologie qui met en œuvre les produits intermédiaires de manière plus intensive ; et (v) il pourrait y avoir protection contre des anticipations de hausse des prix. Comme dans le cas de la prédation, la Cour a recensé les motivations légitimes pouvant pousser une entreprise à adopter un comportement qui fait monter les prix sur le marché des produits intermédiaires. L'adoption, judicieusement adaptée, du critère prix-coût se fonde sur le risque, comme pour les prix d'éviction, de décourager les comportements proconcurrentiels[120].

La Cour a également noté que bien que les schémas de prix d'éviction qui échouent profitent toujours aux consommateurs, les schémas d'offres d'éviction qui échouent (c'est-à-dire qui ne remplissent pas la condition de récupération) peuvent être bénéfiques pour les consommateurs finaux si l'augmentation des achats de produits intermédiaires aboutit à une augmentation de la production en aval. Toutefois, la Cour conclut en faisant observer que les pratiques d'offres d'éviction pourraient être couronnées de succès sans nuire aux consommateurs parce qu'elles ne reposent pas sur une augmentation des prix sur le marché en aval : les prix de production pourraient rester constants pendant la phase de prédation et pendant la phase de récupération[121].

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118 Cooper *et al.* (2005, p. 659). Une autorisation par erreur ou un faux négatif constitue une erreur de type II et reflète un défaut de dissuasion. Une interdiction par erreur ou un faux positif constitue une erreur de type I et reflète un excès de dissuasion.

119 Weyerhaeuser, par. 1077.

120 Weyerhaeuser, par. 1078.

121 Weyerhaeuser, par. 1077-1078.

Le critère de responsabilité de la Cour pour les pratiques d'offres d'éviction soulève un certain nombre de questions, dont :

(i) *la symétrie* entre *les offres d'éviction et les prix d'éviction*. La Cour n'a pas caractérisé correctement le degré de symétrie entre les offres d'éviction et les prix d'éviction. En particulier, elle n'a pas semblé reconnaître la symétrie entre les fournisseurs de produits intermédiaires et les consommateurs. Dans un contexte de prix d'éviction, les consommateurs sont d'abord gagnants, mais s'il y a récupération ultérieure, ils subissent un préjudice. En cas d'offres d'éviction, les fournisseurs de produits intermédiaires commencent par profiter de la situation (grâce à l'augmentation des prix des produits intermédiaires pendant la phase de prédation) et ils en pâtissent ensuite lorsque le pouvoir de monopsone est exercé pendant la phase de récupération. Au lieu de reconnaître cette symétrie, la Cour s'est concentrée sur l'impact pour le consommateur final des prix d'éviction et des offres d'éviction. Cela déprécie l'analyse, étant donné que la Cour a admis que si le marché en aval est concurrentiel, les consommateurs pourront ne pas être touchés ou ne pas subir de préjudice[122]. Cela pourrait vouloir dire que la règle ne serait pas aussi stricte pour les offres d'éviction que pour les prix d'éviction. Or, comme on l'a vu ci-dessus, les consommateurs subissent un préjudice, même si le marché en aval est caractérisé par une offre parfaitement élastique.

(ii) *Incitations et effets* économiques. L'incitation économique à se livrer dans des pratiques d'offres d'éviction peut être plus forte que pour les prix d'éviction et les effets néfastes de ces offres peuvent être plus marqués.

  (a) Les offres d'éviction peuvent être plus problématiques que les prix d'éviction, parce qu'elles peuvent aboutir non seulement à un pouvoir de monopsone, mais également à la création ou au renforcement d'un pouvoir de marché en aval[123]. Si les acheteurs en concurrence sont également des concurrents du prédateur sur le marché en aval, leur sortie ou leur marginalisation sur le marché en amont devrait également entraîner leur sortie ou leur marginalisation sur le marché en aval.

L'exercice du pouvoir de marché par une entreprise en amont en position de monopsone qui est également en position de monopole en aval a plus de poids que celui d'un monopole en aval ou d'un monopsone en amont[124]. Cela montre que le coût des offres d'éviction peut être supérieur à celui des prix d'éviction.

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122 Voir Hylton (2008) ou Blair et Lopatka (2008).

123 Voir Hylton (2008).

124 L'indice de Lerner sur le marché en aval pour un monopsoneur qui est également monopoleur en aval (double monopole) est :

$$L^{DS} = \frac{1}{\varepsilon^{DS}} + \frac{1}{\varepsilon^{US}+1} - \frac{1}{\varepsilon^{DS}(\varepsilon^{US}+1)}$$

où ε^{DS} désigne l'élasticité de la demande en aval et ε^{US} l'élasticité de l'offre en amont. L'indice de Lerner sur le marché en aval pour une entreprise en position de monopsone qui est également preneuse de prix sur le marché en aval est :

$$L^{DS} = \frac{1}{\varepsilon^{US}+1}$$

et l'indice de Lerner sur marché en aval pour l'entreprise en position de monopole qui est également preneuse de prix sur tous les marchés de produits intermédiaires est :

(b) Dans le cas des offres d'éviction, il y a deux marchés sur lesquels le monopsoneur peut tenter de récupérer son investissement dans cette pratique. Les offres d'éviction peuvent créer un pouvoir de marché en amont et en aval[125].

Or, le rôle des prix des produits intermédiaires est de fournir des informations sur la valeur relative des ressources. Ces prix sont cruciaux pour l'affectation des ressources à leurs utilisations optimales, en particulier lorsque les conditions changent et qu'une réaffectation des ressources s'impose. Par conséquent, même si les incitations et les dommages économiques peuvent être plus importants dans le contexte d'offres d'éviction que dans celui de prix d'éviction, le coût de blocage des hausses de prix proconcurrentielles des produits intermédiaires sera probablement très élevé. Certains commentateurs ont donc fait valoir que le critère de responsabilité pour les offres d'éviction devrait être aussi strict que pour les prix d'éviction[126].

(iii) *Critère prix-coût.* Le critère prix-coût du premier volet n'est pas très concluant dans deux circonstances :

(a) Le présumé prédateur stocke ou détruit les produits intermédiaires supplémentaires, s'assurant ainsi que les prix ne tomberont pas en dessous des coûts sur le marché de production. Dans ce cas, il est possible d'inclure le coût des produits intermédiaires détruits ou les produits intermédiaires « supplémentaires » stockés dans le coût marginal retenu pour le critère prix-coût. Il peut être très difficile de distinguer entre des niveaux de stocks anodins pour la concurrence et une accumulation excessive de stocks, ou de faire la preuve qu'une partie des produits intermédiaires a été détruite au lieu d'être utilisée en raison d'une décision qui se révèle erronée a posteriori, et pas à cause d'un phénomène de prédation. Les difficultés liées à ces distinctions impliquent probablement qu'un ajustement du premier volet du critère n'est pas possible[127]. En revanche, si l'on peut démontrer qu'un présumé prédateur a augmenté ses achats et si, dans une proportion significative, ces achats supplémentaires n'ont pas été utilisés mais détruits, il incombe à l'entreprise acheteuse d'expliquer pourquoi, ex ante, l'augmentation des achats de produits intermédiaires était favorable à la concurrence, même si les prix de production dépassaient les coûts marginaux[128].

(b) Si l'entreprise formulant des offres d'éviction bénéficie d'un pouvoir de marché en aval, l'augmentation du volume de produits intermédiaires découlant de ces offres ne remplit pas nécessairement le critère prix-coût. Au contraire, même si l'augmentation du volume de produits intermédiaires entraîne une augmentation de la production en aval, il se peut que cette augmentation ne soit pas suffisante pour réduire les prix en aval à un

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$$L^{DS} = \frac{1}{\varepsilon^{DS}}.$$

Si l'on compare les trois indices de Lerner, l'exercice du pouvoir de marché par le double monopole est supérieur à celui du monopole en aval ou du monopsone en amont. Voir Hylton (2008) pour les dérivations.

125 Hylton (2008, p. 60).

126 Hylton (2008).

127 Voir Blair et Lopatka (2008).

128 Voir Blair et Lopatka (2008, p. 463).

degré tel que le critère prix-coût soit rempli. En l'occurrence, un critère gain-sacrifice pourra être utilisé pour éviter une sous-dissuasion[129].

Toutefois, si l'entreprise formulant des offres d'éviction dispose d'un pouvoir de monopsone (c'est-à-dire si elle est dominante en amont, mais reste preneuse de prix en aval), un accroissement modeste de ses achats, jusqu'au niveau de la concurrence, ne serait pas détecté par le critère prix-coût, puisque la valeur du produit marginal resterait supérieure au prix des facteurs. Ce n'est que si le prix offert pour les produits intermédiaires est supérieur au niveau de concurrence que le critère prix-coût identifiera de ces offres d'éviction. Tout comme pour les prix d'éviction supérieurs aux coûts, on se trouvera dans le cas de faux négatifs, ce qui pourra être néanmoins optimal pour éviter le coût des faux positifs.

(iv) Critères *contre règles* Certains commentateurs font valoir qu'il conviendrait d'utiliser un seuil de preuve inférieur à celui retenu dans l'affaire *Brooke Group.* Ils préconisent une règle de raison comprenant une variante des quatre conditions suivantes[130] :

(a) La preuve qu'un acheteur bénéficiant d'un pouvoir de monopsone s'est livré à une pratique qui a eu pour effet d'augmenter les prix des produits intermédiaires payés par ses concurrents.

(b) L'augmentation du prix des produits intermédiaires pour les concurrents a réduit leur capacité à exercer une concurrence pour ces produits.

(c) Le préjudice pour les concurrents a créé, maintenu ou renforcé un pouvoir de monopsone.

(d) Les consommateurs *en aval* subissent un préjudice.

L'utilisation d'une règle de raison augmenterait le coût des mesures d'application du droit par rapport aux critères de responsabilité spécifiques énoncées dans l'affaire *Weyerhaeuser.* En outre, pour relativiser ce coût, il semblerait que (a) exige un critère coût-prix et que (c) et (d) comprennent une analyse de la récupération[131]. Dans cette formulation, la règle de raison proposée est très similaire au critère de responsabilité retenu dans l'affaire *Weyerhaeuser.* La principale différence réside dans la nécessité de démontrer le préjudice pour les consommateurs en aval.

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129 Voir Blair et Lopatka (2008, p. 465).

130 Voir Kirkwood (2005, p. 661) et Salop (2005, p. 690). Toutefois, Salop fait également remarquer qu'en principe un tribunal pourrait remplacer la règle de raison en quatre étapes par le double critère de l'affaire *Brooke Group :* (i) un critère de prix inférieur au coût et (ii) un critère de probabilité de récupération (pp. 701-702). Kirkwood et Salop sont d'un avis différent concernant l'utilisation d'un critère de prix inférieur au coût et l'étendue du préjudice pour le consommateur en aval qui doit être démontrée (Kirkwood 2005, p. 666 et Salop 2005, p. 694). Salop considère que le préjudice pour le consommateur doit être significatif, tandis que Kirkwood estime qu'il suffit qu'il y ait préjudice, et Salop exige dans ce cas un critère de prix inférieur au coût. Les différences entre les deux résident dans le fait que Kirkwood ne partage pas les mêmes vues sur la fréquence relative des offres d'éviction et que les préoccupations concernant le freinage des augmentations de prix sur le marché des produits intermédiaires ne devrait pas avoir le même poids que le freinage des diminutions de prix sur les marchés de production (Kirkwood 2005, p. 667).

131 Salop (2005, pp. 704-705).

Dans les cas de prédation, comme on l'a vu ci-dessus, la condition de récupération de l'investissement poursuit deux objectifs : (i) vérifier si les prix qui ne répondent pas au critère prix-coût sont bien en fait constitutifs d'une prédation et (ii) apporter la preuve que le dispositif de prédation est nuisible pour les consommateurs. Le préjudice pour les consommateurs découle d'une corrélation négative entre les profits de l'entreprise et le bien-être des consommateurs. Pendant la phase de prédation, les consommateurs profitent de la situation et l'entreprise subit des pertes. Si la prédation est couronnée de succès, l'entreprise augmentera ses profits durant la phase de monopole et le bien-être du consommateur sera inférieur à celui d'une situation sans prédation. S'il y a récupération de l'investissement, cela signifie que la prédation globale a été rentable et probablement que les consommateurs dans leur ensemble ont subi un préjudice.

Toutefois, dans le contexte d'offres d'éviction, le lien entre le bien-être du consommateur en aval et la récupération est faible. La récupération peut être basée uniquement sur la monopolisation du marché des produits intermédiaires. C'est le bien-être des fournisseurs de produits intermédiaires qui sera en corrélation négative avec la récupération rendue possible par l'acquisition ou le maintien d'un pouvoir de monopsone. S'attacher surtout au bien-être des consommateurs finaux aboutira à relever le seuil de responsabilité, pas à l'abaisser.

Si au lieu du bien-être des consommateurs, l'objectif de la politique de concurrence est de protéger les participants au marché des comportements anticoncurrentiels, il devrait suffire d'établir le préjudice causé aux fournisseurs de produits intermédiaires. Dans ce cas, la symétrie entre les prix d'éviction d'un monopole et les d'offres d'éviction d'un monopsone est préservée, ce qui met en lumière le bien-fondé de l'application du double critère de l'affaire *Brooke Group* dans les affaires d'offres d'éviction[132].

5.2 Le pouvoir de l'acheteur et la politique à l'égard des fusions

Le pouvoir de l'acheteur soulève les deux problèmes suivants sous l'angle de la politique à l'égard des fusions[133] :

(i) La fusion entre deux acheteurs crée, renforce ou maintient le pouvoir de l'acheteur sur un marché en amont.

(ii) Il faut se demander si le contre-pouvoir exercé par les acheteurs peut compenser les effets sur le pouvoir de marché des vendeurs *en amont* après une fusion entre des vendeurs.

5.2.1 Une fusion influe sur le pouvoir de l'acheteur

Une fusion entre des acheteurs peut créer, renforcer ou maintenir (ci-après accroître) le pouvoir de monopsone classique ou le pouvoir de négociation.

132 Voir Blair et Lopatka (2008, pp. 445-446).

133 Pour un examen des conséquences du pouvoir de l'acheteur pour la politique à l'égard des fusions, voir Inderst et Shaffer (2008) et Spector (2008).

Pouvoir de monopsone issu d'une fusion

Si la fusion a pour effet d'accroître le pouvoir de monopsone, les effets sur le bien-être sont de réduire les prix et les quantités sur le marché en amont[134]. De plus, l'entreprise fusionnée se comportera comme si son coût marginal sur le marché en aval avait augmenté, réduisant ainsi la production et faisant monter les prix sur le marché en aval.

La diminution du prix payé par l'entreprise fusionnée n'est pas un avantage social, mais un avantage privé. En conséquence, même si le prix en amont baisse, il n'y a pas pour autant augmentation de la production en aval. Par conséquent, cela ne devrait pas être considéré comme une source de gains d'efficience susceptibles de compenser un préjudice en aval issu de la fusion. C'est un autre préjudice qui vient s'ajouter à tout renforcement du pouvoir de marché en aval.

Pouvoir de négociation

La situation n'est pas aussi évidente si la fusion renforce le pouvoir de négociation. Si le renforcement du pouvoir de négociation conduit à un accroissement de la capacité de l'acheteur à réduire l'exercice du pouvoir de marché en amont et si cela entraîne une réduction des dépenses marginales payées par l'acheteur lorsque la consommation de produits intermédiaires augmente, il peut avoir des *effets positifs* sur le niveau des échanges, aussi bien sur le marché des produits intermédiaires que sur le marché de production en aval. Le renforcement du pouvoir de l'acheteur peut être une source de gains d'efficience découlant de la fusion.

Par ailleurs, comme on l'a vu à propos des modèles théoriques évoqués ci-dessus, trois éléments rendent l'opération potentiellement nuisible. Premièrement, la fusion renforce le pouvoir de marché en aval. Deuxièmement, un effet de vases communicants implique que les concurrents de l'entreprise fusionnée paient plus cher les produits intermédiaires, ce qui peut nuire aux consommateurs en aval. Troisièmement, les effets bénéfiques du renforcement du pouvoir de négociation découlent de l'extraction des rentes de monopole des vendeurs. Mais, si le renforcement du pouvoir de négociation est suffisamment important, il peut y avoir extraction de quasi-rentes.

À long terme, l'appropriation des quasi-rentes aura probablement des conséquences négatives pour la concurrence en amont : moins d'investissements et des prix plus élevés pour les produits intermédiaires à mesure que les vendeurs sortent du marché. Ces effets, s'ils se concrétisent, finiront par porter préjudice aux marchés en aval sous la forme de prix supérieurs et, peut-être, d'une perte de variété. Généralement, ces effets seront difficiles à évaluer avec certitude. Il s'agit d'effets à long terme pour lesquels il est nécessaire d'analyser la manière dont l'opération et le renforcement du pouvoir de l'acheteur influeront sur la structure du secteur en amont. De plus, ces coûts à long terme éventuels peuvent être partiellement compensés par des gains pour les consommateurs en aval à court terme, en fonction de l'intensité de la concurrence en aval. Pour éviter un excès de mesures d'application et des faux positifs, le seuil de la preuve devrait donc être relativement élevé.

5.2.2 Contre-pouvoir

Il existe une autre possibilité : la présence du pouvoir de l'acheteur réduit ou élimine la possibilité qu'une fusion entre des vendeurs en amont renforce le pouvoir de marché. La présence d'un pouvoir de négociation peut être un facteur de contre-pouvoir qui atténue la possibilité d'un accroissement de l'exercice du pouvoir de marché issu de la fusion.

134 À supposer que cela n'entraîne aucune discrimination de prix sur le marché en amont.

Dans un contexte de négociations, les effets d'une fusion entre vendeurs dépendent de son impact sur les options extérieures des acheteurs et des vendeurs. Si elle restreint l'option extérieure des acheteurs ou élargit l'option extérieure des vendeurs, elle peut réduire le pouvoir de négociation des acheteurs et l'efficience du contre-pouvoir. Le contre-pouvoir offrira ou non un moyen de défense dans le cas d'une fusion entre vendeurs selon qu'il sera ou non suffisant après la fusion pour empêcher les prix d'augmenter. Pour déterminer les effets de la fusion sur les options extérieures, il faudra au minimum examiner les effets sur les différentes solutions des acheteurs et des vendeurs. À cet égard, une fusion en amont pourrait réduire le pouvoir de négociation d'un acheteur parce qu'elle élimine une solution de rechange.

Pour pouvoir valablement invoquer le contre-pouvoir en cas de fusion entre vendeurs, il faut démontrer que le pouvoir de l'acheteur reste suffisant après l'opération pour empêcher toute augmentation des prix par les vendeurs. Si les options extérieures des gros acheteurs restent inchangées malgré l'opération, il se peut que les vendeurs soient incapables d'augmenter les prix après la fusion. Les circonstances suivantes sont susceptibles de valider cette hypothèse : (i) il reste suffisamment d'autres fournisseurs pour rendre le changement de fournisseur crédible, (ii) les vendeurs éprouvent des difficultés à trouver des volumes de remplacement, (iii) les volumes perdus augmenteront manifestement les coûts des vendeurs, qui auront ainsi du mal à concurrencer les autres vendeurs, (iv) des possibilités s'offriront de créer de nouvelles sources d'approvisionnement en soutenant l'entrée ou en procédant à une intégration verticale, (v) les coûts de changement de fournisseur seront faibles pour les acheteurs et (vi) le vendeur aura dû consentir d'importants investissements irrécupérables[135].

Concernant le risque de voir apparaître un effet de coordination à la suite d'une fusion entre fournisseurs, comme indiqué ci-dessus, il se peut que les gros acheteurs importants rendent la coordination difficile. Cela se vérifiera particulièrement si des commandes importantes peuvent être traitées dans le cadre de contrats à long terme, permettant ainsi aux gros acheteurs d'inciter les vendeurs à ne pas respecter leurs engagements de coordination[136].

Il faut également se demander si tous les acheteurs sont protégés par le contre-pouvoir ou uniquement ceux qui disposent d'un pouvoir de négociation suffisant. Il peut arriver que certains acheteurs (généralement les petits fournisseurs avec des options restreintes) ne soient pas protégés des augmentations de prix parce que leur pouvoir de négociation est insuffisant. Si le problème est celui d'un effet unilatéral, la protection sera fonction des possibilités de discrimination de prix qui s'offriront aux vendeurs. Si le problème est celui d'un effet coordonné, le « bouclier du contre-pouvoir » pourra également s'étendre aux petits acheteurs. La capacité des acheteurs puissants de saper la coordination peut également restreindre la capacité des vendeurs de se coordonner contre les petits acheteurs. La coordination entre les petits acheteurs peut également s'avérer plus difficile plus l'acheteur puissant est de grande taille, étant donné que la sanction de l'entorse à la coordination sera d'autant plus légère que le montant total des ventes coordonnées sera faible[137].

Si le contre-pouvoir peut compenser la perte de concurrence lors d'une fusion entre vendeurs, cette compensation est basée sur des considérations à court terme (à savoir la capacité de limiter les hausses de prix). On peut se demander si le contre-pouvoir offre une compensation aussi intéressante à long terme[138]. En particulier, le contre-pouvoir est-il aussi efficace que la concurrence entre les vendeurs pour empêcher

135 Voir Commission européenne, *Lignes directrices sur l'appréciation des concentrations horizontales au regard du règlement du Conseil relatif au contrôle des concentrations entre entreprises,* Journal officiel de l'Union européenne (2004/C 31/03), p. 65 et commentaire *supra.*

136 *Ibid*, par. 57. Voir Snyder (1996).

137 Voir Inderst et Shaffer (2008, p. 1631).

138 Voir Inderst et Shaffer (2008, p. 1633).

l'inefficience de X et promouvoir l'innovation et la réduction des coûts ? Les performances sectorielles à long terme pourraient être fonction de deux dilemmes : (i) du fait des caractéristiques du secteur, l'innovation est-elle davantage favorisée par la concurrence entre vendeurs ou par la coopération entre vendeurs et acheteurs, et (ii) l'innovation est-elle favorisée ou entravée par une structure du marché verticalement équilibrée, dans laquelle les acheteurs et les vendeurs sont relativement égaux ?

6. Cas sélectionnés

Cette section sera l'occasion d'examiner un certain nombre de cas relativement récents pour illustrer quelques-unes des nuances liées au pouvoir de l'acheteur.

6.1 Le pouvoir de l'acheteur et le contrôle des fusions

On commentera dans cette section trois fusions dans lesquelles le pouvoir de l'acheteur a joué un grand rôle. Dans deux d'entre elles, l'autorité de contrôle a considéré que l'opération pouvait créer un pouvoir de l'acheteur. Dans ces deux fusions, l'autorité de contrôle a conclu que la fusion nuirait aux consommateurs en aval. Dans l'affaire *Safeway* au Royaume-Uni, la relation entre le renforcement du pouvoir de l'acheteur et le préjudice causé au marché en aval était sans doute ténue. Dans l'affaire *Aetna,* le ministère de la justice des États-Unis a utilisé une analyse du pouvoir de négociation pour conclure que l'opération créerait un pouvoir de monopsone, ce qui soulèverait des problèmes de concurrence tant sur le marché en amont que sur le marché en aval. Le troisième cas concerne deux fusions dans le secteur européen du conditionnement des liquides. Bien qu'il soit apparu que ces fusions créeraient un pouvoir de marché, la Commission a conclu, sur la base d'une analyse du pouvoir de négociation, que le pouvoir de l'acheteur empêcherait l'exercice du pouvoir de marché.

6.1.1 Safeway

Le 9 janvier 2003, Wm Morrisons Supermarkets PLC a annoncé un accord de fusion avec Safeway. Cette annonce a alors été suivie par d'autres offres d'acquisition de Safeway de la part de Tesco plc, J Sainsbury's plc et Asda Group Limited (détenus par Wal-Mart Stores Inc.)[139]. Craignant que ces acquisitions débouchent sur une érosion substantielle de la concurrence, le ministre du Commerce et de l'Industrie du Royaume-Uni a soumis chaque proposition de fusion à la Commission de la concurrence (CC) en vertu des dispositions en matière de fusions du *Fair Trading Act 1973*.

Le projet d'acquisition proposée de Safeway est intervenu après la publication, par la Commission de la concurrence d'un rapport détaillé sur le secteur alimentaire en 2000[140]. Un des principaux éléments de cette enquête portait sur l'accumulation, l'exercice et les effets du pouvoir de l'acheteur des grands hypermarchés sur le secteur de l'approvisionnement. Préoccupée par plusieurs pratiques commerciales considérées comme anticoncurrentielles, la Commission de la concurrence a recommandé l'élaboration d'un Supermarket Code of Practice (SCOP). Le SCOP, supervisé par l'Office of Fair Trading, devait réguler l'utilisation des pratiques commerciales jugées problématiques. Au printemps 2002, l'Office of Fair Trading et les principaux distributeurs ont négocié et mis en œuvre le SCOP. Il devait s'appliquer à toutes les chaînes de magasins alimentaires dont les achats représentaient plus de 8 % des achats alimentaires destinés à la revente.

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139 Nos sources documentaires sont : Competition Commission, Safeway plc and Asda Group Limited (owned by Wal-Mart Stores Inc.) ; Wm Morrison Supermarkets PLC ; J Sainsbury plc ; and Tesco plc: A report on the mergers in contemplation (2003) ; Dobson (2005) ; et Dobson et Chakraborty (2008).

140 Voir Competition Commission, Supermarkets: A Report on the Supply of Groceries from Multiple Stores in the United Kingdom, Cm 4842 (Oct. 2000), disponible en ligne sur http://www.competition-commission.org.uk/rep_pub/reports/2000/446super.htm#full.

Le pouvoir de l'acheteur a été identifié en 2000 grâce en partie à deux indices clés : (i) « une corrélation inverse significative entre les prix payés par les chaînes de distribution de produits alimentaires et leur part des achats totaux », relation qui était valable, même pour les plus grands fournisseurs, et (ii) « la grande majorité des fournisseurs dépendait bien plus des chaînes de distribution de produits alimentaires que celles-ci dépendaient d'eux »[141].

À l'époque de cette enquête, Safeway était le quatrième distributeur alimentaire au Royaume-Uni avec 481 sites, allant des grands hypermarchés aux petites épiceries, et un chiffre d'affaires de 8,6 milliards GBP. Il s'agissait du plus petit des quatre distributeurs alimentaires présents au niveau national. Les trois autres étaient Tesco (779 points de vente et un chiffre d'affaires de 21,6 milliards GBP), Sainsbury's (498 magasins et un chiffre d'affaires de 14,3 milliards GBP) et Asda[142]. Le sixième distributeur alimentaire du Royaume-Uni, Morrisons, était un acteur régional avec 119 points de vente et un chiffre d'affaires de 4,3 milliards GBP.

Pour justifier les fusions proposées, chaque partie faisait valoir que l'acquisition de Safeway procurerait un avantage financier qui serait répercuté sur les consommateurs sous forme de prix réduits. Cet avantage financier proviendrait des ristournes accordées par les fournisseurs grâce à une position de négociation améliorée sur le marché des produits intermédiaires et à la réduction des coûts découlant des économies d'échelle et de l'élimination ou de la réduction des services faisant double emploi.

Toutefois, la Commission de la concurrence a reconnu que l'acquisition de Safeway par l'un des quatre repreneurs potentiels pourrait également avoir d'importants effets anticoncurrentiels. Elle a examiné tout particulièrement les effets d'une acquisition sur la concurrence et les possibilités de choix sur le marché des produits alimentaires, ainsi que les relations entre les acheteurs et les fournisseurs sur le marché des produits intermédiaires.

La Commission de la concurrence a conclu que l'achat en une fois dans des magasins de 1 400 mètres carrés et plus constituait le marché de produits des fusions proposées. En termes de définition des marchés géographiques, la Commission de la concurrence a étudié aussi bien les marchés locaux que le marché national. Elle a conclu que l'acquisition de Safeway par Tesco, Sainsbury's ou Asda aboutirait à une intensification des « conditions dans lesquelles on peut s'attendre à des effets coordonnés ». La Commission de la concurrence « ne prévoyait [pas] qu'une concurrence efficace soit maintenue ou encouragée après la fusion »[143] car le nombre de distributeurs nationaux passerait de quatre à trois. En revanche, la Commission de la concurrence a estimé que l'acquisition de Safeway par Morrisons n'aboutirait pas à un effet coordonné étant donné que les distributeurs nationaux sur le marché de l'achat en une fois resteraient au nombre de quatre. Elle a toutefois identifié des effets unilatéraux significatifs sur de nombreux marchés locaux, quelle que soit l'opération proposée. Dans le cas d'une fusion avec Morrisons, elle a donc recommandé le désinvestissement des supermarchés dans 48 régions et l'installation de cinq points de vente plus petits, ce qui constituait selon elle une solution appropriée pour remédier aux préoccupations liées à un effet unilatéral sur les marchés locaux.

Dans sa définition du marché des produits intermédiaires pertinent, la Commission de la concurrence a constaté que les possibilités de substitution étaient trop limitées entre les produits destinés au commerce de détail et ceux destinés aux autres secteurs, cela en raison des différentes exigences de chaque distributeur en matière d'emballage, de conditionnement et de présentation des produits. De surcroît, étant donné que les chaînes de détaillants achètent de gros volumes de produits, les fournisseurs de ces produits

141 Rapport de la Commission de la concurrence, par. 6.2 et 6.3.

142 Le chiffre d'affaires et le bénéfice d'Asda ne sont pas publiés.

143 Commission de la concurrence, par. 2.290, 2.414 et 2.472.

alimentaires éprouveraient des difficultés à trouver d'autres acheteurs. En conséquence, la Commission de la concurrence a conclu que les autres distributeurs de produits alimentaires tels que les hôpitaux, les écoles et les restaurants, ne faisaient pas partie du marché des produits intermédiaires pertinent. Elle a au contraire limité le marché des produits intermédiaires à « tous les détaillants alimentaires représentant au moins 8 % des achats de produits alimentaires destinés à la revente dans tous les magasins du Royaume-Uni ».

Les préoccupations de la Commission de la concurrence concernant les effets de la fusion sur le pouvoir de l'acheteur sont excellemment résumées[144] :

> De manière générale, on s'attend à l'émergence de prix concurrentiels lorsqu'on peut observer un équilibre raisonnable en termes de pouvoir de négociation entre les fournisseurs concurrents et les acheteurs concurrents ; mais on ne peut imaginer cette émergence dans des conditions aussi déséquilibrées que celles qui prévalent dans le secteur des grandes surfaces alimentaires. À cet égard, nous avons conclu dans notre rapport de 2000 que cette situation avait des effets contraires aux intérêts du public et nous estimons que l'une ou l'autre des acquisitions proposées intensifiera ce phénomène. Nous pensons que l'acquisition de Safeway par l'une ou l'autre des trois parties renforcera les capacités de l'acquéreur d'influencer la situation à son propre avantage, d'une façon et à un degré qui seraient impossibles dans une situation de concurrence plus symétrique. Les conséquences pourraient être un effet de vases communicants ou un nouvel affaiblissement général de la position de négociation de certains fournisseurs. Dans ce dernier cas, il est probable que certains fabricants de produits alimentaires se désintéresseront d'investir dans de nouveaux produits ou dans des techniques de fabrication avancées. Et ce d'autant plus que les fournisseurs obtiendront probablement en général des conditions et des prix moins avantageux avec quatre distributeurs alimentaires nationaux qu'avec trois. Nous pensons que l'acquisition de Safeway par Morrisons aura des effets similaires, mais dans une moindre mesure. Les fournisseurs pâtiront moins de l'existence de quatre grands distributeurs alimentaires quasi nationaux parce qu'il y aura davantage de possibilités de procéder à des achats alternatifs à grande échelle, ce qui implique un déséquilibre moins accentué en termes de pouvoir de négociation. Cela peut expliquer les rapports généralement plus favorables pour Morrisons que pour les trois autres parties. Pour ces raisons, l'acquisition de Safeway par Morrisons serait probablement moins préjudiciable pour les fournisseurs qu'une acquisition par Asda, Sainsbury's ou Tesco.

La Commission de la concurrence a utilisé les réponses aux questionnaires soumis aux fournisseurs pour évaluer le pouvoir de l'acheteur. Les deux indicateurs clés du pouvoir de l'acheteur étaient les marges brutes et les prix payés aux gros fournisseurs pour les produits de marque. Comme dans son enquête réalisée en 2000, la Commission de la concurrence a constaté que « les grandes chaînes de distribution de produits alimentaires bénéficiaient de prix inférieurs à ceux appliqués à leurs rivaux de taille inférieure »[145] et que « les plus grandes chaînes de distribution de produits alimentaires généraient pour les fournisseurs une marge brute inférieure à celle qu'ils pouvaient dégager avec des groupes de taille plus modeste »[146]. Les résultats d'enquêtes supplémentaires ont été utilisés pour évaluer l'évolution du pouvoir de l'acheteur depuis 2000 et l'impact de la fusion, notamment en ce qui concerne l'évolution du pouvoir de négociation,

144 Rapport de la Commission de la concurrence, par. 2.257.

145 Rapport de la Commission de la concurrence, par. 6.65.

146 Rapport de la Commission de la concurrence, par. 6.69.

l'impact de fusions antérieures, la probabilité d'un effet de vases communicants, les effets du SCOP et les conséquences attendues d'une acquisition de Safeway pour les prix, les investissements et l'innovation.

La Commission de la concurrence a conclu que les effets négatifs sur le fournisseur seraient limités si Safeway était acquise par Morrisons. En outre, elle a estimé que cette acquisition constituait également un facteur d'efficience. Étant donné que l'acquisition de Safeway par Morrisons n'était pas supposée réduire la concurrence sur le marché de la production (grâce à des désinvestissements), les économies réalisées grâce à la fusion seraient probablement répercutées sur les consommateurs. La Commission de la concurrence a considéré que le préjudice éventuellement causé aux fournisseurs à la suite de la fusion serait compensé par les avantages offerts aux consommateurs et, par conséquent, l'acquisition de Safeway par Morrisons, moyennant certains désinvestissements, était jugée acceptable.

6.1.2 Aetna

En 1999, le Département américain de la Justice s'est opposé à un projet de fusion entre Aetna, Inc. (Aetna) et The Prudential Insurance Company of America (Prudential)[147]. À l'époque, Aetna était la plus grande compagnie d'assurance santé aux États-Unis et Prudential occupait la neuvième place. Les plans HMO permettent aux salariés des souscripteurs d'une assurance santé d'accéder à des réseaux régionaux de prestataires de soins, et notamment de médecins. Les médecins négocient les tarifs pour la fourniture des services avec le responsable du plan HMO, la compagnie d'assurance santé (par ex. : Aetna ou Prudential). Le Département de la Justice craignait que la fusion réduise substantiellement la concurrence sur deux marchés : (i) les plans HMO, le marché en aval, et (ii) les services médicaux dans les régions de Houston et Dallas, le marché en amont. La fusion a donc été autorisée à condition qu'Aetna se défasse de certains actifs provenant de deux filiales précédemment acquises, l'une opérant à Houston et l'autre à Dallas.

Sur le marché en aval, la part de marché d'Aetna après la fusion s'élèverait à 63 % à Houston et à 40 % à Dallas. Cette situation, ainsi que l'existence d'importantes barrières à l'entrée pour la fourniture de plans HMO, étaient suffisantes pour susciter des problèmes de concurrence sur le marché de production. Sur le marché des produits intermédiaires, le Département de la Justice craignait qu'après la fusion Aetna soit en mesure d'imposer aux médecins des prix et des conditions défavorables (renforcement substantiel de sa puissance d'achat). Le Département de la Justice a donc considéré que le renforcement du pouvoir de marché pour la fourniture de services médicaux aboutirait à une diminution de la quantité et de la qualité des soins de santé disponibles (préjudice pour les patients sur le marché en aval).

Le Département de la Justice a constaté que le nombre d'acheteurs potentiels de services médicaux était limité et qu'il était très onéreux pour les médecins de délocaliser leurs cabinets dans d'autres régions géographiques. Étant donné que les possibilités de substitution étaient limitées pour les médecins, une baisse restreinte mais significative des tarifs de leurs services dans les régions de Houston ou de Dallas par un éventuel monopsoneur semblait donc rentable.

L'analyse du Département de la Justice concernant le pouvoir de monopsone susceptible d'être exercé après la fusion était basée sur deux caractéristiques importantes des marchés en amont : (i) la prédominance d'une discrimination de prix et (ii) les coûts de changement. Aetna fixait par négociation bilatérale les tarifs applicables aux médecins. La possibilité pour un médecin de trouver une solution de

147 Nos sources documentaires sont : United States of America and the State of Texas v. Aetna, Inc. and The Prudential Insurance Company of America, Civil n° : 3-99 CV 1398-H, plainte, exposé révisé des conséquences et jugement définitif révisé disponibles en ligne sur http://www.usdoj.gov/atr/cases/indx142.htm ; et Schwartz (1999). Le jugement définitif révisé a été considéré comme conforme à l'intérêt du public. Voir United States of America and the State of Texas v. Aetna, Inc. and The Prudential Insurance Company of America 1999 WL 1419046 (N.D. Texas).

remplacement était limitée par les coûts de changement liés à deux facteurs : (i) il n'était pas possible de constituer une réserve de temps et (ii) le changement ou le remplacement des clients HMO d'Aetna serait très long. Le premier facteur implique que si les patients ne peuvent être remplacés rapidement, le médecin subit un manque à gagner permanent. Remplacer ou retenir des patients d'Aetna ne serait certainement pas facile ou rapide. Pour retenir les patients Aetna existants (ou leurs employeurs), il fallait qu'ils changent de prestataire HMO. Il faudrait également du temps pour attirer de nouveaux patients en raison de la fidélité des patients et de la position d'intermédiaire des prestataires HMO.

Dans son analyse, le Département de la Justice a distingué deux parts de marché pertinentes qui déterminaient la capacité d'Aetna d'imposer après la fusion des pertes aux médecins et par conséquent de faire baisser leurs tarifs. Il s'agissait (i) de la part de patients d'Aetna dans une région, étant donné que moins les patients non-Aetna sont nombreux, moins les patients de remplacement sont nombreux ; et (ii) de la part d'Aetna dans les activités du médecin, étant donné que plus elle est élevée, plus les médecins dépendent d'Aetna et plus le coût de changement est élevé. En fait, le Département de la Justice a conclu que la perte par patient augmentait avec le nombre de patients qui devaient être remplacés, ce qui rendait un médecin beaucoup plus vulnérable aux demandes de baisse des tarifs.

Sur la base de ces considérations, le Département de la Justice a estimé qu'après la fusion Aetna serait en mesure de réduire le taux de remboursement pour un nombre important de médecins. Les craintes du Département de la Justice concernant les marchés en amont et en aval ont été dissipées par les deux désinvestissements. La part de patients en aval détenue par Aetna devait diminuer de 15 % à Dallas et de 21 % à Houston à la suite de ces désinvestissements.

6.1.3 Enso/Stora

En 1998, la Commission européenne a été avisée d'un projet de fusion entre Stora Kopparberg Berslags AB (Stora) et Enso Oyj (Enso), deux importants producteurs européens de pâte à papier, de papier et de carton d'emballage[148]. Ce projet de fusion soulevait des problèmes de concurrence, car aussi bien Stora qu'Enso détenaient d'importantes parts de marché dans le secteur du carton pour l'emballage de liquides. Toutefois, la Commission a conclu que le contre-pouvoir au pouvoir de l'acheteur était suffisant pour compenser la création ou le renforcement d'une position dominante qui résulterait de la fusion.

La Commission s'est principalement concentrée sur le marché du carton pour l'emballage de liquides, type particulier de carton d'emballage destiné au grand public. Ce type de carton d'emballage est utilisé pour conditionner des biens de consommation en vue d'une utilisation en aval. Il est généralement acheté par des convertisseurs qui le modifient selon le type spécifique de marchandises conditionnées par leurs clients. En raison de la grande variété de biens de consommation qui doivent être conditionnés, il y a de nombreux types différents de cartons d'emballage, chacun d'entre eux étant considéré comme du carton pour l'emballage de liquides (LPB) ou du carton pour l'emballage de non-liquides (non-LPB), en fonction de leur utilisation finale spécifique. Par exemple, le carton d'emballage qui sera finalement utilisé pour constituer des emballages de lait ou de jus de fruits est considéré comme appartenant à la catégorie LPB, tandis que le carton d'emballage utilisé pour conditionner des barres de chocolat appartient à la catégorie non-LPB.

La Commission a conclu qu'il n'y avait aucune possibilité de substitution de la demande entre les catégories LPB et non-LPB, en raison de la plus forte résistance à l'absorption requise pour les produits LPB par rapport aux produits non-LPB et des conditions plus strictes de protection bactériologique, de respect des réglementations alimentaires et de préservation de l'environnement

148 Nos sources documentaires sont : la Commission européenne dans l'affaire Enso/Stora IV/M. 1225 [1999] J.O. L254 ; Lofaro et Baker (2000) ; affaire Korsnäs/AssiDomän COMP/M.4057, et Karlsson (2006).

appliquées aux produits LPB. La Commission a également fait valoir que les possibilités de substitution de la demande étaient limitées concernant les produits LPB et d'autres matériaux d'emballage, tels que le verre et le plastique. Étant donné que les convertisseurs ne sont pas des clients finaux, ils ne peuvent adopter d'autres matériaux d'emballage sans forcer leurs propres clients à consentir d'importants investissements dans différentes machines de remplissage et d'emballage. Pour cette raison, les clients LPB évitent de passer d'un type d'emballage à l'autre pour répondre aux fluctuations de prix à court terme. La Commission a conclu que les produits LPB constituaient un marché distinct de celui des produits non-LPB.

Le marché géographique retenu pour les produits LPB était l'Espace économique européen (EEE) en raison des droits, des frais de transports et des barrières non douanières, telles que la législation environnementale, qui ont rendu l'importation de produits LPB dans l'EEE inintéressants pour les clients. La Commission a conclu que le marché pertinent aux fins de cette affaire était le marché des produits LPB dans l'EEE.

Du côté de l'offre, le marché des produits LPB dans l'EEE comptait quatre grands producteurs : Stora et Enso, dont la part de marché conjointe se situait entre 50 et 60 %, et Korsnäs et AssiDomän, avec une part de marché de 10 à 20 % pour chacun. Les barrières à l'entrée étaient élevées en raison des importants coûts fixes liés à la construction d'une machine à fabriquer du carton (entre 300 et 400 millions d'unités monétaires européennes (ECU)) et d'une unité intégrée de production de pâte à papier à longues fibres, toutes deux nécessaires pour la production de carton LPB. En conséquence, la Commission a conclu que les candidats à l'entrée sur ce marché devaient signer des contrats avant de réaliser tout investissement. Avec une croissance modeste de la demande (seulement 1 à 2 % par an) et des relations à long terme entre les acheteurs et les producteurs de carton LPB en place, la signature de contrats, et donc l'entrée, semblait improbable. En effet, aucun nouvel acteur n'était entré sur le marché des produits LPB dans l'EEE au cours des 10 années précédentes. En outre, la Commission a estimé qu'une substitution sur le plan de l'offre entre les produits LPB et non-LPB par les producteurs non-LPB était coûteuse et ne pouvait se faire rapidement, même s'il était plus facile pour les producteurs LPB de réaffecter une partie des capacités non-LPB à la production LPB.

Toutefois, la Commission n'a pas immédiatement conclu que la fusion entraînerait la création ou le renforcement d'une position dominante sur le marché des produits LPB en raison de la concentration extrême et des importantes barrières à l'entrée. En revanche, elle a décidé d'analyser la structure de la demande du marché, qui comprenait trois grands acheteurs : Tetra Pak, qui occupait une position dominante avec une part de marché estimée de 60 à 80 % ; Elopak et SIG Combibloc, qui détenaient chacun une part de marché de 10 à 20 % cent. Ainsi, après la fusion, l'offre correspondrait à la structure de la demande, avec un grand fournisseur et deux plus petits face à un grand acheteur et deux plus petits.

Dans les résultats de son enquête, la Commission a reconnu que les producteurs LPB et les acheteurs dépendaient les uns des autres. Par nature, les relations s'établissaient sur le long terme tant il était coûteux, techniquement contraignant et généralement long de changer de fournisseur. En effet, pour fournir un type spécifique de produits LPB, tant le producteur que l'acheteur doivent consentir d'importants investissements en termes d'outil de production, d'assistance technique et de contrôles. Pour démontrer l'existence d'une dépendance réciproque, la Commission a fait remarquer que le plus ancien client d'Enso travaillait avec cette entreprise depuis 40 ans. En outre, Enso disposait également d'unités de recherche et développement séparées, chacune étant spécialisée dans le développement de produits LPB pour Tetra Pak, Elopak et SIG Combibloc, respectivement.

L'enquête de la Commission a montré que les clients LPB étaient en mesure d'exercer un contre-pouvoir de l'acheteur au moyen de deux stratégies principales. Tout d'abord, les acheteurs pouvaient menacer Stora Enso de confier une partie de leur demande à d'autres fournisseurs. En effet, Tetra Pak achetait plus de 50 % de ses produits chez Stora Enso, ce qui représentait la capacité de plusieurs machines

à produire du carton et plus de 50 % de la production totale de l'entreprise pour l'EEE. En raison des taux de capacité élevés nécessaires pour assurer une rentabilité raisonnable, Stora Enso serait obligée de trouver un autre client important si Tetra Pak décidait de se tourner vers un autre fournisseur, ce qui ne serait pas facile à court terme.

En outre, aussi bien Elopak que SIG Combibloc passaient des commandes suffisamment volumineuses pour garantir l'utilisation à pleine capacité d'une machine à produire du carton. Le fait de recourir à un autre fournisseur, tel que Korsnäs ou AssiDomän, qui disposait du potentiel nécessaire pour assurer la production de davantage de produits LPB à long terme, serait particulièrement préjudiciable pour Stora Enso. De surcroît, par le passé, Elopak et SIG Combibloc s'étaient déjà approvisionnées en LPB aux États-Unis, malgré un coût plus élevé, pour des raisons stratégiques (probablement pour renforcer leur pouvoir de négociation). Les droits de douane étant supposés diminuer dans un proche avenir, ces sources renforceraient leur pouvoir de négociation à terme. Étant donné que les coûts unitaires de Stora Enso augmentaient parallèlement à une réduction de la capacité d'utilisation, même la perte de quelques contrats d'un des grands acheteurs serait particulièrement préjudiciable pour Stora Enso.

Ensuite, en raison du volume important de ses achats, Tetra Pak était en mesure de développer de nouvelles capacités avec des fournisseurs existants ou nouveaux venus sur le marché si Stora Enso était tentée d'exercer un pouvoir de marché. Bien que le changement de fournisseur ne soit pas un processus simple pour un acheteur, le fait que certains clients comme Tetra Pak soient en mesure de soutenir une expansion des capacités réduirait sensiblement le risque d'entrée pour les nouveaux fournisseurs.

Stora Enso avait réalisé d'énormes investissements irrécupérables dans les outils de production LPB, ayant l'intention d'assurer la fourniture de produits LPB pendant de nombreuses années. Si Stora Enso décidait d'exercer son pouvoir de marché, son bénéfice augmenterait durant quelques années pendant que ses clients importants soutiendraient ou appuieraient l'entrée ou l'expansion de fournisseurs existants ou nouveaux venus sur le marché. Étant donné que les investissements dans les capacités de production LPB sont irrécupérables et que les fournisseurs entrants ou en expansion seraient alors tenus de desservir le marché pendant de nombreuses années, la Commission jugeait improbable que les avantages à court terme offerts par un pouvoir de marché compenseraient le préjudice à long terme pour les ventes de LPB de Stora Enso.

Enfin, les trois vendeurs ont reconnu qu'il était intéressant pour eux de contribuer à la prospérité de Korsnäs ou AssiDomän pour éviter de dépendre de Tetra Pak.

Globalement, la Commission a conclu que bien que Stora et Enso aient détenu une forte part du marché des LPB et que les possibilités de concurrence future soient limitées, la demande était aussi concentrée que l'offre et le contre-pouvoir de l'acheteur existant était suffisant pour compenser la fusion des entreprises exerçant un pouvoir de marché (accru). Toutefois, la Commission a fait observer que le contre-pouvoir n'était pas réparti de manière égale. Pour atténuer la crainte que les positions moins favorables de Korsnäs ou AssiDomän ne soient pas aussi efficaces pour limiter le pouvoir de marché des fournisseurs, une mesure comportementale reposant sur un mécanisme de protection des prix a été imposée. Dans le cadre de ce mécanisme, les modifications tarifaires pour les petits clients ne peuvent être supérieures ou inférieures à celles appliquées au plus gros client en cas d'augmentation ou de diminution des prix.

En 2006, la Commission a approuvé une fusion entre les deux autres grands producteurs de LPB, Korsnäs te AssiDomän, créant de fait un duopole dans le domaine de la fourniture de produits LPB. La Commission a conclu que les enseignements tirés de la fusion Enso/Stora montraient que le contre-pouvoir était en fait plus efficient que ce qui avait été exposé lors de l'approbation de cette fusion. La Commission a particulièrement fait valoir la facilité avec laquelle les acheteurs de LPB avaient confié d'importants

volumes de LPB à d'autres fournisseurs en peu de temps. La Commission a également souligné qu'elle ne craignait pas une discrimination à l'encontre des petits concurrents de Tetra Pak. En effet, si elle parvenait à les exclure du marché, une telle discrimination aboutirait à un monopsone qui ne serait pas dans l'intérêt des fournisseurs à long terme.

6.2 Offres d'éviction : Weyerhaeuser

En 2003, Ross-Simmons Hardwood Lumber Company a intenté une action en justice en vertu de l'article 2 du *Sherman Act*, accusant Weyerhaeuser Company d'abus et de tentative d'abus de monopolisation du marché des produits intermédiaires dans le secteur des billes de sciage d'aulne et sur le marché de production dans le secteur du bois d'aulne destiné à la construction[149]. Ross-Simmons alléguait que Weyerhaeuser avait tenté d'éliminer des concurrents en augmentant le prix des billes de sciage. Lors du procès, la Cour de district a écarté l'argument de Weyerhaeuser tiré de l'existence d'offres d'éviction, reprenant le critère utilisé dans l'affaire *Brooke Group Ltd. c/ Brown & Williamson Tobacco Corp.*[150] pour déterminer si une entreprise s'était rendue coupable de prix d'éviction. Le jury s'est prononcé en faveur de Ross-Simmons, jugement qui a été finalement confirmé par la Cour d'appel du neuvième district. La Cour suprême s'est déclarée compétente et a jugé que le critère défini dans l'affaire *Brooke Group* pour les prix d'éviction s'appliquait également aux offres d'éviction, infirmant l'arrêt de la Cour d'appel.

Weyerhaeuser et Ross-Simmons exploitaient des scieries de bois de construction situées dans le nord-ouest des États-Unis, qui achetaient et traitaient des billes d'aulne rouge. Les billes utilisées pour la production soit étaient achetées sur enchères publiques ou par contrats à court et long terme avec des propriétaires de forêts, soit étaient obtenues sur les terrains appartenant à la scierie. Généralement, les billes représentent 75 % des coûts globaux d'une scierie et ces dernières sont situées dans un rayon de 160 km de leurs sources forestières.

Ross-Simmons a débuté ses activités en 1962 avec une seule scierie à Longview, dans l'État de Washington. Weyerhaeuser, l'un des plus grands producteurs de bois de construction au monde, a pénétré sur le marché des billes d'aulne du nord-ouest des États-Unis en rachetant Northwest Hardwoods, Inc. En 1980. Weyerhaeuser a progressivement étendu ses activités et en 2001 il possédait six scieries de bois de construction dans cette région et traitait environ 65 % des billes d'aulne disponibles à la vente dans la région. La part de marché de Weyerhaeuser dans le secteur du bois de construction pour l'ensemble de l'Amérique du Nord atteignait moins de 3 %.

Entre 1998 et 2001, Ross-Simmons et Weyerhaeuser ont vu leurs bénéfices diminuer à la suite d'une hausse des prix des billes d'aulne et d'une baisse simultanée des prix des produits finis. Durant cette période, Ross-Simmons a subi des pertes pour un total de près de 4.5 millions de dollars et a dû fermer sa scierie définitivement en mai 2001. Sur la base de cette évolution des prix, Ross-Simmons concluait que Weyerhaeuser avait dû augmenter ses achats. De plus, Ross-Simmons prétendait que Weyerhaeuser « surpayait »[151].

Toutefois, l'évolution des prix pouvait également être due à une concurrence accrue dans le secteur des billes d'aulne, à une réduction de l'approvisionnement et/ou à une augmentation de l'offre de bois de

149 Nos sources documentaires sont : Weyerhaeuser Co. v. Ross-Simmons Harwood Lumber Co. Ltd., 127 S.Ct. 1070 (2007) ; Confederated Tribes of Siletz Indians of Oregon et al v. Weyerhaeuser Co., 411 F.3d 1030 ; Salop (2005), Kirkwood (2005), Hall (2006), Blair et Lopatka (2008) et Hylton (2008).

150 Brooke Group Ltd. v. Brown & Williamson Tobacco Corp. 509 U.S. 209 (1993).

151 Les preuves attestant cette allégation de surpaiement étaient basées sur des documents internes de Weyerhaeuser.

construction provenant d'autres régions. Weyerhaeuser faisait valoir que la hausse des prix des billes tenait à une concurrence plus rude, les prévisions annonçant une prochaine pénurie de billes pour alimenter toutes les scieries en activité et une diminution de l'offre de billes de sciage. De plus, il n'y avait apparemment aucune preuve directe que Weyerhaeuser ait augmenté ses achats de billes pendant la prétendue période de prédation.

Weyerhaeuser imputait les mauvaises performances de Ross-Simmons à ses équipements dépassés, à son fonctionnement inefficient, à sa mauvaise gestion et à des investissements insuffisants. En effet, de 1990 à 2000, il est apparu que Ross-Simmons avait réalisé peu d'investissements susceptibles d'améliorer ses performances. En comparaison, pendant la même période, Weyerhaeuser avait investi plus de 75 millions de dollars dans ses scieries du nord-ouest. Selon elle, ces investissements avaient amélioré les performances de ses installations de production, produisant pour chaque bille davantage de bois de construction et de recettes. Ainsi, Weyerhaeuser faisait valoir qu'elle était disposée à payer davantage pour les billes d'aulne que Ross-Simmons.

La Cour de district a expliqué au jury que pour avoir gain de cause dans le cadre d'une plainte pour abus ou tentative d'abus de position dominante en vertu de l'article 2 du *Sherman Act*, Ross-Simmons devait apporter la preuve suffisante que Weyerhaeuser s'était livrée à des pratiques anticoncurrentielles. En particulier, en ce qui concerne les accusations d'offres d'éviction et de surachat formulées par Ross-Simmons, la Cour de district a donné les instructions suivantes au jury :

> L'une des affirmations de [Ross-Simmons] dans cette affaire est que [Weyerhaeuser] a acheté plus de billes que nécessaire pour empêcher [Ross-Simmons] d'obtenir les billes dont elle avait besoin à un prix équitable. Si vous estimez que c'est la vérité, vous pouvez considérer qu'il s'agit d'un acte anticoncurrentiel[152].

Répondant positivement à la question évoquée par la Cour de district, le jury a conclu que Weyerhaeuser s'était effectivement engagée dans un comportement anticoncurrentiel et avait monopolisé le marché des billes d'aulne. Toutefois, le jury n'a retenu, à l'encontre de Weyerhaeuser, aucune infraction sur le marché de production car le marché de production pertinent était celui du bois de construction, dont Weyerhaeuser était incapable d'influencer les prix[153].

Dans son analyse, la Cour d'appel a approuvé le rejet par la Cour de district du critère *Brooke Group*. Plus précisément, la Cour d'appel a noté que la jurisprudence *Brooke Group* avait défini un critère strict de responsabilité pour les pratiques de prix d'éviction en vue d'éviter de décourager la concurrence légitime sur les prix qui profite aux consommateurs. En revanche, la Cour d'appel a estimé que les pratiques d'offres d'éviction n'étaient pas nécessairement bénéfiques pour les consommateurs ou ne stimulaient pas nécessairement la concurrence, de sorte que les « préoccupations que le tribunal statuant dans l'affaire *Brooke Group* a formulées concernant la perte pour les consommateurs de l'avantage temporaire de prix bas n'étaient pas nécessairement valables en cas de pratiques d'offres d'éviction »[154]. Ainsi, la Cour d'appel a conclu que le critère de responsabilité dans les pratiques d'offres d'éviction ne devait pas être aussi strict que celui appliqué aux prix d'éviction et a donc rejeté la requête de Weyerhaeuser. En revanche, comme on l'a vu ci-dessus, la Cour suprême a jugé que le critère utilisé dans l'affaire *Brooke Group* s'appliquait également aux pratiques d'appel d'offres d'éviction.

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152 Confederated Tribes, par. 1036, note de bas de page 8.

153 Le jury a estimé qu'il n'y avait aucun marché distinct pour le bois d'aulne en raison de la concurrence exercée par d'autres bois de feuillus comme le chêne et l'érable.

154 Confederated Tribes, par. 1038.

6.3 Effets de vases communicants et pouvoir de l'acheteur : enquête dans le secteur britannique des produits alimentaires (2008)

En 2000, la Commission de la concurrence du Royaume-Uni a publié son premier rapport détaillé sur le secteur des produits alimentaires. Un des principaux volets de cette enquête concernait l'accumulation, l'exercice et les effets du pouvoir de l'acheteur par les grands hypermarchés au niveau des approvisionnements. Les opérations de regroupement et l'entrée sur le marché des grandes chaînes de magasins de distribution dans le secteur du commerce de proximité ont débouché sur une deuxième enquête, lancée en 2006 par la Commission de la concurrence. Les résultats de cette enquête, terminée au printemps 2008, ont de nouveau mis en lumière les problèmes de concurrence dans la chaîne d'approvisionnement, en particulier en termes de pouvoir de l'acheteur[155].

La Commission de la concurrence a défini le pouvoir de l'acheteur comme une forme de pouvoir de marché : « Un distributeur de produits alimentaires exerçant un pouvoir de l'acheteur obtiendrait de meilleures conditions de ses fournisseurs en termes de prix, de qualité des produits ou de conditions d'achat, par exemple, qu'un distributeur de produits alimentaires ne bénéficiant d'aucun pouvoir de l'acheteur »[156]. En conséquence, un fournisseur a probablement une plus faible marge bénéficiaire lorsqu'il traite avec un acheteur qui exerce son pouvoir de l'acheteur.

La Commission de la concurrence a conclu que dans le secteur alimentaire tous les grands distributeurs, grossistes et centrales d'achat bénéficiaient d'un pouvoir de l'acheteur, du moins à l'égard de certains fournisseurs[157]. Pour parvenir à cette conclusion, la Commission de la concurrence a examiné la taille des distributeurs, des grossistes et des centrales d'achat de produits alimentaires par rapport aux fournisseurs ; les prix et les informations relatives aux marges ; la part du prix au détail revenant au distributeur et aux autres intervenants de la chaîne logistique pour les produits primaires ; et toute une documentation concernant les relations entre deux chaînes de grandes surfaces et leurs fournisseurs[158].

À partir d'un échantillon de 141 unités de gestion des stocks et de 29 fournisseurs, la Commission de la concurrence a constaté que les quatre grands distributeurs de produits alimentaires payaient entre 4 et 6 % de moins que le prix moyen. En revanche, les principaux grossistes payaient 2 à 3 % au-dessus de la moyenne, contre 6 à 9 % pour les grossistes plus modestes.

La Commission de la concurrence a analysé en détail l'existence d'effets de vases communicants. L'Association of Convenience Stores (ACS) avait envisagé la possibilité d'effet de vases communicants, analogues au modèle commenté ci-dessus, qui déterminait le potentiel de tels effets sur la base de l'évolution des parts de marché[159]. L'ACS s'intéressait à l'impact d'une augmentation du pouvoir de l'acheteur des grands distributeurs alimentaires sur les magasins de proximité dans le cadre d'effets de vases communicants.

La Commission de la concurrence, respectant la cohérence du modèle théorique envisageant la possibilité d'un effet de vases communicants, a conclu que la distribution de produits alimentaires au Royaume-Uni n'était pas soumise à des effets de vases communicants. Pour évaluer ces effets, la Commission de la concurrence est partie de deux angles différents. En premier lieu, elle a étudié les

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155 Commission de la concurrence, *Market investigation into the supply of groceries in the UK 2008*.

156 Commission de la concurrence, *Market investigation 2008,* par. 9.2.

157 Commission de la concurrence, *Market investigation 2008,* par. 9.21.

158 Commission de la concurrence, *Market investigation 2008,* par. 9.6.

159 Voir ci-dessus, paragraphe 4.4.2.

modalités d'application du modèle de changement des parts de marché proposé par l'ACS. Ensuite, elle a examiné les éléments disponibles pour déterminer s'ils étaient effectivement conformes à un effet de vases communicants.

Selon la Commission de la concurrence, le modèle théorique proposé ne pouvait être appliqué au cas d'espèce parce qu'il n'intégrait pas les éléments suivants :

- Ce modèle présuppose une concurrence sur les marchés locaux entre le magasin de proximité et le supermarché. Il fait l'impasse sur la concurrence exercée par d'autres importants distributeurs de produits alimentaires. Cela signifie que ce modèle minimise le degré auquel les prix inférieurs issus du pouvoir de négociation exercé par les grands supermarchés seront répercutés sur les consommateurs[160].

- Ce modèle présuppose un marché de taille fixe ; par conséquent, lorsque les prix au détail baissent, les ventes en aval devraient augmenter. Cela signifie que ce modèle minimise l'impact des prix les plus bas en termes de bien-être et surestime les effets sur le pouvoir de négociation du magasin de proximité[161].

- Le modèle de l'ACS se base sur une relation linéaire entre la taille de l'entreprise et le pouvoir de négociation. Les données recueillies ne démontrent pas qu'une augmentation de la taille relative d'une entreprise engendre des différences accrues en termes de prix relatifs des produits intermédiaires[162].

- Les données montrent également que le pouvoir de négociation des supermarchés n'est pas uniforme pour tous les fournisseurs. L'enquête indique en particulier que pour les grandes marques, le niveau des commandes a peu d'effet sur le prix, facteur qui devrait atténuer tout effet de vases communicants[163].

- Les petits acheteurs disposent de contre-stratégies efficientes potentielles leur permettant d'obtenir des ristournes analogues à celles des gros acheteurs. Par exemple, les magasins de proximité peuvent bénéficier d'avantages d'échelle en s'adressant à des grossistes de plus grande taille. Les grossistes peuvent augmenter leur taille en constituant des centrales d'achat[164].

- L'analyse de l'ACS présuppose une tarification linéaire. La Commission de la concurrence a estimé qu'en général la tarification n'est pas linéaire, mais polynôme[165].

La Commission de la concurrence n'a trouvé aucune preuve empirique de l'existence d'un effet de vases communicants. Elle n'a trouvé aucune preuve incontestable d'une diminution du nombre des magasins de proximité ou de leurs recettes. Pas plus qu'elle n'a constaté une augmentation des différences de coût des produits intermédiaires entre les grands acheteurs et les petits acheteurs, une augmentation des prix relatifs appliqués par les petits détaillants ou un changement de la demande en faveur des grands

160 Commission de la concurrence, *Market investigation 2008,* par. 5.29.

161 Commission de la concurrence, *Market investigation 2008,* par. 5.30.

162 Commission de la concurrence, *Market investigation 2008,* par. 5.31.

163 Commission de la concurrence, *Market investigation 2008,* par. 5.32. La distinction entre les grandes marques et les autres marques n'apparaît pas clairement.

164 Commission de la concurrence, *Market investigation 2008,* par. 5.33.

165 Commission de la concurrence, *Market investigation 2008,* Annexe 5.4, par. 40.

distributeurs et aux dépens des distributeurs plus modestes. Finalement, l'enquête a révélé que 93 % des fournisseurs ne croyaient pas à l'existence d'un effet de vases communicants[166].

Toutefois, la Commission de la concurrence s'est dite préoccupée de voir les grandes surfaces transférer des risques et des coûts imprévus à leurs fournisseurs en renégociant les conditions commerciales de manière rétroactive. Ce constat est confirmé par le « hold-up » perpétré par les grandes surfaces à l'encontre de leurs fournisseurs. La Commission de la concurrence a considéré que cela posait un problème pour ce qui est de l'incitation des fournisseurs à investir et innover. La Commission de la concurrence recommande notamment d'élargir le champ d'action du SCOP pour inclure davantage de distributeurs, de créer un organe de contrôle et d'application plus puissant (un médiateur) et de renforcer le SCOP pour interdire la renégociation rétroactive des conditions de fourniture.

166 Commission de la concurrence, *Market investigation 2008,* Annexe 5.4, par. 49 et 58.

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CANADA

The Canadian Competition Bureau (the "Bureau") is pleased to provide the following discussion of the roundtable topic "Monopsony and Buyer Power".

1. Definition

1.1 What types of power exercised by buyers have raised antitrust concerns in your jurisdiction? Please define the different types of buyer power that are relevant.

The Bureau is generally concerned with monopsony power as it is defined by the OECD; that is, where the price of an input is depressed below the competitive level such that it results in a decrease in the overall quantity of the input produced or supplied in a relevant market.[1] This concern exists regardless of whether that market power is exercised by a single buyer, a coordinating group of buyers, or a buyer that is not otherwise the only buyer in a market (a dominant buyer). In this sense, the Bureau is also generally concerned with what is referred to by the OECD as "oligopsony power". When considering likely output decreases as a result of a price decrease below competitive levels, the Bureau will take into account any type of quality-adjusted decrease in output[2] or a corresponding diminishment in any other dimension of competition. Also, when considering price decreases, the Bureau will take into account any change in terms of trade that amounts to a price decrease.

The Bureau's concern with monopsony power has typically arisen in merger reviews. There has, to date, been no litigated case involving monopsony power in a merger[3] but there have been negotiated settlements that, at least in part, have been designed to address such concerns.[4]

The Bureau's concern about bargaining power (as defined by the OECD: power to reduce input prices but not so much so that prices fall below competitive levels) primarily (but not exclusively) arises in the context of buyer cartels. Such cartels fall under the conspiracy provisions of the Canadian *Competition Act* and as such are subject to the requirements of that provision, including the requirement that the buyer cartel prevent or lessen competition unduly. The Bureau has carried out a number of investigations into such cartels.[5]

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1 Cases where the supply curve is perfectly inelastic such that a price decrease below competitive levels does not result in a decrease in output but only a transfer may also give rise to concerns. This scenario should be understood to be generally included in the category of monopsony.

2 In such a situation, output would deteriorate not in terms of output, but rather in terms of quality.

3 In a hearing regarding the merger of meat rendering companies, the Competition Tribunal, while examining the merger from the selling side, indicated that it could analyse the competitive effects of the merger from the perspective of either a monopsonist or a monopolist, and that no significant difference resulted from the two characterisations (*The Director of Investigation and Research v. Hillsdown (Holdings) Canada Ltd*., et al., Reasons and Order, Competition Tribunal, March 9, 1992).

4 See, for example, "Competition Bureau reaches agreement to preserve competition in two B.C. forestry markets", Media Release, Competition Bureau, Ottawa, December 7, 2004.

5 See, for example, "Competition Bureau Concludes Inquiry into Snow Crab Processing in Newfoundland and Labrador", Media Release, Competition Bureau, Ottawa, December 17, 2004.

As to bargaining power in unilateral conduct cases, in order for bargaining power to amount to abuse, it must be engaged in by a dominant firm, must constitute a practice of anti-competitive acts in that its purpose is an intended exclusionary, disciplinary or predatory effect on a competitor(s), and that the effect of this is or is likely to be a substantial lessening or prevention of competition. To date, there have been no abuse investigations involving bargaining power that have involved lower input prices. It is unlikely that lower input prices would, in isolation, meet the requirement of a practice of anti-competitive acts.

1.2 What is (are) the appropriate definition(s) of buyer power? What is the relationship between monopsony power, oligopsony power, bargaining power, and countervailing power?

The Bureau considers buyer power to be a general term that includes within it monopsony power, oligopsony power, and bargaining power. Countervailing power is used to mean the power to discipline an exercise of market power, monopsony power or bargaining power, and so the term countervailing power might be applied to either sellers or buyers.

Monopsony power is understood to mean those instances where a price decrease is such that it falls below competitive levels and there is a corresponding reduction in the input supplied or a corresponding diminishment in any other dimension of competition. As noted in footnote 1, here and throughout this submission, monopsony includes within its meaning situations where supply is perfectly inelastic such that a decrease in price below competitive levels does not result in a decrease in output. As is the case when examining downstream market power, the Bureau generally considers such price and output decreases in a relevant market. As noted above, monopsony power is generally used by the Bureau to include within its meaning oligopsony power.

Bargaining power means the power to decrease prices but those price decreases are such that they do not fall below competitive levels, and so the price decrease is associated with increased purchases of the input, rather than decreased purchases.

Countervailing power is normally the expression used when considering whether an act, such as a merger, is likely to result in the ability to sustain a material price increase and the Bureau assesses whether one or more buyers have a countervailing ability to constrain that exercise of market power. Conversely, in the case of monopsony, oligopsony or bargaining power, one or more *sellers* may have a countervailing ability to constrain the exercise of monopsony, oligopsony, or bargaining power.

2. Identifying Buyer Power

2.1 What determines the extent to which a buyer can exercise monopsony power? Bargaining power? Other types of buyer power?

A necessary condition for an exercise of monopsony power is that the input be supplied in a market characterised by an upward-sloping supply curve in the relevant range of production.

The fewer selling options there are, the more likely it is that a large buyer or a coordinating group of buyers will be able to exercise either monopsony or bargaining power. What will largely determine whether the resulting price decrease remains above competitive levels will be the extent of selling options. The fewer the selling options, the more likely it is the bargaining power will extend to monopsony power.

2.2 What metrics can, and have been used, to identify monopsony power? Bargaining power? Other types of buyer power? What are their strengths and weaknesses?

The Bureau first determines whether it is likely a firm has buyer power. It then tries to determine whether that buyer power is likely to entail the special case of monopsony power.[6] This involves the inherently difficult exercise of trying to determine whether prices are competitive or not.

The first step in assessing whether an entity is likely to have buyer power is typically a determination of the relevant market in which the entity makes its purchases. The conceptual basis used for defining markets is, mirroring the selling side, the hypothetical monopsonist test. Conceptually, a relevant market is defined as the smallest group of products and the smallest geographic area in which a sole profit-maximising buyer ("hypothetical monopsonist") would impose and sustain a significant and non-transitory price decrease below levels that would likely exist in the absence of the act in question (for example, a merger). The relevant product market definition question is thus whether suppliers, in response to a decrease in the price of an input, would be able to profitably switch to alternative buyers or modify the input they sell in sufficient quantity to render the hypothetical monopsonist's input price decrease unprofitable.

Buyers currently buying the input in question will generally be considered participants in the relevant market. Buyers not currently buying the input may be considered participants in the relevant market provided, in the event of a small but significant input price decrease, the buyer would buy the input and the seller would sell it. It is of note that buyers need not participate in the same downstream market in which the buyer at issue (for example, the merging parties) participates. For example, a grocery story likely participates in a local market for the sale of groceries, but it may purchase a food input, such as corn, from a producer that may have regional, national and even international buyers for the sale of its product.

Once the relevant market is known and its buyers identified, the size of the entity's purchases of the input relative to its suppliers' total sales of the input in the relevant market is determined. If the entity only accounts for a small percentage of its suppliers' sales in the relevant market, these suppliers are generally considered well placed to forgo sales to the entity in favour of other buyers when faced with an attempt to lower input prices.

If the entity accounts for a significant portion of input purchases, barriers to entry into buying are considered.

If the entity accounts for a significant portion of input purchases and barriers to buying the input are high, likely factors for consideration when trying to distinguish between bargaining and monopsony power include as follows:

- The shape of the supply curve in the relevant range of output: As noted above, upward-sloping supply curves are a necessary condition for monopsony power. If there is evidence that supply is highly elastic over a relevant period of time, the Bureau is less likely to pursue a monopsony power case. Relevant considerations when evaluating the shape of the supply curve include any factors, such as pre-existing contracts, that may influence the time it takes for supply to adjust to new demand conditions.

- Whether upstream supply of the input is characterised by a large number of sellers and low barriers to entry such that the normal selling price of a supplier is likely competitive.

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6 Which is as defined above and so subject to the note contained in footnote 1.

- Whether it seems likely that certain suppliers will exit the market in response to the anticipated price decrease or will scale back production.

- Where possible, empirical techniques for analysing the effect of historical changes in supply on price and quantity to help determine whether monopsony power exists.

If it appears that monopsony power is possible (including the case where the supply curve is perfectly inelastic), the likelihood of such power actually being exercised may be considered. Factors relevant to this include the possibility of an exercise in monopsony power jeopardizing a long-run source of supply, and the possible costs to the potential monopsonist of decreased output in the downstream market that may follow decreased input purchases.

2.3 What is the relevance of market definition for identifying monopsony power? Bargaining power?

Market definition is relevant for identifying both monopsony and bargaining power, and is used by the Bureau in the manner described above.

Identifying relevant markets is of particular importance in monopsony cases since the decrease in input production of concern need only occur within the relevant market. It need not occur more generally. For example, a grain purchaser may be able to exercise monopsony power in its grain purchases in a region of Canada. That region of Canada is a relevant geographic market because grain producers located therein would not be able to discipline a decrease in grain prices by selling to other buyers or geographic locations. Grain production in other markets, say, for example, those located outside of Canada, may, however, increase output in response to the decrease in output in the relevant market of concern. This, however, would not be a consideration when assessing the likelihood of monopsony power in the relevant market of concern (except to the extent that it may influence the potential monopsonist's incentives to exercise monopsony power in the first place). Where the Bureau is concerned with monopsony power (where, again, this includes the case where the supply curve is perfectly inelastic so that there is no decrease in output as a result of a decrease in price below competitive levels), it is only concerned with monopsony power in the identified relevant market (this also means that there need not be a decrease in output in the corresponding downstream market). This position is consistent with inefficiencies arising from such behaviour more generally. Economic theory suggests that an output decrease in response to monopsony power in one relevant upstream market that results in output increases in other relevant upstream markets is typically the result of inefficient substitution towards less efficient producers.

2.4 What issues arise in adapting the hypothetical monopolist test to define markets to identify monopsony and/or bargaining power?

The main issue in adapting the hypothetical monopolist test to define markets to identify monopsony and/or bargaining power arises in regard to product market definition. Since the hypothetical monopsonist test is applied from the perspective of sellers and the buyers to whom they can sell, the relevant product market definition question is whether suppliers, in response to a decrease in the price of an input, would be able to profitably switch to alternative buyers or modify the input they sell in sufficient quantity to render the input price decrease unprofitable to the buyer. This opens the door to the possibility that the product market would consist of products that are otherwise unrelated or, from the buyer's perspective, not substitutes. For example, if grain suppliers could discipline a grain price decrease by switching to fruit

production, this would imply that, for the purposes of assessing the likelihood of monopsony power, grain and fruit are in the same product market.[7]

While this is technically correct, the time and money required by sellers to switch into the production of other products so as to discipline a price decrease are often either too costly and/or take too long to be an effective discipline. Consequently, while it is possible that relatively modest changes to an input so as to expand suppliers' selling options can be achieved at little cost and time, and so would be a consideration, the Bureau's more likely focus in regard to market definition in upstream cases is geographic, whereby alternative locations and the buyers in those locations are identified.

3. Welfare Effects

3.1 What are the welfare effects of the exercise of the different kinds of buyer power? How does the exercise of the different types of power by a buyer affect input suppliers and consumers of the firm exercising the buyer power? Do the welfare effects of the exercise of buyer power depend on the market structure downstream?

Monopsony power will generally result in allocative inefficiency in the upstream market in which it takes place.[8] The decrease in input purchases can also result in decreased downstream output with corresponding higher prices, which will adversely affect downstream consumers. Such an effect in the downstream may not arise, however, since that market may be competitive such that a decrease in output by one participant does not have any impact on market price and output. Under Canadian law, there need not be harm by way of a price or output effect in the downstream market in order for an exercise of monopsony power to be considered harmful. Consequently, it is typically sufficient that there be a reduction in output (or a corresponding decrease in another dimension of competition) in the upstream market in order for an antitrust concern to arise.

As noted above, however, the downstream market structure can impact the profitability of an exercise of monopsony power and, in turn, the potential monopsonist's incentive to reduce input purchases. In competitive downstream markets, the only downstream effect of decreased input purchases and the corresponding decrease in downstream output will be lost downstream market share. This will reduce, although not necessarily eliminate, the incentive to exercise monopsony power. Reduced input purchases may nonetheless be profitable for the firm if the benefit of the cost savings upstream outweighs the costs associated with decreased market share downstream.

Cases of non-conspiracy related abuse of bargaining power are normally (but not necessarily exclusively) considered under section 79 of the Canadian *Competition Act*. Under this section the Bureau considers (1) whether a firm is dominant; (2) whether the firm has engaged in a practice acts intended to exclude, discipline or predate a competitor; and (3) whether the practice has resulted in a substantial prevention or lessening of competition in a market. That market can be either the upstream market in which input purchases are made or the downstream market in which product based on those inputs are sold. The practice of anti-competitive act(s) at issue would be assessed to see whether it likely has the effect of substantially lessening or preventing competition in the relevant market by way of creating, enhancing or preserving the dominant firm's market power.

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7 It may also be the case that buyers who participate in wholly different downstream markets will be relevant purchasers in the upstream market. For example, a buyer who purchases corn for flour production may participate in the same market as a buyer who purchases corn for ethanol production.

8 Where the supply curve is perfectly inelastic, there will be no allocative inefficiency resulting from a decrease in price below competitive levels. As noted in footnote 1 and elsewhere in this submission, such a situation may still give rise to concerns.

Acts that result only in transfers of wealth among various market participants as a result of lower prices that either do not constitute monopsony power (where monopsony power includes those situations where the supply curve is perfectly inelastic such that a decrease in price below competitive levels only entails a transfer) that has the effect of substantially lessening or preventing competition, or do not ultimately result in substantially lessened or prevented competition as a result of an adverse effect on a competitor, generally do not raise antitrust concerns in Canada. The exception to this arises under the cartel provisions, where conspiracies to lower prices that do not necessarily amount to prices below competitive levels may be found to warrant investigation.

3.2 With respect to conduct that increases buyer power, what welfare effects suggest that such conduct should be a concern of competition policy? If the conduct increases buyer power but does not result in an increase in prices for downstream consumers, should it be enjoined? Why?

As noted in the response above, under the abuse provisions, anti-competitive conduct that increases buyer power is only a concern if the intended effect is an exclusionary, disciplinary or predatory effect on a competitor such that there is a substantial lessening of competition in the market in which that competitor participates or otherwise would have participated. If the conduct increases buyer power but does not, through the mechanism described above, result in created, enhanced or preserved market power, the required elements of the Canadian abuse of dominance provisions would not be met and the conduct could not be enjoined. If the market of concern is the downstream market, the required elements of the abuse provisions will normally entail an increase in downstream consumer prices (or a negative effect on some non-price element of competition, such as quality). If the market of concern is the upstream market for the purchase of inputs, prices to consumers need not necessarily increase for the conduct to be considered anti-competitive, but upstream input prices would typically have to fall below competitive levels.

3.3 What are the welfare effects of the secondary line price discrimination implied by the cycle hypotheses, perhaps augmented by a waterbed effect? Is the change in downstream market structure necessarily harmful for consumers? If not, on what basis can consumer welfare improving cycles be distinguished from those that are deleterious?

The Canadian abuse provisions do not have an efficiency defence, but business justifications that are pro-competitive will be considered when assessing particular conduct. Such a justification can overcome the reasonably foreseeable effects of the conduct if the firm(s) can show that those anti-competitive effects were not the overall purpose of that conduct. The Bureau considers credible efficiency or pro-competitive rationales to generally fall into one of two categories: activities that minimise costs of production or operation, independent of the elimination or discipline of a rival; and activities that improve a firm's product, service, or some other aspect of the firm's business. Consequently, in order for a change in downstream market structure, which may result from secondary line price discrimination implied by the cycle hypotheses, to be considered harmful, it must be the case that the intended purpose of the discrimination was the exclusion or disciplining of competitors (as opposed to some pro-competitive rationale), and that such exclusion/disciplining results in enhanced downstream market power. A simple observation of price discrimination in the input market would not normally be sufficient to conclude any anti-competitive effect.

3.4 Under what circumstances is a waterbed effect possible?

The Bureau has no experience with waterbed effect cases. The OECD notes that a waterbed effect arises if the effect of the exercise of the bargaining power is to increase the input price paid by other buyers. Such a case would only be subject to the Canadian *Competition Act* if a dominant firm engaged in an act that relatively increased its competitors' input costs (a theory of raising rivals' costs) through a

practice of anti-competitive act, such that the intended effect of the act was to exclude or discipline their market participation. Merely being able to negotiate relatively more favourable prices does not typically meet these requirements.

3.5 What should be, and is, the legal status of the exercise of the different types of buyer power? Why?

As noted above, acts that result only in transfers of wealth among various market participants as a result of lower prices that either do not constitute monopsony power (where monopsony power includes those situations where the supply curve is perfectly inelastic such that a decrease in price below competitive levels only entails a transfer) that has the effect of substantially lessening or preventing competition, or do not ultimately result in substantially lessened or prevented competition as a result of an adverse effect on a competitor generally do not raise antitrust concerns in Canada.

4. Buyer Power and Conduct

4.1 Horizontal Mergers. When and why does a horizontal merger create buyer power that gives rise to competition policy concerns? Can the creation of buyer power, in particular countervailing power, be a benefit of a horizontal merger?

As described above, as to buyer power, the Bureau is generally concerned with horizontal mergers that create, enhance or preserve monopsony power. The Bureau is generally not concerned with bargaining power unless it is an anti-competitive means by which a competitor's costs are raised such that it is excluded or disciplined with the net result that there is a substantial lessening or prevention of competition in a well-defined market. While such cases are typically considered under the abuse provisions, the Bureau does not rule out the possibility of such a consideration under the merger provisions.

The Bureau, when considering countervailing power in the merger context, normally considers it from the perspective of existing entities being able to discipline a possible exercise of market power by merging parties. It does not typically consider the creation of countervailing power through a merger as one of the benefits of that merger.

4.2 Vertical Restraints. What are the implications of buyer power for the competitive analysis of vertical restraints? Does buyer power give rise to competitive concerns regarding buyer-led vertical restraints? What kinds of vertical restraints can, and have, raised concerns because of buyer power? Can buyer power and vertical restraints result in welfare-reducing foreclosure?

The vertical cases involving the buying of inputs with which the Bureau typically concerns itself involve the driving up of input prices to competitors by engaging in a practice of anti-competitive acts. Examples of such vertical acts might include the pre-emption of scarce inputs by a variety of means, including exclusive deals with the main suppliers of the relevant input.[9] In such a way, buyer-led vertical restraints can give rise to competitive concerns. While the Bureau generally acknowledges that differences in the relative costs of inputs to a dominant firm versus that to its rivals might be to the rivals' disadvantage, the Bureau does not generally consider the achievement of such relative cost differences by way of a dominant firm simply being able to negotiate a lower input price, to be an anti-competitive act.

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9 *Director of Investigation & Research v. D&B Co. of Canada,* Reasons for Order, Competition Tribunal, 1995 ("Nielsen").

For an act to be considered anti-competitive, it must be found to be for the purpose of an intended negative effect on a competitor that is exclusionary, disciplinary, or predatory. Such acts could include exclusive dealing, bundling, tying and so forth. As noted above, exclusive dealing in the purchase of scarce inputs was the basis of the *Nielsen* case. In examining the purpose of the act, the Bureau takes into account the fact that a non-monopsony price reduction in input prices can be pro-competitive and so efficiency enhancing.

The Bureau is generally of the opinion that buyer power and vertical restraints can result in welfare-reducing foreclosure. While this is the case, it should be noted that the abuse provisions do not provide for an efficiencies defence.

4.3 Predatory Bidding. Predatory bidding might create buyer market power. It involves overbidding for inputs in the short-run to reduce the profitability and induce the exit of competing firms that use the input in order to create monopsony power in the long-run. Under what circumstances is predatory bidding profitable and harmful? What should be the legal standard for a finding of anticompetitive predatory bidding?

To date, the Bureau has not investigated any matter involving predatory bidding. While the Bureau has considered matters where the price of a scarce input to competitors was increased, for example, through pre-emption or exclusive dealing, the Bureau has generally been concerned with the consequent impact the exclusion or disciplining of rivals would have on the downstream, rather than upstream, market (which, as noted above, is not to say that downstream effect is strictly necessary for the Bureau to have an issue). As noted above, however, the Bureau is generally concerned with monopsony power and its creation, and so would investigate matters involving allegations of predatory bidding.

The Bureau generally considers predatory bidding, as described above (and so ignoring any possible effect in the downstream market), to be profitable if its net effect, upon the exclusion of competitors, is a lower price paid for inputs than that which would otherwise have prevailed absent the bidding by an amount sufficiently large and/or for a period sufficiently long so as to allow the predating bidder to recoup the costs of the higher input prices it paid. If such bidding does not lead to a substantial lessening or prevention of competition by way of created, preserved or enhanced market power downstream, or enhanced market power upstream by way of creation of monopsony power, the bidding would not generally be considered abusive by the Bureau.

4.4 Raising Rivals' Costs (RRC) Overbuying. RRC Overbuying involves a downstream firm increasing its purchases of an input to raise demand and therefore the price of the input, with the intent of raising the cost of its rivals in the downstream market. Under what circumstances is RRC Overbuying profitable and harmful? What should be the legal standard for a finding of anticompetitive RRC Overbuying?

The Bureau considers RRC overbuying to be profitable to the firm engaging in it, if the net effect of the exclusion or the disciplining of rival firms whose costs have been raised is a higher downstream price than that which would have prevailed absent the overbuying by an amount sufficiently large and/or for a period sufficiently long so as to recoup the costs of the higher input price. If having also found that the intended purpose of the overbuying was exclusion or disciplining, rather than some pro-competitive rationale, the Bureau will generally consider created or enhanced downstream market power to be the result of abuse.

4.5 Buyer Groups. Under what circumstances does the formation of agreements, arrangements, and institutions that facilitate collective purchasing by buyers raise antitrust concerns? What should be the legal standard for the determination that a buyer group should be enjoined due to competition policy concerns?

Monopsony power and also bargaining power that result from the formation of a cartel will generally raise concerns under the conspiracy provisions of the Canadian *Competition Act.*

FINLAND

1. Introduction

Although simplistic models of buyer power may work as crude instruments of thought, monopsony and buyer power are not solely constrained to the textbook examples where a buyer uses his power in a highly concentrated or fragmented supplier market. In a small economy where different sectors of the economy are prone to become concentrated, the analysis of the effects of buyer power has to take into account the dependencies of that both upstream and downstream firms may have market power in both buying and selling markets. In addition, when a limited number of buyers are well organised, this necessarily requires that the bargaining process between the actors has to be brought under closer scrutiny. Being fully aware of the multidimensional characteristics of buyer power, a first attempt to define buyer power yielded a following tentative definition:

> "*The ability to use one's position in the downstream market to gain relatively more favourable terms than one's potential or actual competitors in a way that offsets the suppliers' market power*".

Such a definition, yet only a canvas for more sophisticated ones, includes the situation of a monopoly buyer, as only the set of actual competitors in the definition is empty. This definition includes the descriptions of buyer power offered by standard textbook models, the bargaining model and the theories of locking in suppliers. The definition relates to oligopoly power and takes into account the countervailing power of strong buyers.

The rest of the contribution is organised as follows: The next chapter focuses on the identification of buyer and bargaining power. We then turn to discuss the welfare effects and measurement together and end the contribution regarding principles with phrasing some questions in relation to the market definition. Finally, the contribution presents a number of cases where FCA has either evaluated or influenced the extent to which buyer power can be and has been exploited. This section focuses on, but is not restricted to, elements of buyer power in the retail market for fast moving consumer goods (FMCG).

2. Identifying buyer power

Bargaining power may be most concretely visible in the ability of a buyer to obtain terms or conditions of sale or discounts of such a magnitude which can leverage the downstream market power. Temporary successes in bargaining may not reveal the buyer power as well as the lasting presence of a "virtuous circle", where the benefits obtained through buyer power transfer to growth and the subsequent realisation of even more favourable terms in the buying process (i.e. *discounts→concentration→further discounts…*). The buyer power that stems from increased size or importance of buyers, be it a result of organic growth or mergers, may be manifested and identified as reductions in suppliers' profitability. Such a finding does, however, not necessarily establish causality, because reductions in profitability can result from a number of other factors as well.

Quite a decisive aspect for the buyer power to constitute harm is whether and to what cost the sellers and buyers are deprived of an outside option. This clearly leads one to take into account the relative size of the buyer and the extent to which it has the ability and credibility to integrate backwards, if the exercise of buyer power is successfully opposed. Credibility also plays a role in the ability and propensity of a buyer to switch a supplier or to encourage entry of new suppliers, in order to reinforce the buyer power.

The methods employed by the buyers in competitive procurement may also contribute to substantial buyer power, especially if the suppliers' outside options are limited. Auction mechanisms, for example, may be used to boost buyer power and effectively setting firms against each other, especially if the auction process is completed with succeeding bargaining rounds.

When the buyer is a downstream retailer of the supplier's product, the buyer power may be created or further strengthened in the outlets. The buyer may induce competition "for the shelf" and possibly enhance this effect by introducing competition "in the shelf". Introduction of or increasing the selection of private labels in fast moving consumer goods, for example, may strengthen the buyer or bargaining power of retailers vis-á-vis suppliers.

3. Welfare effects or harm determine the metrics of buyer power

Regarding the metrics of buyer power, we agree with the view of Inderst and Mazzarotto (2006), in that the metrics of buyer power should be closely related to the assumed harm it constitutes to the market or to market actors.[1] Exact quantification of deadweight losses or changes in consumer or producer surpluses may be far too challenging a task, although the monetary metrics is easily interpreted and quite well understood.

If buyer power is argued to reduce the suppliers' incentives to innovate, the metrics regarding the effects should capture the changes in these incentives or outcomes. For example, a situation where any process improvements and cost savings by suppliers are swiftly vitiated by the ratchet effect of buyer power, could be detected in terms of decelerating innovative (or R&D) activity. Arriving at firm and correct conclusions again requires credibly established causal relationships.

One important aspect of welfare effects is that in presence of buyer or bargaining power we may end up in a situation where the market shares merely reflect differences in bargaining power and not the differences in efficiency. To measure the allocative inefficiency arising from this, would imply metrics in terms of textbook case surpluses and deadweight losses.

As the suppliers' ability to find viable outside options is essential in restricting buyer power, focus should also be put on the locking mechanisms in contracts. Substantial artificial switching costs created by lengthy and/or exclusive contracts may contribute to underutilisation of capacity, contributing to productive inefficiency. The metrics of buyer power could therefore build upon an assessment of the importance of switching costs (Waterson, 2003; Klemperer, 1987&1995; Shy, 2001 & 2002; Caruana, 2004) and whether these relate to informational, artificial or implicit switching costs.[2]

There are effects that may counterbalance the negative effects of buyer power. For example, if buyer power results in the "virtuous circle" of growth and increasing monopsony power, some positive effects (e.g. lower prices) are likely to come over to the consumers. Emphasising these gains may be quite correct

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1 Inderst, R. & N. Mazzarotto (2006) Buyer Power in Distribution, manuscript.

2 Waterson, M. (2003) The role of consumers in competition and competition policy. *International Journal of Industrial Organization* (*IJIO*) 21 (2), 129–150; Shy, O. (2002) A Quick and Easy Method for Estimating Switching Costs."*IJIO* 10, 71-87; Shy, O. (2001) *The Economics of Network Industries*, Cambridge University Press; Caruana, A. (2004) The impact of switching costs on customer loyalty: A study among corporate customers of mobile telephony. *Journal of Targeting, Measurement, and Analysis for Marketing* 12, 256-268; Klemperer, P. (1987) Markets with Consumer Switching Costs. *Quarterly Journal of Economics* 102, 375-394; Klemperer, P. (1995). Competition when Consumers have Switching Costs: An Overview with Applications to Industrial Organisation, Macroeconomics, and International Trade. *Review of Economic Studies* 62, 515-539.

in the short run, but this is conditional to two long-run presumptions; a) competitors will not be pressured to exit the market or cease to restrict the market power of the growing entity b) this increasing buyer power does not induce the waterbed effect on the terms of purchase for other less influential buyers.

Another positive, but possibly short-run, effect of the interplay between size and obtained discounts is that it provides incentives for the buyer to improve its efficiency and to grow further. This eventually enhances the competition in the final goods market.

The positive effects of buyer power and the canalisation of these to the consumers give credit to the current policy in which, despite a serious balancing act, the main attention is given to competition in the final goods market.

4. Relevance of market definition in assessing buyer power

There is a dichotomy brought to light in how buyer or bargaining power is assessed by the authorities and a individual supplier. This is largely a question of the perspective from which the market is defined. An individual supplier may regard a far smaller geographical area as his relevant market than the buyer does. The question is whether such one-way dependence is a result of poor strategy or lack of competitiveness, or a result of market development, where the mismatch between sizes of sellers and buyers is a result of a market evolution influenced by political preferences, for example. The situation of relatively small regional suppliers may be blurred by the systemic view that emphasises the frictionless working of the internal market. The assessment of importance of absolute and relative buyer power in a situation where buyer faces a supply from a far larger market, whilst a supplier is seriously restricted in his choices, is linked to the discussions of firms' incentives and possibilities to grow. It also relates to assessment of cooperation between firms in the formation of alliances, for example.

5. On the role of buyer power in Finnish competition policy

According to the European Commission's guidelines on horizontal agreements[3], there is no absolute threshold which indicates that a buying cooperation creates some degree of market power and thus falls under Article 81(1). However, in most cases, it is unlikely that market power exists if the parties to the agreement have a combined market share of below 15% on the purchasing market(s) as well as a combined market share of below 15% on the selling market(s). In any event, at that level of market share it is likely that the conditions of Article 81(3) are fulfilled. Following these guidelines would, especially in a relatively small economy like Finland, give reason to assess the effects of buying power more often and more thoroughly. However, in merger cases the FCA has to prove existence of dominance, which practically means a single or joint share of more than 50%. With buying markets are to an ever larger extent international, the present framework in which to assess buying power captures mainly hardcore restrictions. The subsequent sections illustrate the role of buying power assessments insofar as it relates to the main tasks of the FCA.

There are a few cases where the FCA has been faced with nearly complete monopsony power. These cases involve the market for district heating. A typical situation is a large industry plant, which produces heat as a by-product, which can *de facto* only be bought by district heating companies (DHCs). The outside option for the industry plants is not to sell this by-product, which would incur a substantial loss of revenues. The situation is further aggravated in that the DHCs are considered to be in a dominant position

[3] Paragraph 130 in Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements (2001/C 3/02). *Official Journal C 003 , 06/01/2001 P. 0002 - 0030*

vis-á-vis its existing customer base.[4] According to the FCA assessment the DHCs are able to transfer any cost increases fully into the consumer prices due to the emissions trade.[5] The question is to what extent the DHCs can be assessed to have an obligation to buy from industrial suppliers of heat. The situation is further complicated by the emissions trade, as this gives the DHCs incentives to expand or use their own heat generating capacity more efficiently. These factors sum up to a combination of increased bargaining power and a potential waste of energy.

Another significant example of buying power is the buyer cartel in the round wood markets. The case, including price and market-partitioning cartel, was solved in 2001. Fines imposed on the forestry companies were finally reduced to a seventh part of those initially suggested.[6] A recent FCA decision proposes fines to two large forest companies for violation of article 81 by having participated in a buyer cartel in the round wood markets. The proposition of FCA, currently pending in Market Court, includes a fine of total 51 million euro (30+21).[7]

It is possible that the buyer power in round wood markets is to some extent countervailing to the bargaining power of the supply side, where the sellers are rather well informed about market situations. The nature of the product in being "non-perishable" at least in the short run may make the buyer power even more important in ensuring availability and input prices to support international competitiveness of forest industry. The delicate balance now strikes to a relevant extent between forest industry and (associations of) forest owners, with the latter functioning under some influence of the Central Union of Agricultural Producers and Forest Owners (MTK).

5.1 Buyer power in grocery retail markets

The current food price inflation has raised concerns that retail competition in groceries does not work sufficiently. Statistics do however reveal that in many categories the pass-through of increasing producer prices to the retail level is far from incomplete and associated with remarkable lags. For the moment being, this works in the consumers' interest and signals the presence of retailer buyer power.

Concerning retail markets, the State Council noted that there are indications of increased buyer power in the Finnish retail market. This was motivated with the retailers' larger share of final prices and in that industry has had to contribute more extensively with marketing fees/subsidies.[8]

In a number of decisions, the FCA has assessed the state and development of buyer power in the retail sector, and especially that of the two largest retailer groups. This was especially in focus in years 2000 to

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4 Here reference is made to two "benchmark" rulings in 2001 (151/690/1999 and 173/690/2000), where Competition Council affirmed the dominant position of Helsingin Energia and the town of Kuopio vis-á-vis consumers of district heating.

5 Regarding the downstream dominance, the FCA has assessed but not supported allegations of the DHCs' abuse of this position. (Dno 615/61/96), 30.9.1998 Epäilty määräävän markkina-aseman väärinkäyttö kaukolämmön hinnoittelussa Pirkkalan kunnan alueella / Dno 801/61/99, 26.1.2000 Kaukolämmön hinnoittelu Rääkkylän kunnan alueella)

6 Dnro 196/61/97, 5.6.2000 Epäilty tarjousyhteistyö, hankintalähteiden jakaminen ja tietojenvaihto raakapuun kaupassa.

7 Dnro 416/61/2004 Esitys kilpailunrajoituslain (480/1992) 6§ ja Euroopan yhteisön perustamissopimuksen 81 artiklan mukaisen kilpailunrajoituksen toteamisesta ja kilpailunrikkomusmaksun määräämisestä Stora Enso Oyj:lle ja Metsäliitto osuuskunnalle.

8 Vähittäiskaupan kehitys Valtioneuvoston selonteko vähittäiskaupan rakenteesta, muutoksista ja kauppaa koskevista erityiskysymyksistä (Luku 3)

2001, while granting the exemptions for vertical pricing cooperation (maximum resale price maintenance, formation of selections etc.) and for horizontal cooperation between cooperative retailers.

More recently, the FCA has paid attention to the use of buyer power in negotiations between the Finnish retail sector and the food industry. At present, the Finnish retail sector in FMCG constitutes a countervailing power to the food processing industry to be reckoned with, which has brought the retail sector under closer and more systematic scrutiny. The retail market is currently assessed as being competitive, but as a result of mergers and subsequent increasing concentration, there exists a potential for more relaxed competition. The grocery retail market is concentrated with CR_2 = 73.4%, CR_3 = 85.3% and CR_4=89.4%, together with a Herfindahl-Hirschman index of around 2900 points. The FCA has pursued to ensure and promote competition in retail through a number of decisions and inquiries, and thus ensured that the potential buyer power has ultimately gained consumers. In two more recent cases, the focus was the assessment of practices of exchange of information that had a potential to restrict competition.[9] In both cases, the retailers changed their practices and the potential harm to efficient competition was thereby removed.

Regarding the role of private labels in Finland the share of private labels of total sales was about 10 percent in 2005 according to AC Nielsen, which was among the lowest in Europe. However, the (annual) growth was 16 percent, which was among the highest in Europe. It should be noted that the growth in branded products during this period was -3%. The number of private label products (items) increased from 2600 in year 2002 to more than 4 000 in 2005. The FCA's granting of exemption for joint pricing in private labels may have contributed to the rapid increase of private labels.

5.2 Welfare effects

Assessing the detrimental effect of buyer power of the retail sector deserves closer attention. With the downstream competitive process in the working, the problem is not in that the result of this power would not transfer into lower consumer prices, but in that the industry is faced with terms that may:

- induce it to lower the standards of products (quality degradation);
- be tempted to fail on the environmental requirements in their production may be relevant questions in the near future.

A growing concern from a welfare point of view are situations where the use of buyer power leads to underutilisation of productive capacity. The current inflationary development and the general strive for efficiency and competitiveness imply that inefficiency arguments may gain more weight in future assessments of buyer power.

5.3 Mergers

In industrial mergers the FCA has analysed the buyer power of the merged entity, but also the countervailing buyer power of the merged entity's downstream customers.[10] In retail sector mergers, the analysis of changes in buyer power has not been in the main focus. However, it is possible that merging parties may have had different supplier structure, with one party giving more weight to small and local suppliers. A merger may provide serious challenges as well as opportunities to these small suppliers.[11] The

9 Dnro 253/61/1999, 23.2.2004 Päivittäistavarakaupan myymälärekisteriin liittyvät kilpailunrajoitukset & Dnro 154/61/2007, 19.6.2008 Tietojenvaihto suomen päivittäistavarakaupan markkinoilla.

10 Dnro 99/81/2001, 28.3.2001 Yrityskaupan hyväksyminen; Omya AG / Mondo Minerals Oy

11 Dnro 657/81/2005, 4.1.2006 Yrityskaupan hyväksyminen ehdollisena; SOK / Suomen Spar Oyj

main welfare effects to consumers may sum up to a loss of variety in the selections, which may also be a result of insufficient product differentiation. In a small economy like Finland, the buyer power of the downstream retailers can be seen as to counterbalance the market power of the concentrated food processing industry. In general the relative level of buyer power may be influenced by cultural characteristics, as suppliers in Finland are not extensively active at the retail level through their own outlets, for example.

At the FCA, the analysis of the effects of a merger contains a SSNIP-alike assessment of buyer substitutability, based on the statements and interviews of the upstream suppliers of a merged entity. A recent merger in the meat processing industry included such an evaluation, stating a regional increase of buyer concentration and corresponding increase in activities including procurement and exchange of animals (farrows and calves). [12]

5.4 Joint purchases

On a number of occasions the FCA has granted individual exemptions for joint sourcing which was not assumed to increase buyer power to a relevant extent.[13] However, in these analyses, some points were risen that cooperation in sourcing could affect competition in the downstream markets.[14]

In retailing, buyer power has been assessed in joint sourcing when granting individual exemptions for cooperative retailers to cooperate in their purchasing activities in the FMCG market. In the exemption granted it was required that the efficiencies obtained to be transferred to the consumers indicating that cost savings associated with and absorbed by market power only are not sufficient for such an exemption.[15]

6. Summary

In a small economy that is integrated to the European single market, concerns of local suppliers cannot be given too much weight, especially if the purchasing market is merely international. The issue of the restricted outside options of domestic suppliers' is perhaps more of a shared concern of other policy areas.

In addition to more classical cases of monopsony power, where identification of buyer power is less of a problem, the FCA is today faced with assessment of more complex entities where both identification of and challenging the use of buyer power is less straightforward. An increase in buyer power when leveraged by competition in the outlets, serves as an example. Much of what has potential to induce problems, is now avoided or solved by keeping the retail sector competitive. This eventually and at least in the short run, serves the main objectives of competition policy: the interest of consumers.

The metrics of welfare effects of buyer power should be closely connected to the harm. However, at present there is a notable lack of research in whether such negative effects are currently of relevance, or can be identified in our supply-side industry. In contrast, there is a relatively rich theoretical research tradition on barriers to access outside options. Therefore, closer attention could and even should be paid on

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12 Dnro 492/81/2007, 21.9.2007 Yrityskaupan hyväksyminen; Atria Suomi Oy / Liha-Pouttu Oy.

13 Dnro 205/67/2003, 22.9.2003 Poikkeuslupa teletuotteiden hankintayhteistyöhön ja yhteistyöhön hankintapalkkioiden määrittämiseksi — Finnet Logistiikka Oy

14 Dnro 205/67/2003, 22.9.2003 Poikkeuslupa teletuotteiden hankintayhteistyöhön ja yhteistyöhön hankintapalkkioiden määrittämiseksi — Finnet Logistiikka Oy

15 Dnro 135/67/2001, 31.8.2001Poikkeuslupa S-ryhmän alue- ja paikallisosuuskauppojen käyttötavaroita koskevalle hankinta-, markkinointi- ja hintayhteistyölle

the distinction between mechanisms that create lock-in and true loyalty effects supplier side. By removing too restrictive artificial switching costs, the lock-in effects that enable an abuse of buyer power can be minimised together with a lessening of the long-run concerns.

Summing up, despite being constrained by lack of efficient tools with which to circumvent the use of buyer power, the FCA has together with other policy sectors been able to avoid the most detrimental effects by protecting competition in markets for final goods. This does not, however, imply any underestimation whatsoever of the need to take the potential detrimental effects of buyer power most seriously.

FRANCE

La puissance d'achat peut se définir comme la capacité d'une entreprise cliente à exiger de ses fournisseurs des conditions d'achat préférentielles par rapport à celles des autres acheteurs pour une prestation équivalente (OCDE, 1981). Ces dernières années, les autorités de concurrence de plusieurs pays de l'OCDE se sont préoccupées du rôle ambigu que pourrait jouer la puissance d'achat dans le fonctionnement des filières de production et de commercialisation, s'agissant notamment de la vente au détail des biens de consommation courante. Bien qu'elle demeure, pour la plupart des économistes, un facteur d'intensité concurrentielle, la puissance d'achat a également fait l'objet de plusieurs contributions académiques qui mettent en évidence des effets parfois partagés sur la concurrence et sur les incitations des fabricants à investir.

Cette note présente la pratique décisionnelle du Conseil de la concurrence (ci-après le « Conseil ») à l'égard de la puissance d'achat. Elle commence par rappeler que la puissance d'achat s'exerce le plus souvent au bénéfice des consommateurs finaux, notamment lorsque le degré de concurrence est plus élevé en aval qu'en amont. C'est également dans une telle configuration que les effets de la puissance d'achat sur l'investissement des producteurs sont les plus susceptibles de s'exercer dans un sens favorable aux consommateurs. Dès lors, dans la mesure où elle s'avèrerait nécessaire, la régulation de la puissance d'achat devrait surtout s'appuyer sur une action sur les structures de marché visant, à titre principal, à renforcer la concurrence sur le marché aval. Les contraintes réglementaires pesant sur les opérateurs disposant d'une puissance d'achat, lorsqu'elles ont effectivement été appliquées, ont entravé de manière significative le jeu concurrentiel.

La seconde partie de la note examine la possibilité que des entreprises utilisent leur puissance d'achat pour évincer des concurrents, élever des barrières à l'entrée et, plus généralement, mettre en œuvre des pratiques anticoncurrentielles. S'agissant de comportements affectant le marché amont, le Conseil a principalement sanctionné des pratiques concertées de boycott à l'encontre de certains fournisseurs. S'agissant de comportements affectant le marché aval, les pratiques examinées ont concerné l'acquisition d'avantages dans la concurrence, tels que rabais discriminatoires ou exclusivités de clientèle. Au regard de la pratique décisionnelle du Conseil de la concurrence, ces comportements demeurent relativement rares.

1. La régulation des effets économiques de la puissance d'achat passe par une action sur les structures de marché

L'exercice de la puissance d'achat peut entraîner une diminution des prix de revente aux consommateurs, mais a des effets plus ambigus sur l'incitation des producteurs à investir. Dans ces conditions, l'encadrement réglementaire s'avère moins adapté et efficace qu'une politique de concurrence axée sur une évolution des structures de marché.

1.1 Les effets pro-concurrentiels de la puissance d'achat

Lors d'une négociation entre un client et un fournisseur, les opportunités alternatives des deux parties en cas d'échec des discussions jouent comme des « points de menace ». La puissance d'achat trouve sa source dans l'asymétrie de ces points de menace. Concrètement, un grand acheteur peut obtenir des rabais de ses fournisseurs pour plusieurs raisons.

Le pouvoir de marché du distributeur sur le marché de la vente au détail est un premier déterminant de la puissance d'achat. En effet, le déréférencement des produits de ses fournisseurs entraînerait une diminution significative de leurs profits lorsque ceux-ci ne peuvent recourir à des débouchés alternatifs. A

l'inverse, le distributeur n'est guère affecté par l'échec de ces négociations lorsque sa position lui garantit de conserver une large clientèle.

Ceci ne signifie pas pour autant que la puissance d'achat n'existe que sur les marchés avals peu concurrentiels. En effet, indépendamment de la structure concurrentielle, la puissance d'achat d'un distributeur est généralement d'autant plus grande que les volumes achetés sont importants. Il peut ainsi bénéficier des économies d'échelle ou de gamme générées par ses volumes de commandes. Des rabais supplémentaires peuvent également lui être octroyés si, de par sa taille et son expérience du secteur, il est capable de s'intégrer vers l'amont, de faciliter l'entrée de nouveaux producteurs ou de faire appel à des producteurs concurrents existants, de mettre en place des procédures d'achat compétitives (mécanismes d'enchères par exemple), d'être mieux informé des évolutions de coûts et de demande, de s'abstraire du pouvoir de marché des marques de ses fournisseurs ou de déstabiliser une entente entre producteurs par des achats importants[1].

Les rabais qu'un tel distributeur est susceptible d'obtenir de ses fournisseurs peuvent être rétrocédés au consommateur final si la concurrence sur le marché aval est suffisamment vive. La puissance d'achat bénéficiera également au consommateur si les marchés de producteurs sont peu concurrentiels : en empêchant le producteur de fixer un prix de vente élevé, la puissance d'achat atténue le phénomène de double marginalisation et profite au consommateur, et ce même lorsque l'intensité de la concurrence en aval est limitée. Enfin, la puissance d'achat est susceptible de déjouer des pratiques anticoncurrentielles. A titre d'exemple, dans l'affaire dite « des jouets » (07-D-50), le Conseil avait constaté que les producteurs éprouvaient des difficultés à imposer leurs prix de revente aux distributeurs les plus importants, sauf à fixer le prix de revente à un niveau équivalent au seuil de revente à perte (cf. *infra*). Sur un plan empirique, les travaux sur la transmission aux consommateurs des rabais obtenus par les distributeurs demeurent rares, mais plusieurs études font état d'un taux de rétrocession significatif[2], quoique vraisemblablement variable en fonction de la nature des produits étudiés, de l'étendue de la concurrence sur les marchés aval et amont et de la structure des tarifications entre les producteurs et les entreprises clientes.

Compte tenu de ces éléments, le Conseil de la concurrence a estimé que « sur le marché aval, la puissance d'achat des entreprises de la grande distribution est en général considérée comme favorable aux consommateurs dès lors que la concurrence qui s'exerce en aval conduit les distributeurs à répercuter dans les prix de détail les concessions qu'ils obtiendront de leurs fournisseurs »[3]. Cette analyse a notamment trouvé à s'appliquer en contrôle des concentrations, où, à plusieurs reprises, le Conseil a estimé qu'une opération était moins susceptible de produire des effets défavorables à la concurrence si les entreprises clientes disposent d'une puissance d'achat à même de contrer une augmentation unilatérale des prix ou des

1 Sur les différents déterminants de la puissance d'achat, cf. Inderst et Mazzaroto (2006).

2 Cf., par exemple, sur données américaines, Besanko et al. (2005), "Own-Brand and Cross Brand Retail Pass-Through", *Marketing Science*, 24, 1, pp. 123-137 ; sur données portuguaises, J. Rodrigues (2006), "Buyer power and pass-through of large retailing groups in the Portuguese food sector", mimeo., Autoridade da Concorrencia ; sur données françaises relatives à la filière de la tomate et à celle de l'endive, M. Simioni (2001), « Price linkage and transmission between shippers and retailers in the French fresh vegetable channel »», *INRA Cahier de recherche 2001-06*. A titre d'illustration, les estimations présentées par cette dernière étude montrent que les différentiels de prix entre les prix départs et les prix de détail sont à peu près constants, c'est à dire que les distributeurs répercutent intégralement et rapidement (dans un délai de l'ordre d'une semaine) les variations de leurs prix d'achat dans leurs prix de vente aux consommateurs.

3 Avis 00-A-02 relatif à un projet de réforme de l'ordonnance de 1986 visant notamment à accroître la protection des fournisseurs face à la puissance d'achat de la grande distribution.

comportements d'éviction[4]. C'est pour ces raisons que, dans son avis relatif à un projet de réforme de la régulation des relations commerciales, le Conseil a alerté les pouvoirs publics sur la dégradation de la concurrence qui pourrait résulter de dispositions rigidifiant les relations commerciales et empêchant l'exercice de la puissance d'achat[5].

1.2 Les effets ambigus de la puissance d'achat sur l'investissement des offreurs

Comme d'autres autorités de concurrence[6], le Conseil de la concurrence est sensible au risque que la puissance d'achat des entreprises clientes puisse limiter les incitations ou la capacité des fournisseurs à investir dans l'amélioration de leurs produits. A titre d'exemple, dans son avis relatif à l'organisation économique de la filière « fruits et légumes »[7], le Conseil a estimé que, si le partage des profits entre l'amont et l'aval de la filière fruits et légumes ne relève pas *a priori* de la politique de concurrence, dont la mission n'est pas d'intervenir dans la répartition des surplus entre les opérateurs, « *la fragilisation du secteur amont via le pouvoir de marché proche de l'oligopsone de l'aval est susceptible, à moyen terme, d'entraîner une réduction de l'offre ou de sa diversité, nuisible au bien-être collectif. De plus, en s'octroyant une très forte part du profit de la chaîne économique, les distributeurs pourraient réduire la part de leurs fournisseurs jusqu'à limiter les investissements amont en deçà du niveau nécessaire au bon fonctionnement de la filière.*». Cette analyse rejoint le constat plus général formulé dans l'avis 00-A-02 relatif à un projet de réforme de la régulation des relations commerciales : « *le sens actuel de l'évolution des rapports entre producteurs et distributeurs et le déséquilibre croissant des forces en présence pourraient conduire à des abus de nature à compromettre la rentabilité d'entreprises qui en seraient victimes, à les contraindre à réduire leurs dépenses d'investissement, de recherche et de développement, à réduire leur capacité d'innovation et, par conséquent, de nature à restreindre à terme la concurrence.* ».

Les effets concrets de la puissance d'achat sur les marchés de l'approvisionnement demeurent toutefois mal connus, peu d'études empiriques ayant été publiées sur le sujet. Au vu des études théoriques[8], ces effets peuvent jouer en sens contraires et leur impact net est donc ambigu. L'étendue de la concurrence en amont et en aval de la filière est notamment susceptible de jouer un rôle déterminant :

- En amont, il peut être présumé que des producteurs sur un marché peu concurrentiel n'ont que de faibles incitations à investir. En accroissant la concurrence sur ce marché amont, la puissance d'achat des distributeurs peut développer les incitations à investir des producteurs, soucieux de regagner un certain pouvoir de négociation vis-à-vis des distributeurs[9]. Sur un marché amont concurrentiel, en revanche, les effets de la puissance d'achat peuvent s'avérer plus ambigus. La diminution des marges et de la capacité de financement des producteurs à un niveau tel que des

4 Avis 98-A-09 (Coca-Cola-Orangina), 04-A-16 (SEB-Moulinex), 04-A-20 (Arc). Les grandes enseignes de vente au détail sont réputées disposer d'une puissance d'achat potentiellement importante en raison de leur poids dans le chiffre d'affaires de leurs fournisseurs et de la concentration de ce secteur. Pour évaluer ensuite si cette puissance d'achat peut effectivement être exercée envers les fabricants d'une catégorie de produits donnée, le Conseil tient notamment compte du poids de la grande distribution dans le chiffre d'affaires de l'entité fusionnée et, inversement, du poids de l'entité fusionnée dans le chiffre d'affaires de ces enseignes, de l'attachement du consommateur final aux marques de l'entité fusionnée, de la variété des référencements sur les linéaires pour la catégorie de produits étudiés, de la concurrence à laquelle sont soumises ces enseignes, qui les inciterait à changer de fournisseur en cas de hausse des prix.

5 Cf., notamment, l'avis 00-A-02 précité.

6 Cf., par exemple, FTC (2001) et Commission européenne (1999).

7 Avis 08-A-07.

8 Cf. Chen (2004), Inderst et Wey (2005), Inderst et Schaffer (2004), Montez (2005), Batigalli et al. (2006).

9 Cf. Indest et Wey (2004), Montez (2005).

dépenses d'investissement importantes deviendraient difficilement envisageables doit être mise en parallèle avec les volumes importants que peuvent écouler de grands distributeurs[10].

- Les incitations des distributeurs à promouvoir l'investissement de leurs fournisseurs doivent également être prises en compte. En effet, si la concurrence en aval est suffisamment forte, l'investissement réalisé par les fournisseurs d'une enseigne constitue un élément important de sa compétitivité. Les grands distributeurs auraient d'autant plus d'intérêt à promouvoir, par le biais de contrats adaptés, l'investissement des producteurs que leur puissance d'achat leur permet de s'attribuer une part importante du surplus généré par ces investissements.

Ces différentes considérations permettent d'expliquer que, dans l'avis 00-A-02 précité, le Conseil souligne que « sans nier que des fournisseurs individuels puissent rencontrer des difficultés, voire disparaître, les autorités de la concurrence ne considèrent pas que la "puissance d'achat" acquise par les grands distributeurs constitue **à elle seule** une menace pour la concurrence sur les marchés d'amont. ». En outre, l'effet de la puissance d'achat sur les incitations à investir, à supposer qu'il s'avère négatif, doit être mis en parallèle avec son impact sur les prix de revente aux consommateurs, d'autant plus important que la concurrence sur les marchés amonts est limitée et que la concurrence sur les marchés avals est vive. Au final, l'effet défavorable de la puissance d'achat sur le bien-être des consommateurs pourrait se limiter aux marchés amonts dont la structure très concurrentielle limite d'emblée les marges des producteurs et aux marchés avals où la concurrence entre les distributeurs demeure insuffisante.

En tout état de cause, pour remédier à d'éventuels effets adverses de la puissance d'achat, une action sur les structures de marché (regroupement des producteurs les plus fragiles, intensification de la concurrence en aval, par exemple par un abaissement des barrières à l'entrée) démontrerait probablement une plus grande efficacité que le seul contrôle des comportements bilatéraux. En effet, comme le rappelle le Conseil dans son avis 00-A-02, des dispositions juridiques ciblées comportent nécessairement des lacunes et, en tout état de cause, les victimes des comportements abusifs, craignant un éventuel déréférencement de leurs produits, hésitent à porter plainte. Le recours à une intervention réglementaire plus dissuasive, par le biais de dispositifs juridiques élargis, empêcherait la puissance d'achat d'exercer son rôle de contre-pouvoir de marché et pénaliserait une concurrence qui, tant en aval qu'en amont, demeure dans nombre de filières l'un des principaux moteurs de l'investissement des producteurs. A ce titre, les exemples de la législation dite « Galland » ou de l'interdiction de discriminer montrent que la limitation de la concurrence opérée dans le but de pacifier les relations verticales n'a pas eu les résultats escomptés.

1.3 Les risques associés à un encadrement réglementaire de la puissance d'achat

En dépit des effets souvent favorables de la puissance d'achat sur la concurrence, le législateur français a, au regard d'autres objectifs de politique économique, longtemps cherché à limiter son exercice. Visant des comportements concurrentiels bilatéraux, les dispositions utilisées figuraient principalement au titre IV du livre IV du Code de commerce[11] et n'étaient donc pas censées affecter la concurrence sur les

10 L'effet de la puissance d'achat sur les investissements des producteurs peut également être compensé par son effet sur l'investissement des distributeurs (amélioration des chaînes d'approvisionnement, développement de nouvelles surfaces commerciales, etc.). L'argument selon lequel la puissance d'achat des distributeurs doit être régulée car elle entraîne une diminution des marges des producteurs, qui n'auraient plus les moyens de financer leurs investissements, implique en outre que le régulateur est disposé à créer une inefficience sur le marché des produits pour compenser une inefficience sur celui du financement des entreprises : remédier directement aux difficultés de financement des entreprises pourrait s'avérer être un remède économiquement plus efficace.

11 Cf., notamment, son article L.442-6, qui proscrit la coopération commerciale fictive, le déséquilibre manifeste des obligations des parties à la relation commerciale, l'obtention d'avantages sans engagement sur des volumes d'achats proportionnels ou des services de coopération commerciale, la rupture brutale des

marchés. Mais la combinaison de l'interdiction de discriminer et du seuil de revente à perte issu de la loi Galland a eu pour effet d'atténuer de manière très significative la concurrence sur les filières concernées.

Plus précisément, si la législation française prohibait la revente à perte depuis 1963, la législation dite « Galland » votée en 1996 a accru le seuil de revente à perte en le définissant à partir du seul prix de facturation net des remises quantitatives acquises à la date de la transaction. Les remises conditionnelles et la rémunération des services de coopération commerciale (mises en avant des produits dans les linéaires, présence des produits dans les catalogues de l'enseigne, etc.) ne pouvaient donc plus être incluses dans le seuil de revente à perte. Cette législation s'est juxtaposée à celle, bien antérieure, interdisant à un fournisseur de pratiquer des conditions de vente discriminatoires entre ses distributeurs, lorsqu'elles ne sont pas justifiées par des contreparties réelles et proportionnées. Ces deux dispositions avaient notamment pour objectif de protéger des effets de la puissance d'achat des grands distributeurs les fournisseurs et le petit commerce de détail.

Elles ont toutefois eu pour principale conséquence une hausse des prix des produits de grande consommation, notamment des produits alimentaires[12]. Parallèlement, le niveau des « marges arrière », c'est-à-dire les différentes ristournes octroyées aux distributeurs et la coopération commerciale facturée aux fournisseurs, a également cru de manière rapide[13], témoignant de l'échec de ces lois à encadrer l'exercice de la puissance d'achat. Ces évolutions sont toutefois conformes à l'analyse économique des relations verticales : combiné à l'interdiction de discriminer, le nouveau seuil de revente à perte introduit par la loi Galland a permis aux fournisseurs d'imposer des prix de revente uniformes à l'ensemble des distributeurs. Les producteurs en ont profité pour accroître leurs prix de vente et ont acheté l'agrément des entreprises clientes par le biais de « marges arrière », qui, en vertu de la définition du seuil de revente à perte introduit par la loi Galland, ne pouvaient être rétrocédées aux consommateurs[14].

Le Conseil de la concurrence a ainsi sanctionné plusieurs pratiques de prix de revente imposés s'appuyant sur la législation Galland : sur les marchés de la distribution de jouets (décision 07-D-50), de calculatrices (03-D-45) et de vidéocassettes (05-D-70). Dans ces différentes affaires, le Conseil a constaté que les entreprises en cause cherchaient à facturer des services fictifs de coopération commerciale ou considéraient des remises acquises (susceptibles d'être déduites du seuil de revente) comme conditionnelles (auquel cas ces remises ne peuvent être déduites du seuil de revente à perte), initiatives visant d'une part à élever artificiellement le seuil de revente à perte (et donc les prix au consommateur) et d'autre part à dédommager les distributeurs les plus puissants de la perte afférente de volumes d'affaires.

Prenant acte de l'évolution des prix de détail et des pratiques anticoncurrentielles dont la législation Galland fut le support, la loi dite « Chatel » de janvier 2008 introduit un nouveau seuil de revente à perte correspondant au prix facturé, net de tous les avantages financiers concédés par le producteur à son

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relations commerciales ou la menace d'une telle rupture aux fins d'obtenir des avantages commerciaux, les délais de paiement abusifs, les remises, rabais et ristournes rétroactives, le paiement d'un droit d'accès préalable à la passation de toute commande, etc.

12 Ainsi, alors que les prix alimentaires progressaient plus lentement que l'indice général des prix à la consommation avant 1997, l'inverse est constaté après l'introduction de la loi Galland : après avoir chuté de 8% entre 1990 et 1997, le niveau des prix alimentaires corrigé de l'inflation a retrouvé en 2002 son niveau de 1990. Cette évolution contraste également avec celle constatée dans les autres pays européens, qui connaissent, de 1996 à 2001, une diminution de leurs prix alimentaires (Cf. Allain et al., 2008).

13 De 22% du prix d'achat des produits en 1999, elles passent à 33,5% en 2005 et 37% en 2006 (source : ILEC).

14 Cf. l'avis 04-A-18 (UFC) pour la position détaillée du Conseil à l'égard de cette législation, Rey et Vergé (2004) pour une formalisation théorique de ses différents effets et Biscourp, Boutin et Vergé (2008) pour une validation empirique.

acheteur-revendeur. Cette loi a été suivie de celle dite de « modernisation de l'économie », votée en août 2008, qui lève l'interdiction de discriminer et permet ainsi aux producteurs et à leurs entreprises clientes de négocier leurs prix librement, sans qu'il ne leur soit plus nécessaire de justifier par des contreparties chacun des avantages tarifaires consentis à tel ou tel partenaire. Les effets attendus de cette nouvelle législation incluent le fait de permettre aux distributeurs de s'opposer à des hausses tarifaires injustifiées, d'accroître la concurrence en amont et en aval des filières et de faciliter la répercussion au consommateur des rabais obtenus par les distributeurs.

1.4 L'importance d'une action sur les structures de marché

Les effets positifs de la puissance d'achat sont amplifiés lorsqu'existe une concurrence forte entre les entreprises clientes. D'une part, cette concurrence favorise la rétrocession au consommateur final des réductions de prix concédées par les producteurs aux distributeurs. D'autre part, elle diminue le risque que cette puissance d'achat entraîne un assèchement de l'investissement des producteurs, les distributeurs soumis à une forte concurrence devant veiller à présenter des référencements attractifs aux consommateurs. Parallèlement, la puissance d'achat serait susceptible de produire des effets adverses sur l'investissement lorsque les offreurs ne disposent que de marges très faibles et n'ont pas une importante capacité d'investissement. Face aux difficultés et aux risques que présente un encadrement réglementaire de la puissance d'achat, une grande attention est portée par le Conseil à la concurrence aux marchés de la vente au détail et de l'approvisionnement et, par conséquent, à la structure de ces marchés.

1.4.1 Sur les marchés de la vente au détail

Le renforcement de la concurrence entre les distributeurs passe en premier lieu par un abaissement des barrières à l'entrée. Dans un objectif de protection du commerce de proximité, la réglementation dite « Raffarin » introduite en 1996 avait contraint les entreprises désireuses d'ouvrir de nouvelles surfaces commerciales supérieures à 300m² (plutôt que 1000m² auparavant) à obtenir une autorisation d'implantation, délivrée au terme d'un examen prenant principalement en compte « l'équilibre entre les différentes formes de commerce ». Dans son avis 07-A-12, le Conseil de la concurrence a émis d'importantes critiques envers les réglementations dites « Royer » et « Raffarin ». En effet, ces restrictions à l'entrée de nouveaux magasins n'ont eu qu'un impact marginal sur la protection des commerces de proximité, mais ont significativement entravé l'implantation de grandes surfaces[15], notamment étrangères et/ou de maxi-discompteurs. Elles ont en outre conduit les opérateurs existants à se développer par le rachat de surfaces existantes, d'un chiffre d'affaires inférieur aux seuils de notification des opérations de concentration, entraînant ainsi une diminution de la concurrence sur les zones de chalandise. Issus de la loi de modernisation de l'économie votée en août 2008, l'élévation du seuil de notification des projets d'implantation de surfaces commerciales à 1000m² et le renforcement des pouvoirs de l'autorité de la concurrence sur ce secteur[16] devraient dans les prochaines années accroître l'intensité de la concurrence entre les distributeurs.

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15 Ainsi, le nombre annuel moyen d'ouverture de grandes surfaces est passé de 379 entre 1986 et 1994 à 162 entre 1995 et 2003, cette diminution concernant notamment les maxi-discompteurs, alors en plein développement.

16 D'une part, les seuils de notification des opérations d'acquisition et de concentration dans le secteur du commerce de détail sont abaissés: les rachats de magasins totalisant un chiffre d'affaires supérieur à 15 millions d'euros - à comparer aux 6 millions d'euros de chiffre d'affaires d'un magasin de taille moyenne – devront à présent être notifiés, dès lors que le chiffre d'affaires total des opérateurs impliqués excède 75 millions d'euros. D'autre part, l'autorité de concurrence dispose désormais de la faculté d'ordonner des injonctions structurelles, telles qu'une mise en vente de certains magasins, lorsque des abus de position dominante ou de dépendance économique d'une entreprise du secteur de la vente au détail ont été sanctionnés de façon répétée sans qu'il n'ait été mis un terme aux comportements visés.

Le Conseil de la concurrence est également très attentif à préserver la concurrence entre les entreprises clientes dans le cadre du contrôle des concentrations. Ainsi, même si la puissance d'achat des distributeurs est susceptible de s'accroître lorsque ceux-ci se regroupent, les effets d'efficience éventuellement induits ne sont considérés qu'avec beaucoup de prudence lorsque l'opération entraîne parallèlement une restriction de la concurrence sur le marché aval. A titre d'exemple, lors de l'examen des opérations Cafom-Fincar (07-A-06) et Canal Plus-TPS (06-A-13), le Conseil a évalué la possibilité d'obtention d'avantages tarifaires (compte tenu notamment du pouvoir de négociation des offreurs), la forme que peuvent prendre ces avantages (les avantages tarifaires ayant plus de chances d'être rétrocédés aux consommateurs qu'un abaissement des coûts fixes du distributeur par le biais de droits de référencement accrus), le maintien d'une concurrence suffisante entre les entreprises clientes (pour que le consommateur final bénéficie effectivement de ces rabais), et la nécessité de l'opération pour la réalisation des gains allégués – la création d'une centrale d'achat commune, qui n'entraîne pas de restriction de concurrence sur le marché aval, étant également à même d'accroître la puissance d'achat des distributeurs. Sur ces différents critères, les circonstances des opérations mentionnées ne permettaient pas en l'occurrence de démontrer un accroissement de la puissance d'achat susceptible de bénéficier au consommateur et les gains d'efficience allégués n'ont pas été pris en compte ni dans l'avis final, ni dans la définition des remèdes.

1.4.2 Sur les marchés de l'approvisionnement

Une réduction de la concurrence sur le marché amont de l'approvisionnement ou un déséquilibre trop marqué des pouvoirs de négociation sur ce marché pourrait avoir pour répercussion de réduire les incitations à investir des producteurs et, plus généralement, de réduire l'intensité de la concurrence. Le Conseil de la concurrence est donc attentif à ce que la structure de ce marché demeure de nature à garantir un fonctionnement concurrentiel des filières.

Le contrôle des concentrations entre des entreprises clientes est le premier vecteur de cette action sur les structures des marchés d'approvisionnement. Lors de l'examen de ces opérations, le Conseil de la concurrence évalue notamment dans quelle mesure le rapprochement pourrait entraver le bon fonctionnement de la filière en accordant aux entreprises concernées une position prééminente sur ce marché ou en mettant les fournisseurs en situation de dépendance économique. Parmi les critères pris en compte par le Conseil figurent notamment la part de marché de la nouvelle entité sur le marché aval, son poids dans le chiffre d'affaires de ses fournisseurs, la part de marché et la notoriété des marques de ces derniers. A titre illustratif, dans le cas de l'acquisition par la société Casino des enseignes Franprix et Leader Price[17], le Conseil a considéré que le poids limité des achats de ces enseignes dans le chiffre d'affaires de leurs fournisseurs n'était pas de nature à conférer au nouveau groupe une position prééminente sur leurs marchés d'approvisionnement. En outre, dans le cas de Casino et de Franprix, les fournisseurs étaient essentiellement des grandes marques à même de bénéficier de circuits de distribution alternatifs. Si l'enseigne Leader Price faisait quant à elle exclusivement appel à des PME-PMI pour lesquelles le chiffre d'affaires réalisé avec elle représentait une part prépondérante de leur chiffre d'affaires total, les réponses à un questionnaire effectué lors de l'examen du projet d'acquisition ont montré qu'une part significative de ces fournisseurs s'attendait à une augmentation de leurs ventes à la nouvelle entité. Elles montraient également qu'un durcissement éventuel des conditions de négociation, estimé probable par seulement une minorité de fournisseurs, n'était pas de nature à entraîner une rupture des relations commerciales.

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17 Avis 98-A-06 (Casino-Franprix-LeaderPrice). Cf. également l'avis 96-A-11 (Auchan-Docks de France). Il s'agit là des deux derniers avis rendus, respectivement en 1998 et 1996, concernant des opérations de concentration dans le secteur de la grande distribution. Le Conseil n'a pas été saisi par le Ministre des opérations Casino-Monoprix, réalisée en 2000, et Carrefour-Treff, réalisée en 2003. Son analyse de l'opération Carrefour-Promodes n'a porté que sur le marché aval.

Comme le montre l'avis relatif au projet d'acquisition par les groupes Vivendi Universal et Canal Plus des sociétés TPS et Canal Plus Satellite (avis 06-A-13) sur le marché de la télévision payante, cette grille d'analyse peut s'appliquer à d'autres secteurs que celui de la grande distribution. Pour cette opération, la position de quasi-monopsone de la nouvelle entité sur les marchés français de l'approvisionnement en contenus audiovisuels incitait a priori à une certaine prudence. Toutefois, les détenteurs de droits se trouvaient dans des situations de marché nettement distinctes. Ainsi, les groupes détenant les droits de diffusion de films américains ou de certains événements sportifs pouvaient opposer à la nouvelle entité un pouvoir de négociation très significatif, tiré de la place marginale du marché français dans leur chiffre d'affaires total ou de leur propre position de monopole sur le marché de la vente de droits. En revanche, sur le marché de l'approvisionnement en films français récents, le caractère atomisé de l'offre et sa dépendance à l'égard du financement des chaînes de télévision auraient en effet permis à la nouvelle entité en position de quasi-monopsone d'imposer ses prix ou des restrictions verticales (cf. *infra*) et de façonner ainsi, dans une large proportion, l'offre de films proposée aux consommateurs. Face à ces effets concurrentiels, le Conseil a proposé des remèdes visant à faciliter l'entrée d'éditeurs de chaînes alternatifs (limitation de la durée des durées des contrats avec la nouvelle entité et de l'octroi d'exclusivités sur ces droits) et à remettre ainsi en cause la position de monopsone du nouvel opérateur.

Dans le prolongement de cette analyse, saisi de la question de l'organisation économique de la filière « fruits et légumes »[18], le Conseil a souligné que, face à une demande très concentrée et aléatoire, le caractère atomisé de l'offre, son caractère aléatoire et sa faible élasticité à court terme entraînaient un rapport de force déséquilibré entre l'amont et l'aval et une forte volatilité des prix à même de réduire le bon fonctionnement de la filière**.** Tout en rappelant que cette situation appelle un renforcement de la concurrence entre les enseignes, le Conseil a également estimé qu' « *il peut s'avérer bénéfique d'encourager les producteurs à se regrouper [dans les limites imposées par le respect du droit de la concurrence*[19]*] afin de peser davantage dans les relations commerciales, ce que permettent les associations d'organisations de producteurs (AOP) de commercialisation.* ». De même, tout en considérant que ces AOP de commercialisation restent la solution la plus simple au déséquilibre des pouvoirs de négociation, le Conseil a estimé que des échanges d'informations au sein d'« AOP de gouvernance » ayant pour objet de limiter le caractère aléatoire de l'offre contribueraient également à rééquilibrer le pouvoir de négociation avec l'aval. Compte tenu du caractère atomisé de l'offre, des difficultés que rencontrerait une AOP de gouvernance à être reconnue si elle est en position dominante, de l'absence de barrière à l'entrée, et de l'existence d'un service de diffusion d'informations précises en accès libre, le Conseil a en effet estimé que de tels échanges d'informations entre entreprises ne seraient pas générateurs d'effets anticoncurrentiels, dès lors qu'il ne visent pas à diffuser des prix recommandés ou obligatoires.

2. La répression des comportements anticoncurrentiels basés sur la puissance d'achat

La puissance d'achat peut parfois être utilisée pour mettre en œuvre des pratiques susceptibles de limiter la concurrence, soit sur les marchés amonts, en portant atteinte aux producteurs sur ces marchés, soit sur les marchés avals, en avantageant le(s) distributeur(s) détenteur(s) de puissance d'achat et en faussant ainsi le jeu de la concurrence. La forme et les effets de telles pratiques, au demeurant relativement rares, sont d'abord étudiés sur le marché amont (2.1.), puis sur le marché aval (2.2.).

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18 Avis 08-A-07.

19 Le Conseil a notamment rappelé que selon le règlement 1182/2007 sur les organisations communes de marché (OCM), une AOP ne peut être reconnue par un État membre que « *si l'association ne détient pas une position dominante sur un marché déterminé, à moins que cela ne soit nécessaire à la poursuite des objectifs visés à l'article 33 du traité* » et précisé que cette possibilité de reconnaissance d'une AOP en position dominante sur son marché ne devait être utilisée que de manière exceptionnelle.

2.1. Pratiques des entreprises clientes affectant le marché amont

Pour contenir les effets potentiellement négatifs de la puissance d'achat sur l'investissement des producteurs, le législateur a le plus souvent choisi de compléter le titre IV du livre IV du code de commerce, c'est à dire les règles visant les comportements bilatéraux entre entreprises. Néanmoins, l'autorité de la concurrence a vocation à contrôler l'utilisation de la puissance d'achat lorsqu'elle affecte défavorablement la concurrence sur un marché. Dans ce cadre, les manifestations de la puissance d'achat dont le Conseil de la concurrence a été saisi concernent, à titre principal, la rupture des relations commerciales et la renégociation sans contrepartie de conditions commerciales, notamment à la suite d'opérations de concentrations entre distributeurs. Le Conseil, comme la Commission de concurrence qui l'avait précédé, estiment que « *le référencement comme le déréférencement ne sont pas a priori illicites et les difficultés certaines qu'ils peuvent faire subir au producteur en cause ne sauraient en elles-mêmes être qualifiées d'abus***. »** Ne peuvent donc être sanctionnées au regard du droit de la concurrence que les pratiques de déréférencement ou de renégociation ayant pour objet ou pour effet potentiel de restreindre la concurrence, en s'appuyant soit sur des abus de position dominante ou de dépendance économique, soit sur des actions concertées.

2.1.1 Les abus de position dominante et de dépendance économique

Selon les termes de l'art. L.420-2 du code de commerce, « la rupture de relations commerciales établies, au seul motif que le partenaire refuse de se soumettre à des conditions commerciales injustifiées », caractérisées notamment par l'absence de contreparties offertes à la renégociation de conditions commerciales, constitue, le cas échéant, un abus de position dominante. Cela étant, le distributeur le plus important d'un marché dispose rarement d'une part de marché telle qu'il puisse être qualifié de dominant, sauf lorsque ce marché est étroitement cloisonné, sur une base géographique par exemple.

Notamment pour cette raison, cette disposition a été complétée dès 1986 par une disposition sur les abus de dépendance économique, permettant au Conseil de contrôler des comportements bilatéraux d'opérateurs qui, sans nécessairement être en position dominante, sont en raison de leur poids sur le marché des partenaires obligés, soit de leurs fournisseurs, soit de leurs clients. Selon l'article L.420-2, ces abus peuvent notamment consister en refus de vente, en ventes liées, en pratiques discriminatoires ou en accords de gamme, mais ils ont plus fréquemment consisté en une rupture brutale des relations commerciales, par le biais notamment d'une forte hausse ou baisse des prix d'achat ou de vente. Chargé de sanctionner les abus de dépendance économique dès lors que ceux-ci sont susceptibles d'affecter le fonctionnement ou la structure de la concurrence, le Conseil de la concurrence a précisé la notion de dépendance au moyen de quatre conditions cumulatives : la forte notoriété de l'entreprise dont dépend le plaignant ; sa part de marché importante ; sa part importante dans le chiffre d'affaires du dépendant ; enfin, et surtout, l'absence, pour le dépendant, de situation alternative.

A titre d'illustration, dans l'affaire 07-D-18, un producteur de pommes à cidres a saisi le Conseil des pratiques de renégociation des accords d'approvisionnement d'un important cidrier. Le Conseil a relevé toutefois qu'en dépit du fort pouvoir de négociation dont disposaient les cidriers à la suite de multiples opérations de concentration, le producteur de pommes à cidre disposait de solutions alternatives équivalentes, telles que les coopératives de collecte ou les exportations via des négociateurs indépendants. En outre, aucun abus, sous la forme d'une rupture brutale et unilatérale des relations contractuelles, n'a pu être constaté, les contrats signés entre le groupe cidrier et le plaignant ayant été exécutés jusqu'à leur échéance.

Plus généralement, une certaine prudence s'est imposée dans le recours à cette qualification qui, sur un total d'une quarantaine de saisines, n'a finalement été retenue que sept fois. En effet, au regard de la pratique décisionnelle, cette disposition tend à accorder à une entreprise en situation de dépendance un

droit particulier à une plus grande stabilité dans ses relations commerciales, et ce alors même que les renégociations des accords commerciaux participent du fonctionnement efficace et concurrentiel d'un marché et d'une économie. Par conséquent, lorsqu'il est saisi d'un abus de dépendance économique, le Conseil veille à vérifier d'une part qu'il existe bien une atteinte à la concurrence, établie par exemple lorsque la pratique en cause est susceptible de porter atteinte à la survie économique du dépendant ou de générer des désavantages significatifs dans la concurrence, d'autre part que le plaignant ne dispose d'aucune autre solution alternative que celle proposée par l'entreprise dont il allègue être dépendant – situations qui, en pratique, demeurent rares. De fait, les abus de dépendance allégués mettent plus fréquemment en cause les fournisseurs que les distributeurs - et n'ont même jamais concerné un opérateur de la grande distribution - dans la mesure où un distributeur particulier est rarement un débouché indispensable à un fournisseur.

2.1.2 Les actions concertées visant à renforcer la puissance d'achat

Les entreprises clientes peuvent choisir de combiner leur puissance d'achat aux fins d'obtenir des conditions de vente plus avantageuses de la part de leurs fournisseurs. De tels regroupements, par exemple au sein d'une centrale de référencement ou d'achat, ne sont pas en eux mêmes prohibés. En revanche, les négociations qui sont alors conduites ne doivent pas s'appuyer sur des pratiques ayant pour objet ou pour effet potentiel de restreindre le jeu de la concurrence. En particulier, les « boycotts », qu'ils soient organisés par des centrales d'achat ou de référencement de distributeurs indépendants[20] ou directement par des entreprises clientes[21], constituent des actions concertées limitant artificiellement l'accès des fournisseurs visés au marché final et la fixation des prix par le libre jeu du marché. Dans ces affaires, le Conseil a donc dû rappeler que les distributeurs indépendants membres d'une centrale doivent demeurer libres de s'approvisionner en produits auprès de fournisseurs non référencés.

Le Conseil a en revanche conclu à des non-lieux dans deux autres affaires invoquant également une entente entre des distributeurs visant à opérer un transfert de marges de l'amont vers l'aval de la filière[22]. Les pratiques alléguées revêtaient la forme d'exigences de renégociations de contrats de commercialisation et de ristournes supplémentaires suite à la création d'une union de coopératives ou d'une centrale de référencement commune à deux grands distributeurs. Sans se prononcer sur la licéité de ces pratiques au regard de certaines dispositions du titre IV pour l'application desquelles il n'est pas compétent, le Conseil a estimé qu'en l'absence de tentative de boycott et d'alignement des conditions commerciales des membres des groupements de cette union, ces pratiques de renégociation participaient d'un fonctionnement concurrentiel du marché, compte tenu notamment des informations progressivement obtenues par chacun

20 Décisions 99-D-01 (Distri club medical) et 94-D-60 (Lessives).

21 Décision 04-D-56 (commissaires-priseurs toulousains).

22 Décisions 03-D-11 (Opera) et 05-D-62 (Lucie). Dans l'affaire 95-D-34 (Rallye), le Conseil a été saisi de pratiques similaires (renégociation des conditions de vente et demandes de participation publicitaires faites à l'occasion de cette opération de concentration) sous le grief d'ententes entre le distributeur et ses fournisseurs. Toutefois, ce grief n'a pas été retenu par le Conseil, la première pratique n'ayant pas revêtu un caractère général suffisant et la seconde ayant été assortie de contreparties réelles. Cette décision a été réformée par la Cour d'Appel, qui dans son arrêt, considère « *qu'à la différence d'une négociation bilatérale qui, sauf hypothèses d'abus de position dominante ou de dépendance économique non visées en l'espèce, doit être considérée comme l'exercice normal d'une négociation commerciale entre un vendeur et un acheteur, la généralisation à tous les fournisseurs ou à une partie substantielle d'entre eux, d'une offre indifférenciée de conditions de renégociation, a pour objet ou pour effet d'entraîner leur adhésion à une harmonisation des pratiques et à une uniformisation des conditions de vente, partant, de neutraliser ou d'affaiblir le risque concurrentiel* ». Cet arrêt a cependant été cassé par la Cour de cassation dans un arrêt du 7 avril 1998, au motif qu'il n'était pas établi que les parties avaient librement consenti à l'entente en vue de limiter l'accès au marché ou à la libre concurrence.

des opérateurs sur les conditions accordées aux fournisseurs et aux distributeurs concurrents. En outre, au vu des parts de marché des distributeurs concernés[23], de la notoriété des marques des fournisseurs concernés par ces négociations, de la fréquente obtention de contreparties par les fournisseurs en échange des ristournes accordées et du caractère limité des déréférencements observés, le Conseil a estimé que les distributeurs concernés n'avaient pas restreint l'accès de leurs fournisseurs concernés au marché aval.

2.2 Pratiques des entreprises clientes affectant le marché aval

En permettant à son détenteur d'influencer les conditions commerciales en sa faveur et au détriment de ses concurrents, la puissance d'achat est également susceptible de restreindre la concurrence entre les entreprises clientes.

2.2.1 Puissance d'achat et exclusivité de clientèle

Des distributeurs peuvent utiliser leur puissance d'achat afin d'imposer à leurs fournisseurs des exclusivités de clientèle susceptibles de diminuer l'intensité concurrentielle sur le marché aval. Ainsi, dans sa décision 07-D-44 (GIE Ciné Alpes), le Conseil a établi qu'un GIE regroupant différents exploitants de salles de cinéma, utilisait sa position de monopole sur certaines zones de chalandises pour subordonner (ou menacer de subordonner) la programmation de films dans les zones où il était en monopole à l'octroi de droits en exclusivité ou de priorité dans les zones où il était en concurrence avec d'autres exploitants. Dans cette affaire, le Conseil a montré que la position de monopole détenue par le GIE sur certaines zones de chalandises était suffisante pour le doter d'une position dominante sur les marchés correspondants de l'approvisionnement[24]. La position de « *gatekeeper* » détenue par le GIE sur plusieurs zones de chalandise lui permettait donc de détenir une position dominante sur le marché de l'approvisionnement et d'exiger des distributeurs des exclusivités alors même que l'attrait du produit concerné aurait dû doter ces derniers d'un pouvoir de négociation significatif. L'effet anticoncurrentiel de ces pratiques était en outre attesté de deux façons. Premièrement, le GIE se servait de sa position de monopole sur certaines zones de chalandises pour obtenir un avantage concurrentiel sans rapport avec ses mérites dans les zones de chalandises où il était en concurrence avec d'autres exploitants. Deuxièmement, les films concernés par ces exclusivités étaient des films à grand succès, si bien que le GIE pouvait en tirer des avantages significatifs dans la concurrence qui l'opposait aux autres exploitants.

Le pouvoir de négociation associé à la puissance d'achat n'est pas toujours si important que l'entreprise cliente puisse se passer de toute concession financière à son fournisseur, notamment lorsque le produit visé crée un important avantage dans la concurrence et que, de fait, son producteur dispose donc lui aussi d'un certain pouvoir de négociation. C'est par exemple ce que montrent les pratiques constatées à

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23 15% du marché de l'approvisionnement pour Lucie et de 11% à 14%, selon les catégories dans le cas d'Opera.

24 Le marché amont de l'acquisition de droits est défini, comme celui de l'exploitation des films, sur des zones locales de chalandise. En effet, « p*our les distributeurs qui veulent maximiser leurs profits, une zone [de chalandise] n'est pas substituable à une autre. Le distributeur qui ne pourra pas placer une copie de son film dans une zone monopolistique, pourra placer cette copie dans une autre zone de chalandise mais il retirera de ce placement des bénéfices bien inférieurs à ceux qu'il aurait pu retirer s'il avait pu placer ses copies dans deux villes distinctes.* ». Sur ces zones locales, la position de l'entreprise sur le marché amont dépend étroitement de sa position en aval : « *Dans le secteur cinématographique, l'interdépendance entre les marchés de l'exploitation et leurs marchés en amont est très forte. En effet, les distributeurs et les exploitants se trouvent liés par un dispositif dans lequel le nombre d'entrées réalisées détermine non seulement les bénéfices des exploitants mais aussi, par le jeu de la remontée des recettes, ceux qui seront réalisés par les distributeurs. En conséquence, le comportement des intervenants sur le marché de l'acquisition de droits cinématographiques est fortement dépendant de la demande des consommateurs finals, à l'instar du secteur du commerce de détail.* ».

l'occasion des enchères organisées en 2002 par la Ligue de Football professionnel (LFP) pour l'attribution des droits de retransmission du championnat de France de Ligue 1[25]. Sur ce marché, Canal Plus détenait d'une part une position dominante sur le marché aval de la télévision payante (où elle détenait 67% de part de marché en nombre d'abonnés payants) et était, en partie pour cette raison, un acheteur quasiment incontournable dans la mesure où la Ligue était « *soucieuse d'assurer la meilleure diffusion aux épreuves qu'elle organise* ». Confrontée sur ce marché de l'attribution des droits à la concurrence d'une chaîne concurrente (TPS), Canal Plus a proposé à la Ligue une prime d'exclusivité de 290 millions d'euros par saison[26]. Saisi de cette pratique par ledit concurrent, le Conseil, qui s'est prononcé favorablement sur une demande de mesures conservatoires, n'a pas exclu que Canal Plus se soit appuyé sur sa position dominante et sur sa position d'acheteur quasiment incontournable pour proposer à la Ligue une offre qu'elle ne pourrait pas refuser. En particulier, « *la faiblesse de l'offre par lots de Canal Plus et l'écart entre son prix et le prix proposé en contrepartie de l'exclusivité sont tels qu'il ne peut être exclu que la combinaison de ces deux offres n'ait été possible que de la part d'un opérateur en position dominante qui, au surplus, savait que* ***son éviction du marché aurait présenté de graves inconvénients pour la LFP »*** (soulignement ajouté). N'ayant pas eu à se prononcer sur le fond[27], le Conseil n'a pas précisé le standard de preuve qui serait nécessaire pour sanctionner un tel comportement. Selon un scénario de prédation, il pourrait être argué que l'offre de l'opérateur dominant n'est profitable que dans la mesure où elle exclut son concurrent. Selon un scénario basé sur la puissance d'achat, la position dominante et la puissance d'achat de Canal Plus lui permettent de négocier une offre avec laquelle son concurrent, compte tenu de sa puissance d'achat inférieure et de sa moindre présence sur le marché aval, ne peut pas rivaliser : le prix de l'exclusivité pour TPS eût été bien plus élevé et, de fait, non-profitable. Dans les deux cas, les consommateurs ne sont réellement pénalisés que si l'exclusivité obtenue par Canal Plus réduit la capacité de TPS et des autres opérateurs éventuels à exercer une pression concurrentielle sur le dominant, effet possible compte tenu de l'importance de ces diffusions sportives pour l'attractivité des chaînes.

Dans ces deux affaires, la puissance d'achat préexistait à la pratique et découlait d'une position dominante sur le marché aval. Dans d'autres cas traités par le Conseil, la puissance d'achat est le résultat d'une action concertée d'entreprises indépendantes, qui, par des menaces de boycott ou de déréférencements, obligent conjointement leurs fournisseurs à ne pas livrer des entreprises concurrentes, commercialement plus agressives (décisions 06-D-03, Chauffagistes, et 02-D-13, Lunettes optiques).

Enfin, le contrôle des concentrations a également vocation à prévenir la mise en œuvre de tels comportements. Ainsi, au terme de l'avis Canal Plus/TPS (06-A-13), la nouvelle entité a souscrit des engagements lui interdisant d'acquérir des exclusivités sur la diffusion de certains programmes. Compte tenu de sa position de monopsone sur certains marchés et de sa forte puissance d'achat sur d'autres, il lui aurait été relativement aisé d'imposer à certains détenteurs de droits cinématographiques des exclusivités susceptibles ensuite de limiter la concurrence sur les marchés avals de l'édition de chaînes télévisuelles.

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25 Décision 03-MC-01du 23 janvier 2003.

26 L'enchère comportait trois lots. Canal Plus avait offert 150 millions pour le premier lot et 20 millions pour chacun des deux suivants, soit 190 millions pour l'ensemble des lots. La prime d'exclusivité de 290 millions, subordonnée à l'obtention des trois lots, représentait donc 152 % du montant total des offres de Canal Plus par lots.

27 La décision de mesures conservatoires a suspendu les effets de la décision d'attribution des droits de diffusion des matchs de la Ligue 1 jusqu'à l'intervention de la décision du Conseil de la concurrence sur le fond. A la suite de l'appel formé par Canal Plus, la Cour d'appel de Paris a homologué l'accord signé par les trois parties, qui reconduisait le partage antérieur des lots. L'arrêt de la Cour d'appel ayant éteint la procédure, le Conseil ne s'est pas prononcé sur le fond.

2.2.2 Les discriminations tarifaires de second niveau

Par opposition à celles de premier niveau, visant à exclure ou du moins, désavantager, un producteur concurrent, les discriminations tarifaires de second niveau ont pour finalité d'évincer du marché ou de désavantager une entreprise cliente concurrente. De telles discriminations tarifaires peuvent découler de la puissance d'achat d'une des entreprises clientes à même de négocier des avantages tarifaires vis-à-vis de ses concurrentes. Leur effet sur l'efficience économique demeure toutefois très ambigu[28].

En effet, plusieurs formalisations théoriques récentes ont illustré comment de telles discriminations étaient susceptibles de détériorer le bien-être du consommateur final. Elles sont ainsi susceptibles d'accentuer à moyen terme le degré de concentration du secteur aval en entraînant progressivement l'éviction des distributeurs les moins puissants. En outre, les rabais obtenus par certaines entreprises clientes peuvent avoir pour corollaire une augmentation des prix d'achat pour d'autres[29], si bien que même à court terme l'effet de ces discriminations tarifaires reste ambivalent. Enfin, elles peuvent altérer le jeu concurrentiel sur le marché aval en accordant un avantage dépourvu de justifications réelles à certaines entreprises au détriment d'autres, peut-être plus performantes.

Parallèlement, en l'absence d'effet d'éviction, ces rabais sont favorables à l'efficacité économique et intensifient la concurrence entre les entreprises clientes. Ainsi, ces rabais peuvent découler, pour une part significative, de la plus grande efficience productive permise par les volumes importants achetés par certaines entreprises clientes. Par ailleurs, en déstabilisant des ententes entre producteurs et, plus généralement, en accroissant la concurrence sur les marchés amont, la puissance d'achat peut générer une diminution des prix d'achat qui bénéficie à tous les distributeurs. En outre, les distorsions induites par une différenciation croissante des prix d'achat restent difficiles à analyser. Les rabais octroyés à certains distributeurs sont susceptibles de bénéficier au consommateur final, directement, l'entreprise en bénéficiant en profitant pour diminuer son prix, et indirectement, les différentes entreprises clientes cherchant à améliorer leur compétitivité sur le marché aval pour bénéficier de rabais sur le marché amont[30]. Enfin, si les rabais ne sont octroyés qu'aux distributeurs les plus efficaces, la diminution des prix d'achat qui en résulte est susceptible de profiter à de nombreux consommateurs tandis que la croissance des parts de marché de ces distributeurs accroît l'efficience productive.

Face à ces effets divergents, l'analyse du Conseil de ces rabais porte d'une part sur les effets de la discrimination, d'autre part sur ses justifications. Lorsqu'un effet anticoncurrentiel est avéré, le Conseil peut alors s'appuyer soit sur le grief d'entente verticale, soit sur celui d'abus de position dominante. Le Conseil de la concurrence a notamment été amené à aborder ces problématiques dans deux décisions, 04-D-76 (Digitechnic) et 06-D-04 (Parfumerie de luxe). Dans la première affaire, la société Digitechnic, qui avait obtenu une licence pour pré-installer les logiciels « Pack Office Pro » sur les ordinateurs qu'elle assemblait, considérait qu'elle était victime d'une discrimination excessive de la part de Microsoft, au motif que le prix qui lui était proposé, ainsi qu'aux autres petits assembleurs, était bien plus élevé que celui consenti aux constructeurs américains, alors que cette différence de prix ne se trouvait justifiée ni par une différence de taille et de quantités vendues, ni par une différence de service après-vente, ni enfin par une différence de notoriété. Toutefois le Conseil a relevé que l'impact du prix du logiciel « *Pack Office Pro* » sur le prix global des ordinateurs avait été faible et que de nombreux ordinateurs avaient été vendus sans

28 Cf. Inderst et Mazzaroto (2006).

29 Cet effet « lit-à-eau » peut découler d'une augmentation de la concentration sur le marché amont (Majumdar, 2005) ou/et d'une réduction du pouvoir de négociation de ces entreprises clientes, par exemple du fait de la disparition de certains grossistes ou de l'amoindrissement de leur chiffre d'affaires sur le marché aval (Inderst, 2006).

30 Inderst et Valetti (2006)

être équipés de ce logiciel, n'empêchant donc pas la société Digitechnic de connaître une forte croissance de son chiffre d'affaires. Dans la seconde affaire, le Conseil a estimé que les différences de traitement opérées par les fabricants de parfums de luxe dans leurs barèmes de remises selon la nature du distributeur agréé, qui avantageaient les grandes chaînes au détriment des petits distributeurs, étaient justifiées par l'avantage que représentait pour eux la concentration d'un grand nombre de parfumeries autour d'une structure commune permettant, notamment, des économies d'échelle en termes de logistique et de livraison. Les barèmes de remises plus favorables bénéficiant aux grandes chaînes venaient alors récompenser cette économie de coûts et étaient donc économiquement justifiés. Dans ces deux affaires, les discriminations tarifaires opérées par les producteurs, peut-être sous l'effet de la puissance d'achat des entreprises clientes, n'avaient donc pas d'effet anticoncurrentiel.

Conclusion

La puissance d'achat apparaît le plus souvent comme un facteur d'intensité concurrentielle qui s'exerce au bénéfice des consommateurs. L'expérience française en matière de réglementation des relations fournisseurs-distributeurs montre qu'un encadrement trop strict de son exercice entrave la concurrence, accroît de manière injustifiée le niveau des prix et pénalise le consommateur final. Les effets de la puissance d'achat sur l'investissement sont plus ambigus, mais à supposer qu'ils justifient une intervention de l'autorité de la concurrence, celle-ci doit alors promouvoir, par l'intermédiaire de ses avis comme au titre du contrôle des concentrations, un abaissement des barrières à l'entrée et une réduction de la concentration sur le marché aval.

Dans certaines circonstances, la puissance d'achat peut également être utilisée comme un support nécessaire à la mise en œuvre de comportements concurrentiels. Sur les marchés d'approvisionnement, le Conseil de la concurrence a surtout condamné des pratiques concertées de « boycott » de fournisseurs par des distributeurs indépendants : c'est alors l'entente donnant lieu à la constitution de la puissance d'achat que le Conseil a sanctionné, et non l'exercice en soi de cette dernière. En effet, l'exercice de la puissance d'achat, dès lors que celle-ci s'est constituée de manière transparente, n'a pas entraîné de restrictions à la concurrence, compte tenu de l'existence de distributeurs alternatifs à ceux disposant de la puissance d'achat et de la notoriété des fournisseurs concernés. Sur les marchés avals, la puissance d'achat peut contribuer à renforcer les opérateurs dominants, susceptibles d'imposer soit des exclusivités de clientèle, soit des discriminations tarifaires. Il convient alors d'examiner comment de tels avantages faussent le jeu concurrentiel.

Les effets de la puissance d'achat sur le bien-être du consommateur militent en faveur d'un renforcement de la concurrence entre les entreprises clientes détentrices de cette puissance d'achat et pour un contrôle au cas par cas de ses conditions d'exercice. D'une part, sa contribution à l'efficience économique est renforcée puisqu'alors ses effets ne se résument pas à un simple transfert de marges. D'autre part, les comportements anticoncurrentiels fondés sur la puissance d'achat sont rendus moins profitables et plus difficiles à mettre en œuvre

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GERMANY

1. Introduction

The issue of buyer power has recently been the subject of an increasing number of expert and political discussions. Examples are the takeover of Plus by EDEKA that was examined by the Bundeskartellamt[1], the UK Competition Commission's current sector inquiry into groceries retailing[2] and the recent call by the European Parliament upon the European Commission to take a closer look at retailers' buyer power[3]. In the US the issue met with great interest within the context of the *Supreme Court*'s *Weyerhaeuser* decision[4]. The discussion is by no means confined to the food retail sector. Issues relating to buyer power also arise in other sectors such as the supply industry, energy procurement or public sector demand.

This contribution was elaborated as background paper for the Meeting of the Working Group on Competition Law on September 18, 2008 in Bonn under the title "Buyer Power and Competition Law – State and Perspective"[5].

Economic theory has long neglected buyer power. More recent research has meanwhile produced differentiated insights (see Chapter 2.).

In the competition authorities' practice buyer power has mainly played a role in the following three case constellations: (i) two or more large buyers merge to form one buyer, (ii) buyers conclude joint purchasing agreements, and (iii) dominant or powerful buyers induce suppliers who depend on them to grant them advantages without any objective justification (see Chapter 3.).

The assessment of buyer power under competition law is substantially influenced by the general competition policy concept. Depending on this concept's "strategic approach", buyer competition appears to be more or less worthy of protection. Beyond its theoretical definition and the practical approach to it, buyer power must therefore also be discussed in terms of the basic objectives of competition law (see Chapter 4.).

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1 See the Bundeskartellamt's English press release at http://www.bundeskartellamt.de/wEnglisch/Publications/Working_Group.php. The decision is available in German at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion08/B2-333-07_Internet.pdf.

2 The sector inquiry is available at http://www.competition-commission.org.uk/.

3 Written declaration of the European Parliament (0088/2007) on investigating and remedying the abuse of power by large supermarkets operating in the European Union, http://www.europarl.europa.eu.

4 Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc., 127 S. Ct. 1069 (2007); cf. Werden, Monopsony and the Sherman Act: Consumer Welfare in a New Light, available at http://ssrn.com/abstract=975992.

5 For more than 40 years, the Bundeskartellamt has organised an annual meeting of the Working Group of Competition law which consists of university professors from economic and legal faculties and judges from the competition divisions at the courts. These experts come together to discuss current competition law issues. For more information as well as other background papers see http://www.bundeskartellamt.de/wEnglisch/Publications/Working_Group.php.

As regards the question as to whether competition law protects competition only in one specific direction, it is remarkable that European competition law excludes the state as a pure buyer from the area of application of competition law (see Chapter 5.).

2. Buyer power in economic theory

2.1 The theoretical analytical framework

Economic theory offers several analytical instruments to examine buyer power[6]. The so-called monopsony model has established itself as the standard instrument. In analogy to the analysis of supply-side market power the assumption is that one powerful buyer faces a large number of suppliers. As a mirror image of a monopolist's behaviour, a monopsonist can take advantage of his market power by reducing his demand. In this way he can achieve a procurement price below the competitive level.

However, the simple monopsony model often does not adequately reflect the reality of procurement markets. In many cases both sides of the market are concentrated to a certain extent. Furthermore, the transactions are not concluded as part of anonymous exchange deals, but in bilateral negotiations which leave room for individual contract conditions regarding prices and rebates, terms and conditions of supply etc. For this reason current literature often interprets buyer power as bargaining power and examines it within the context of bargaining theory models. Demand-side market power is not expressed by a strategic reduction of quantities, but in bilaterally negotiated individual prices and rebates as well as other purchase conditions.

2.2 Welfare effects

In the simple monopsony model the reduction in quantity traded leads to allocative inefficiencies and therefore to a welfare loss. If, however, the use of buyer power does not lead to a reduction in quantity (as in the bargaining model), allocative inefficiencies and welfare loss caused by them will not occur. There will merely be a redistribution of economic rent among suppliers and buyers with a neutral effect in terms of welfare theory.

However, even without a direct reduction of supply, the use of buyer or bargaining power in bilateral negotiations can still have a negative effect on welfare. If, due to his bargaining power, one buyer has better procurement conditions than other buyers, he can use these to strengthen his market position in the sales market. A strengthened position in the sales market can in turn improve his procurement situation, e.g. as he is in a position to negotiate additional quantity discounts. This mechanism is known in the literature under the term "spiral effect". As a result, less efficient (smaller) competitors are squeezed out of the market. In the long term, however, this could lead to price increases if, due to decreasing competitive pressure, the remaining companies are no longer forced to pass on their procurement advantages.

Furthermore, recent literature has also discussed negative competitive effects resulting from the so-called "waterbed effect"[7]. According to this theory the expansion of a large buyer's bargaining power weakens the negotiating position of smaller buyers who will have to pay higher prices due, on the one hand, to their smaller sales volumes, and on the other, to the fact that manufacturers have to compensate for high discounts granted to customers with considerable buyer power by raising prices for smaller

6 A clear general overview is provided by Inderst/Wey, Die Wettbewerbsanalyse von Nachfragemacht aus verhandlungstheoretischer Sicht, DIW Research Notes 25/2007, available at www.diw.de.

7 For an overview, see Inderst/Wey, loc. cit. Cf. also the European Commission's Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, OJ of 6.1.2001, C 3/02, paras. 126 and 135.

customers. According to the model described above, their choice of action is restricted. It is questionable, however, whether price increases for smaller companies will occur at all, whether they will be considerable enough to compensate for the price reductions made by the larger companies, and whether they will lead to a higher price level in the overall market[8].

In view of dynamic welfare effects it is generally assumed that the use of buyer power reduces the suppliers' opportunities for investment and innovation because it reduces their profits. However, the economic literature has developed some explanations on why, under certain circumstances, buyer power can also have investment incentive effects, and thus positive welfare effects. A large, powerful buyer could thus be prepared to share the high initial investment costs of a product because this could also increase his own profit; any free rider behaviour, which smaller buyers might possibly adopt, would be less likely in the case of large buyers. Furthermore, if they are faced with powerful buyers, suppliers might have a greater incentive to invest in the quality and brand of their product in order to increase their bargaining power vis-à-vis these buyers.

3. Buyer power in the competition authorities' practice

3.1 Control of Concentrations

Within the context of the control of concentrations, buyer power plays a particular role with regard to the creation or strengthening of a dominant position. Buyer power can create a dominant position directly in the procurement market concerned (see 3.1.2 below). It can, however, also have an effect within the framework of the assessment of a supply-side market position (see 3.1.3 below) under the aspect of access to procurement markets. Moreover, buyer power is sometimes used as an objection to relativize a dominant position which would otherwise exist (see para. 3.1.4 below).

3.1.1 Market definition

As for market definition, the demand-side oriented market concept which is tailored to supply markets has gained acceptance in practice. Under this concept it is primarily the actual ability of the opposite market side to resort to other sources which limits a supplier's scope of action[9]. In the case of buyer power it is the procurement markets, not the supply markets, which have to be defined. The demand-side oriented market concept is applied inversely in this context. From the suppliers' point of view the market definition is thus based on their ability to switch to alternative sales opportunities. The definition focuses on the products the supplier is offering or would be able to offer without any significant problems. With these products in view it has to be asked which (alternative) sales channels could be serviced in an economically viable manner.

In practice, the inverse application of the demand-side oriented market concept to procurement markets leads to application problems. In those cases of buyer power which are relevant in practice, the

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8 The Competition Commission's recent sector inquiry reached the conclusion that, to the extent that any waterbed effect existed in the UK grocery retailing sector, it would only be of limited impact, Appendix 5.4., The waterbed effect in supplier pricing, available at http://www.competition-commission.org.uk.

9 In certain cases it is also necessary to take into account the suppliers' ability to adjust their supply at short notice to meet the demand side's requirements (cf. German Federal Court of Justice (BGH) decision of 16 January 2007 WuW/E DE-R 1925, 1928 – "*National Geographic II*"). A competition between substitutes with an equal effect on all competitors only comes into play in the competition analysis of the relevant market (cf. BGH of 2 October 1985, WUW/E BGH 1027 – "*Gruner + Jahr/Zeit I*"; BGH of 4.3.2008, WuW/E DE-R 2268 – "*Soda-Club II*"). The same applies to potential competition (cf. *Commission Notice on the definition of the relevant market*, OJ of 9.12.1997, C 372/5, para. 24.)

number of companies on the demand side, and usually also on the supply side, is relatively low. In such a constellation the companies' individual differences in the products they produce, their individual sales alternatives and individual flexibility to switch to other sources, become much more apparent.

Not least because of the time limits which have to be observed in merger control proceedings, the competition authorities' practice with regard to procurement markets is generally limited to establishing sufficiently significant product groups. This applies in particular to the food retail sector[10].

3.1.2 Assessment of dominance

The definition of the market is followed by the issue of market dominance. In the case of supply markets the consideration of market shares generally allows for statements about the supplier's position vis-à-vis his competitors and the opposite side of the market. This approach cannot easily be applied to procurement markets. In this area, buyer power is less often expressed in the classical sense as market power affecting the opposite market side as a whole, but more often in the form of bargaining power exercised bilaterally vis-à-vis individual suppliers. However, market dominance cannot simply be equated with an imbalance in bilateral power relationships. This would ultimately lower the requirements down to the level of relative market power (dependence). According to the Berlin Higher Regional Court's fundamental decision in the Coop/Wandmaker case, only actors who can influence the opposite side of the market as a whole can "dominate" the market[11]. It therefore remains to be discussed to what extent the partial proof that a greater share of the suppliers depend on one powerful buyer can be used as an element for proving the existence of market dominance.

In the European Commission's practice the assessment of relative economic dependencies ("threat points") on an average basis has become a decisive element in the assessment of a buyer's market dominance. In two cases concerning the food retail market the Commission focused on the fact that, on an average basis, a share of turnover accounted for by a buyer was indispensable to the supplier if it amounted to more than 22 per cent of the turnover[12]. To determine whether market dominance exists in a procurement market it also appears feasible to consider the average procurement share particularly against the background of proven cases of individual dependency [13].

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10 For the Commission's practice, see decision of 3 February 1999, COMP IV/M.1221 – "*REWE/Meinl*", para. 76 ff.; for the Bundeskartellamt's practice see decision of 25 August 2005, B9 27/05, para. 35 – "*Edeka/Spar*", decision of 30 June 2008, B2-333/07, – "*Edeka/Plus*", available in German at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion08/B2-333-07_Internet.pdf; fundamental decision of the Berlin Higher Regional Court (Kammergericht), 5 November 1986, Kart. 14/84, WuW OLG 3917, 3928 – "*Coop/Wandmaker*".

11 Berlin Higher Regional Court, decision of 5 November 1986, Kart. 14/84, WuW OLG 3917, 3928 – "Coop/Wandmaker".

12 Decision of 3 February 1999, COMP IV/M.1221 – "*REWE/Meinl*", para. 98 ff. in particular 101; see also decision of 3 February 1999, COMP IV/M.1221 – "*Carrefour/Promodes*", where the Commission applied the same criteria; and the recent decision of 23 June 2008, COMP/M.5047, para. 93 ff. – "*REWE/ADEGK"*, in which the Commission again referred to this standard.

13 Cf. Bundeskartellamt, decision of 30 June 2008, B2-333/07, – "*Edeka/Plus";* however, under the aspect of access to procurement markets. The decision is available in German at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion08/B2-333-07_Internet.pdf.

3.1.3 Access to procurement markets

Access to procurement markets is one of the criteria which could be of significance for evaluation under Section 19 (1) no.2 of the Act against Restraints of Competition (ARC)[14] of whether a paramount market position vis-à-vis other competitors, and thus dominance, exists in a downstream sales market. The European Commission thus also used dominance in procurement markets to prove the existence of dominance in sales markets (and vice versa)[15]. A similar line of argument was adopted by the Bundeskartellamt in its recent decision in the Edeka/Plus case: To prove the existence of a dominant position in the regional sales markets in the food retail sector the Bundeskartellamt inter alia assumed the creation of paramount access to the procurement markets[16].

3.1.4 Countervailing buyer power

A company's power to supply can not only be limited by competitors but, under certain circumstances, also by countervailing buyer power[17] .

A powerful buyer can thus counteract the effect of (relative) power of supply, if he can credibly threaten to switch to another supplier within a short time frame or to take other effective retaliatory measures.

Moreover, a powerful buyer can feel induced (and, above all, feel able) to distribute his demand over several suppliers (who are possibly entering the market for this particular purpose). He can thus already prevent the emergence of market power on the supply side. It is another question, however, under which circumstances countervailing buyer power and strategic buyer behaviour could eliminate a dominant position which otherwise is to be assumed on the supply side in an equivalent manner ("equivalent to effective competition")[18]. This seems problematic if countervailing market power has an equal effect on all suppliers. The suppliers' market positions in relation to one another remain largely the same. However, it also seems problematic to have only some buyers benefit from the exercise of countervailing buyer power[19].

Purchasing agreements

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14 For an English version of the ARC, see http://www.bundeskartellamt.de/wEnglisch/download/pdf/06_GWB_7__Novelle_e.pdf.

15 Decision of 3 February 1999, COMP IV/M.1221 – "*REWE/Meinl*"", para. 54 f.; 115; cf. also recent decision of 23 June 2008, COMP/M.5047, para. 96 ff. – "*REWE/ADEGK"*.

16 See English press release at http://www.bundeskartellamt.de/wEnglisch/News/press/2008_07_01.php. The decision is available in German at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion08/B2-333-07_Internet.pdf.

17 Cf. European Commission, decision of 19 July 2000, IV/M.1882, para. 77-80 – "*Pirelli/BICC*"; Bundeskartellamt, decision of 14 December 2004, B9-101/04, para. 34 f. – "*Belgian New Fruit Wharf / HHLA / Stein*".

18 Cf. Bundeskartellamt, decision of 3 February 2004, B3-112/03, S. 15 – "*Freudenberg / Bergmann*"; fundamental decision of the Berlin Higher Regional Court of 7 February 1978, WuW/E OLG 1921, 1924 – "*Thyssen / Hüller*"; cf. also Federal Court of Justice, decision of 21 February 1978, WuW/E BGH 1501, 1504 – "*Kfz-Kupplungen*"; Federal Court of Justice, decision of 2 Dezember 1980, WuW/E 1749, 1754 – "*Klöckner / Becorit*".

19 ICN Merger Guidelines Workbook, p. 42, available at http://www.internationalcompetitionnetwork.org

Before the 7th Amendment of the ARC, German case law on the application of Section 1 ARC to purchasing agreements (i.e. agreements concerning the joint buying of products) focused in particular on the freedom to act competitively Purchasing agreements with exclusive purchase commitments were considered per se to be anti-competitive[20]. The courts were of the opinion that even where there was no explicit purchase commitment, the freedom to act (and therefore competition) was restricted where a purchasing agreement resulted in a maximum price agreement. This case-law did not differentiate between a restriction of supply or demand competition. Consequently, it envisaged the one type of competition as a mirror image of the other. Accordingly, agreements between buyers on maximum prices and agreements between suppliers on minimum prices were to be assessed alike. Neither a balance of interests nor counterbalancing aspects were essential to fulfil the elements of anticompetitive conduct. Since the focus was exclusively on competition on the demand side, it was of no consequence whether the respective buyers were also competitors on the sales side. Possible effects on the down-stream sales markets were to be assessed separately where applicable.

The Commission's Guidelines on the applicability of Article 81 EC to horizontal co-operation agreements are based on a different competition concept. Apparently, they assume that the fixing of prices or other business conditions by competing buyers on the demand side does not have as its object a restriction of competition, while the same behaviour by suppliers on the supply side does[21]. A purchasing agreement is said not to appreciably restrict competition if the aggregate market share of the parties to the agreement does not exceed 10 per cent[22] As a general rule a competition restraint is to be denied where the buyers are merely competitors on the demand side but not simultaneously on the supply side[23]. According to the guidelines, purchasing agreements are *per se* only anti-competitive where they serve as a tool to cover up a cartel agreement (on the sales side!)[24]. In all other cases their anti-competitiveness depends on the effects of the purchasing agreement. To assess these, not only the purchasing markets but also the sales markets would have to be examined. The Commission's primary concerns about buying power are that lower purchasing prices may not be passed on to customers further downstream and that it may cause cost increases for the purchasers' competitors in the sales markets[25]. According to the Commission, only joint buying with a market share significantly above 15 per cent in a concentrated market is likely to come under Article 81 (1) EC[26].

As regards Sections 1 and 2 of the current version of the ARC, the Bundeskartellamt arrives at similar conclusions as the Commission in assessing purchasing cooperations that lack market power; however, it still assumes a competition restraint even in those cases where there is no market power in the sales market. Ultimately the Bundeskartellamt arrives at the same conclusion as the Commission because it

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20 The case law was based on the old version of Section 1 ARC: Federal Court of Justice "Holzschutzmittel; Berlin Higher Regional Court "HFGE", in particular Berlin Higher Regional Court "Selex – Tania"; in reaction to this case law the legislator created for the benefit of small and medium-sized companies the possibility to exempt purchasing cooperations under Section 5c ARC^{old} (later section 4 (2) ARC^{old}). This possibility has been incorporated in the general exemption rule of Section 2 ARC.

21 Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis), OJ of 22.12.2001, C 368/13, para. 7.

22 loc. cit., para. 11.

23 Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, OJ of 6.1.2001, C 3/02, para. 123.

24 loc. cit., para. 124.

25 loc. cit., para. 126.

26 loc. cit., para. 131.

typically assumes efficiency gains in the case of a purchasing cooperation with a relatively low market share which would be likely to result in an exemption[27]. So far, there has been no relevant case law of the European Court of Justice which would clarify the legal situation on this matter[28].

Passive discrimination

Under Section 20 (3) ARC, undertakings with purchasing power are prohibited from inviting or causing other companies in business activities to grant them advantages without any objective justification. Under the latest amendment[29] the scope of application of this provision has been extended beyond small and medium-sized enterprises. It now comprises all cases where a supplier is dependent on a buyer.

The extension of the scope of application raises the question of whether the protective purpose of Section 20 (3) has been amended, too. The prohibition of unfair hindrance within the meaning of Section 20 (3) ARC^{old} primarily addressed distortions of competition by which a dominant competitor hinders other buyers. Whether the purpose of the provision was also to protect dependent suppliers from being exploited, was open to controversy[30]. According to the relevant recommendation of the Parliamentary Committee on Economics and Technology *"Section 20 (3) shall in future protect all undertakings irrespective of their size from demands for preferential terms if they are dependent on the demanding undertaking."* This could be viewed as a clarification of the protective purpose of the provision.

The substance of an assessment under Section 20 (3) is open to wide interpretation. Primarily, assessments are based on the principle of commensurability with performance *(Leistungsgerechtigkeit)* of the demanded/granted advantages, whereby this term requires further clarification. The assessment is all the more difficult since the advantages have to be evaluated in relation to service provided in return. Rebates and other advantages as a part of remuneration cannot be assessed separately[31]. The assessment process is ultimately similar to that applied to abusive pricing and raises the same concerns and problems: Under the aspect of commensurability of advantages, it remains difficult to distinguish an anticompetitive advantage from a merely low price.

The decision-making practice of the competition authorities and courts on Section 20 (3) ARC is transparent and confined to clear-cut cases (e.g. where there is a simultaneous violation of the rules of fair competition). In the majority of the cases the competition authorities have concluded the instituted

27 Cf. the Bundeskartellamt's information leaflet on cooperation possibilities for small and medium-sized companies, para. 38. The leaflet is available in English at http://www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/0711KMU_Merkblatt.pdf.

28 Difficult to assess in this context is the ECJ's "order for reference" in the DLG case in 1994 which remained an isolated decision. The Court had to decide whether and under what circumstances the prohibition of a dual membership in a cooperative purchasing association was compatible with Article 81 (1) EC. Whether the cooperative purchasing association as such was compatible with competition law was not the subject of the decision (cf. on this issue in general: the Monopolies Commission, Die Konzentration im Lebensmittelhandel (*Concentration in the food retail sector*), special opinion no 14, p. 53 ff., as well as KG (Berlin Higher Regional Court) WuW/E OLG 2745 - *"HFGE"*. Rather, the relevant issue was the prohibition restricting the opportunity for members of such an association to join *other competing types of cooperation* and thus obtain supplies elsewhere.

29 See critical opinion by the Monopolies Commission, http://www.monopolkommission.de/sg_47/text_s47.pdf.

30 Left open in Federal Court of Justice decision of 24 September 2002 WuW/E DE-R 984, 990 – *"Konditionenanpassung"*.

31 Cf. for abusive pricing Federal Court of Justice, WuW/E BGH 2103 – "Favorit:" "Gesamtbetrachtung des Leistungsbündels".

proceedings without a formal decision. The decided cases concerned retroactive "wedding rebates", i.e. the retroactive adjustment of purchase conditions after the merger with a buyer who, as only became evident during the merger proceedings, had been granted better conditions.

4. Buyer power and guiding principle for competition policy

The European Commission pursues a competition policy which is aimed predominantly at maximising consumer welfare. Accordingly, it is distinctly more lenient of restraints of demand competition than it is of those that affect supply competition. With an eye on the end consumer, the Commission focuses in its assessment mainly on the effects in downstream sales markets. This is an intrinsically logical approach. Detriment to suppliers caused by the exercise of buyer power does not necessarily go hand in hand with detriment caused to end consumers downstream of the relevant market. If competition policy is consistently focused on the welfare of the end consumer, those suppliers disadvantaged by buyer power could now and then find themselves in a rather defenceless position. Discussing how to address buyer power under competition law therefore also offers us an opportunity to consider the guiding principle for competition policy on which the existing law is based. The question is whether competition law protects demand competition in the same way that it protects supply competition.

The classical German and European approach understands competition as an open-ended process. This is revealed particularly well in the example of buyer power and buyer cartels[32]. Article 82 sentence 2 lit. a) EC prohibits in equal measure not only the imposition of unfair selling prices and conditions but also that of unfair purchase prices and conditions. It prohibits in equal measure the direct fixing of selling and purchase prices. This view is consistent with the understanding of Section 1 ARC in the version before the 7th amendment[33] It is not clear from the materials that the amendment was meant to change this. One can go from the assumption that the existing law aims to protect the competition process "in all directions"[34] Detriment to consumer welfare is not a compelling precondition for this, least of all evidence of such harm.

Evidence of a direct link between the protection of demand competition and the competition policy concept can be seen from a glance at the American debate, in which *consumer welfare* is widely undisputed as the aim of competition policy. Yet there is intensive discussion about what this concept really means. This is clear from the current debate, triggered by the Supreme Court's decision in the *Weyerhaeuser case*[35], about the treatment of buyer power under American antitrust law[36]. One of the questions raised here is whether the term *consumer* means only the end consumer on the downstream market or whether ultimately the long-term well-being of all is at stake (*aggregated welfare*). Understood in the latter meaning the term *consumer welfare* attains such a level of abstraction that it can well be used as an overall concept but not as a standard for deciding specific cases. However, if competition as a process is protected with the aim to attain *consumer welfare* as defined above, the practical differences to the German approach can be put into perspective[37].

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32 Cf. Zimmer, Thesen zur Praxistauglichkeit des More Economic Approach, DIW – Roundtable, 26.10.2007, accessible at: http://www.diw.de.

33 For the treatment of purchase cooperations see aforementioned under 3.2.

34 Zimmer, loc. cit.

35 Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc., 127 S. Ct. 1069 (2007): In this case a dominant buyer was accused of squeezing buyers in competition with it out of the market by demanding excessive purchase prices – a constellation mirroring the "predatory prices" case group.

36 Cf. Werden, Monopsony and the Sherman Act: Consumer Welfare in a New Light, with further references, accessible at: http://ssrn.com/abstract=975992.

37 Cf. Werden, loc. cit.

5. The concept of an undertaking and "pure" purchasing activity

In cases in which European courts recently had to deal with buyer power, this involved the purely purchasing activity of the state. However, according to the European Court of Justice, the state as a buyer only then engages in an activity as an undertaking if the subsequent use of the products purchased can also be seen in connection with an economic activity[38]. The Court came to this result because it defines the concept of an undertaking from the supply side. Purchasing activity is assessed in dependence on an activity on the supply side (accessoriness approach). The exclusion of "pure purchasing activity" stands in contrast to the case-law of the Federal Court of Justice on the concept of an undertaking within the meaning of the ARC whereby, in terms of the purpose of the law to protect the freedom of competition, principally every form of activity in business transactions, including the procurement activity of public authorities for their own use, fulfils the concept of an undertaking[39].

The jurisdiction of the European Court of Justice on the concept of an undertaking is criticized by writers in Germany because it lacks convincing results[40]. The question has also been raised whether the European Court of Justice is displaying a change of course in competition policy in favour of end consumers, which could put the hitherto equal treatment of demand and supply competition to the test[41]. How this will affect the concept of an undertaking within the meaning of the ARC remains to be seen[42]

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38 ECJ of 11 July 2006, Case C-205/03 – FENIN, preceded by ECJ of 4 March 2003, Case T-319/99. In the more recent Selex decision (ECJ, decision of 12.12.2006, T-155/04) the ECJ rejects the argument that the scope of the FENIN decision is limited to social institutions. This rule can be applied to every institution which buys products for non-economic activities.

39 In 2002 the Federal Court of Justice (BGH) still qualified the collective purchase of fire-fighting equipment by local authorities as an economic activity of the public sector and insofar confirmed that this constituted an undertaking, see BGH decision of 12.11.2002, WuW DE-R 1087, 1089. However, in a more recent decision, the Court left this explicitly open, decision 19.6.2007, file KVR 23/98 WuW DE-R – 2161 ff. – Tariftreueerklärung III. According to Bornkamm, German law should take account of the ECJ's reasoning; see Bornkamm, Hoheitliches und unternehmerisches Handeln der öffentlichen Hand im Visier des europäischen Kartellrechts – Der autonome Unternehmensbegriff der Art. 81, 82 EG, Festschrift für Günther Hirsch, 2008, p. 231 ff.

40 Convincing statement by *Roth*, Zum Unternehmensbegriff im europäischen Kartellrecht, Festschrift Bechtold, 2006, p. 393, 402 und 404: Whether, e.g. universities offer their services free of charge or on the open market (thereby considering social criteria if necessary), can have no bearing on which competition law restrictions their purchasing activity is subject to; see also critical comment by Bornkamm, Festschrift Hirsch, p. 232 ff.

41 Bornkamm, Festschrift Hirsch, p. 232.

42 See Federal Court of Justice decision of 19.6.2007, file KVR 23/98, WuW DE-R 2161 ff. – Tariftreueerklärung III; primacy of European law does not stand in conflict with a more comprehensive concept of an undertaking under German law. This definitely applies to abuse regulations, where simple primacy applies. Since the introduction of Regulation 1/2003 extended primacy applies with regard to the European ban on cartels. However, agreements between purely buyers – at least in the literal sense – are not "agreements between undertakings" within the meaning of Art. 3 (2) of Regulation 1/2003. Even if Section 1 ARC were to be interpreted according to Art. 81 EC based on an autonomous decision under German law, Section 130 ARC would have to be taken into consideration, which extends the scope of application to a purely "state" purchasing activity.; loc.cit. Bornkamm, Festschrift Hirsch, p. 238 f., whose argument of a level playing field in the area of non-economic activity (from a European point of view) is, however, unconvincing.

HUNGARY

The Hungarian Competition Authority (Gazdasági Versenyhivatal (GVH)) has very limited experience in cases related to buyer power. However, it could be interesting that the issue of buyer power can come up in Hungary in the context of two laws, the Competition Act[1] and the Act on Trade.[2] Regarding to the former the GVH deals with buyer power with regard to dominance, merger and non-hardcore agreements, while the Act on Trade has a different approach on buyer power and imposes additional obligations on firms having "significant buyer power". The Act on Trade primarily aims to help the survival and development of suppliers (primarily SMEs) and the GVH is responsible for the enforcement of only a part of the Act.

1. Definition

On the one hand, based on the Competition Act and according to the jurisprudence, the GVH would conclude that buyer power or dominance exists if the following conditions hold:

- the buyer has significant share from the overall sales of suppliers,
- the suppliers have no real alternatives to sell to other customers,
- the suppliers cannot replace the drop of sales of the given product with other type or variety of product(s).[3]

Whereas the second condition refers to demand-side substitutability, and the third condition refers to supply-side substitutability, i.e. the possibility to switch with use of the existing equipment to the production of other products.[4] So the relative size of the downstream firm to the upstream firm does not necessarily implies buyer power. In this case (GE) the Competition Council of the GVH stated that the asymmetric bargaining power between firms does not necessarily constitutes buyer power in the upstream market, e.g. when the dealer faces competition in the downstream market.

The issue of buyer power can arise in the context of merger cases in connection with countervailing buyer power, discussed in detail later.

On the other hand according to the Act on Trade it is prohibited to abuse "significant buyer power" (SBP) *vis-à-vis* suppliers. The regime of the Act on Trade resembles to some extent that of the EC telecommunications framework regulation, which relies on the concept of significant market power. According to the Act a retailer has SBP if its consolidated turnover derived from its retail activities in the previous year was higher than HUF 100 billion (approximately EUR 414 million). A retailer or a group of retailers also has SBP when it, or the purchasing association it belongs to, is in "*a one-sidedly favourable bargaining position* vis-à-vis *its suppliers*" based on "*the structure of the market, the existence of entry barriers, the market share and the financial strength of the enterprise and its other resources, the size of its trading network, the size and location of its outlets and all of its trading and other activities*". The Act on Trade prohibits, among others, the unjustified discrimination of the suppliers, the threatening of them with

1 The Act of LVII of 1996 on Competition

2 The Act of CLXIV of 2005 on Trade

3 These factors were identified in case Vj-46/2001/13*, Magyar Posta Rt.* and *Matáv Rt*., 13 August 2001.

4 This argument came up in case Vj-50/2003/13, *GE*, 2 October 2003.

dissolution of contract in order to achieve one-sidedly favourable conditions, the unjustified restraint of the access of suppliers to sales opportunities, the unjustified alteration of the terms of contracting to the detriment of the suppliers or reserving such option for the retailer, charging fees one-sidedly to suppliers for services not demanded by them, or the forcing of them to avail themselves of designated third parties. These descriptions are intended to catch practices – or certain types of them – like imposing various fees (e.g. slotting allowances, or fees covering nonexistent services), forfeit practices, exclusive discounting and other practices the suppliers often complain about publicly.

Although the act came into force in 2006, there has been only a few enforcement actions since. In a case[5] *OBI* (a DIY retailer) was claimed to abuse its SBP due to conditions in the general contract *vis-à-vis* suppliers with respect to forfeit, returning goods and discounting. In the end the case was terminated due to the lack of SBP (OBI's turnover was under the HUF 100 billion limit), and no infringement was established. In the *TESCO* (an FMCG retailer) case[6] it was claimed that the retailer abused its buyer power and forced the suppliers to avail themselves of designated suppliers of merchandising. This case was ended with remedies by which TESCO undertook to choose its merchandising suppliers by means of a transparent tender. It is worth noting that none of the cases ended with imposing fine.

In summary, the Act on Trade specifies explicitly and almost completely what constitutes a SBP and an abuse of it; and the listed abusive behaviours fall basically under *per se* prohibition. As a consequence, there is no much room for the GVH to adopt a rule of reason approach such as identifying SBP or assessment of welfare effects of its exercise under the Act on Trade. Actually, the Act on Trade is not considered by the GVH as part of competition law, though the GVH is required to enforce the above-mentioned provisions of the Act. Thus, the remaining part of this submission focuses on the notion of buyer power as applied under the Competition Act.

2. Identifying buyer power

It is crucial to identify the factors that affect a firm's ability to use its buyer power. As mentioned above, the GVH takes into consideration supply-side and demand-side factors.

With regard to demand-side substitutability the barriers to entry and/or expansion regarding the downstream market[7] or the ability to circumvent that market level[8] was considered. The latter refers to the case when a supplier has sufficient financial strength to establish its own downstream presence (in this case by setting up a wholesaler).

Assessing supply-side substitutability the dependence of the suppliers on the market of the product in question was considered. In other words: are they present in other product or geographical market(s)? Or in the extreme case is it possible for a supplier to exit the market?[9]

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5 Case Vj-149/2007/58, *OBI*, 2 July 2008.

6 Case Vj–92/2006/92, *TESCO*, 24 August 2007.

7 In the case Vj-182/2001/22 (*Hungaropharma*, 13 June 2002.) it was found that a merger in the pharmaceutical wholesale market increases the buyer power, but it cannot be abused because there are no significant barriers to entry into the wholesale market.

8 Case Vj-99/2002/33, *Phoenix Pharma* and *Bellis*, 19 November 2002.

9 In the case Vj-41/2002/33 (*Nemzeti Autópálya Rt*. 2 June 2003.) it was found that the suppliers, large construction companies, have extensive business activities in other construction markets as well, so they can exit from the Hungarian motorway construction market, therefore they are not exposed to the abuse of buyer power of Nemzeti Autópálya Rt. (the national motorway operator monopoly and the buyer of motorway construction services).

The possible existence of countervailing buyer power has been considered in the context of mergers on the supply side. In cement cases[10] a few large buyers was identified, nevertheless there were a lot of small buyers (representing a significant percentage of purchases together) as well, therefore the larger buyers' power was still not strong enough to countervail that of the merging parties. Taking into consideration other market attributes, such as the homogeneity of the product and the transparency of the market, the existence of large buyers could also motivate suppliers to defend themselves plausibly against any countervailing buyer power by price fixing.

In a merger case[11] in the sugar industry it was pointed out that countervailing buyer power was mitigated by the price elasticity of end consumers: if the price elasticity was relatively low (and as a matter of fact due to the nature of the product, it was), then the buyer (a retailer) has less incentive to use its power against suppliers, as it can pass on the price increase to end consumers. Moreover, it was held that despite the existence of large buyers using industrial sugar, who have alternative sweetener supply sources (demand-side substitutability), they had weak incentive to use their bargaining power, as the importance of industrial sugar was insignificant in the their cost structure.

3. Welfare Effects

The GVH has not assessed the possible welfare effects of buyer power in any of its cases so far. However, the need of better understanding has arisen. Therefore, the chief economist conducted a research[12] devoted to the issue. The main results are summarized below.

The assessment of welfare effects is rather complicated. Favourable effects can be the countervailing of upstream market power, the pass-through of the achieved cost reductions to the end consumers, the increasing of the price elasticity of demand due to stronger incentives to provide wider scope of products and to pursue intensive advertising by the buyer or the stronger incentives for suppliers and/or competitors to adopt more efficient methods.

There can be negative effects as well, but these are not so straightforward and are harder to prove. First, if the buyer power raised the barriers to entry and/or to expansion, the incentives to improve quality and to innovate can be diminished. Second, the asymmetric distribution of downstream market power can weaken the above mentioned pass-through effect.

Besides, in a case[13] it was stated that the negative effect of the abuse of buyer power could result in using less input (the firm can lower the price of the given input by decreasing its purchases) and in consequence producing less output in the downstream market in comparison to the outcome under effective competition.

Thus the assessment of the pass-through effect is very important in such cases, but would be rather complicated to carry out. Moreover there is a certain possibility that the positive effects exceed the

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10 Cases Vj-17/2001/89, *Holcim Rt., Breitenburger Gmbh* and *CeBeKa Kft*., 9 january 2002. and Vj-73/2001/65, *Holcim Hungária Rt., Duna-Dráva Cement Kft., BÉCEM Cement és Mészipari Rt.* and *Magyar Cementipari Szövetség*, 8 October 2002.

11 Case Vj-127/2001/71, *Raffinerie Tirlementoise S.A.*and *Financiere-Franklin Roosevelt S.A.S.* 21 March 2002.

12 The research is based mainly on the study of Rodrigues (2006): Buyer power and pass-through of large retailing groups in the Portuguese food sector.

13 Case Vj-41/2002/33, *Nemzeti Autópálya Rt*. 2 June 2003.

negative effects. As it has a considerable data and resource requirement, the GVH should consider to proceed with such evaluation only when it has a decisive role in a case.

4. Buyer Power and Conduct

Under competition law enforcement, as noted above, so far the GVH has had only a few cases involving buyer power issues. Regarding horizontal mergers, the issue did arise, but did not play a critical role. The subject was taken into consideration with respect to countervailing buyer power, for example in the sugar industry.

Besides, in the *METSPA* case[14] it was found that, in spite of the fact that the parties (a buyer group) established a joint company to negotiate certain purchasing conditions with suppliers, the GVH established that the alleged conduct did not impede competition. The decisive argument was that the parties had small (less then 10 per cent) joint share on the upstream market and the fact that the parties negotiated the final conditions directly with the suppliers.

Furthermore, although in the cement cartel case[15] and in the sugar merger case the assessment of countervailing buyer power did come up, the argument was not found decisive.

Finally, the GVH has also encountered a rather odd argument in a proceeding[16], requested by the *Lawyers' Chamber in the city of Debrecen* the applicant argued as an extenuating cause that the consumers' bargaining power was strengthened by knowing the Chamber's recommended fees. This innovative argument (perhaps relevant in a competition culture context rather than in a buyer power context) was rejected by the GVH.

14 Case Vj-176/2003/8, *Metro, Spar, Praktiker*, 7 April 2004.

15 Case Vj-73/2001/65, *Holcim Hungária Rt., Duna-Dráva Cement Kft., BÉCEM Cement és Mészipari Rt.* and *Magyar Cementipari Szövetség*, 8 October 2002.

16 Case Vj-56/2003/18 *Lawyers' Chamber Debrecen*, 9 September 2003.

JAPAN

1. Introduction

This contribution paper describes the JFTC's viewpoints and efforts concerning how the power exercised by a buyer against a seller impacts competition. In the following sections, we would like to introduce a summary of the special program on "Abuse of Superior Bargaining Position" held during the 7th Annual Conference of the International Competition Network ("ICN") in Kyoto. We would also like to introduce the JFTC's viewpoints concerning the abuse of dominant bargaining positions of large-scale retailers as well as the results of fact-finding surveys and recent JFTC cases, which are related to the theme of this roundtable.

2. Special Program on "Abuse of Superior Bargaining Position" during the ICN Annual Conference in Kyoto

The ICN Kyoto Annual Conference (April 14-16, 2008) was hosted by the JFTC and the topic of the special program during the conference was "Abuse of Superior Bargaining Position". For the program, a questionnaire was sent to ICN member jurisdictions and a report was developed based on the responses to the questionnaire. During the ICN Kyoto Annual Conference, a panel discussion was also held. The summaries of the report and the panel discussion are as follows.

2.1 Report on Abuse of Superior Bargaining position

In markets where both larger firms and smaller firms operate, an issue of the abuse of superior bargaining position ("ASBP"), as opposed to the more familiar abuse of dominance/monopolization issues, appears to have recently arisen in business to business relations in several jurisdictions, particularly, but not limited to, in the retail sector in the wake of the emergence of large-scale retailers like hypermarkets. ASBP typically includes, but is not limited to, a situation in which a party makes use of its superior bargaining position relative to another party with whom it maintains a continuous business relationship to take any act such as to unjustly, in light of normal business practices, cause the other party to provide money, services or other economic benefits.

The report is based on the responses of ICN members regarding ASBP. The report includes an overview of the status of regulation, reasons for and against specific provisions, criteria for assessing superior bargaining position, abusive conduct, enforcement and so on.

Of the 32 jurisdictions that responded to the survey, seven jurisdictions (the "Specific Provisions Group": Austria, France, Germany, Italy, Japan, Korea and Slovak Republic) reported specific legal provisions. Twenty-four jurisdictions indicated that their laws and regulations do not contain any specific prohibition. Thirteen jurisdictions (Austria, Brazil, Canada, Chile, Croatia, European Union, Indonesia, Italy, Jamaica, Norway, Russia, Serbia, and Taiwan) indicated the applicability of their general unilateral conduct competition provisions, such as abuse of dominance. Nine jurisdictions (Belgium, Brazil, Chile, Croatia, Czech Republic, Italy, New Zealand, Norway and Pakistan) indicated the applicability of non-competition provisions.

The reasons the Specific Provisions Group has adopted specific provisions include 1) to protect the foundation of free competition, 2) to eliminate negative effects on competition and 3) to protect against the exploitation of trade partners. On the other hand, the reasons for not adopting specific provisions include 1) reluctance to interfere with the contractual freedom between private parties, 2) concern that the concept of ASBP would introduce confusion and/or uncertainty into the market, 3) contract disputes involve private harm and case-by-case circumstances that are effectively dealt with through private enforcement and 4) the application of the abuse of dominance provision is sufficient to assure competition.

The criteria used by the Specific Provisions Group in order to assess superior bargaining position includes the probability of finding an alternative trade partner, degree of trade dependence on the firm by the other, supply and demand forces of the product or service and the difference in the scale of business between the parties. Regarding abusive conduct, the group enumerated conducts such as unjust requests for the provision of labor, unjust requests for contributions, unjust coercive sales, refusal to purchase and so on.

Only Germany required that effects on competition be demonstrated in order to prove ASBP. The type and nature of sanctions varied among jurisdictions from cease and desist orders to fines. Two jurisdictions take into account positive aspects of countervailing power. One jurisdiction identified the close relationship between ASBP and "abuse of dominance/monopolization" while five jurisdictions indicated no direct relationship between them.

Among the seven jurisdictions in the Specific Provisions Group, three jurisdictions stated that competition agencies are authorized to handle or enforce specific provisions on ASBP. Among the group, four jurisdictions have enforced the special provision actively.

Most jurisdictions in the Specific Provisions Group allow private cases to challenge ASBP-type conduct.

2.2 Outline of the panel discussion during the ICN Kyoto Annual Conference

During the panel discussion held on the second day, Mr. Frederic Jenny, Chairman of the OECD Competition Committee and who also chaired the panel, explained the two hypothetical cases the panel would discuss. Case 1 involved Retailer D, which accounted for 10% of a retail market and engaged in a "series of coercive activities" with respect to its four suppliers. Case 2 involved Bank M, which, with a 40% share, was the top firm in the banking market. A company relied on the bank's support and was getting financing elsewhere. Bank M would only provide a loan on favorable terms if the company purchased from the bank non-investment grade bonds. The panelists then engaged in a lively and interactive discussion of the hypothetical cases and ASBP more generally.

Tadashi Shiraishi, Professor, University of Tokyo, Graduate School of Law and Politics, Japan, provided his opinion that the JFTC would respond to the situations in the hypothetical cases by issuing cease and desist orders. He added his views that pursuant to JFTC guidelines, a superior bargaining position can be identified when victims do not have alternatives, and under Japanese law, a large market share is not a requirement for a superior bargaining position.

Francis Amand, Deputy Director General, DGCCRF, France, explained that France has a two-fold system to address what he referred to as abuse of dependency. He described Article 442-6 of the Commercial Code, which includes a list of unfair discriminations, as broader and more comprehensive than the competition law, Article 420. He also noted a degree of convergence exists between the provisions. Mr. Amand thought that the first hypothetical might raise an issue under Article 442.6, but would not under Article 420 because of the retailer's low market share. With respect to the bank

hypothetical, Mr. Amand believed that the competition law, Article 420, might be applied given a possible anticompetitive effect on the market, but noted that the effect might not be significant due to the size of the firms. Instead, Article 442 might be a better provision to address the situation, and it would be applicable due to coercion by the bank.

Vladimir Kachalin, Advisor to the Head, Federal Antimonopoly Service, Russia, described ASBP as being a "vertical exploitive practice spreading downstream and upstream." He observed that the hypothetical cases were quite similar to actual cases addressed in Russia pursuant to Article 11 of the Law on Protection of Competition. That law prohibits activity that has or may have the effect of harming consumers or competition.

Deborah Battell, Acting General Manager, New Zealand Commerce Commission, did not believe that New Zealand law would reach the conduct involved in the hypothetical cases. She explained that under the common law, the threshold for unconscionable conduct is very high, and the courts would be unlikely to interfere in the contracts involved. Under the Commerce Act, the inquiry would be whether the conduct involved constitutes an abuse of market power. The firm in the first hypothetical would need a higher market share protected by high entry barriers. New Zealand authorities view their role as protecting the competitive process, rather than small suppliers.

William Kovacic, Chairman, USFTC, indicated that in the United States there might be a number of ways to address the situations in the hypothetical cases, but with the possible exception of tying in hypothetical 2 (which would be difficult to prove on those facts), such legal recourse would come virtually entirely from outside the competition law realm. Mr. Kovacic also raised a practical concern with a competition authority handling matters that are fundamentally contract disputes: the large number of such disputes could overwhelm the agency.

Syamsul Maarif, Chairman, Commission for the Supervision of Business Competition (KPPU), Republic of Indonesia, described general provisions of his country's competition law that address unilateral conduct by dominant players, as well as recently issued non-competition law that prohibits hindrance of small suppliers.

A number of audience members expressed a wide range of views regarding ASBPs and the extent, if at all, to which they are or should be related to protecting competition. A government economist from the Chilean delegation indicated that while she agrees an agency's enforcement goal is to protect competition, rather than competitors, permitting ASBPs can create an asymmetry of bargaining position that can cause small competitors to exit the market. Kazuhiko Takeshima, Chairman, the JFTC, emphasized the importance of fairness, adding that when fairness is excluded, it means protecting the big players. He indicated his view that competition law should protect the rights of the players on a level playing field as well as consumers. Paul Csiszár from the European Commission recognized the need to ensure equality of opportunities, but believed competition law should apply only in those situations where there was a link to an abuse of market power.

Mr. Jenny began his wrap up of the special program on ASBP by restating that the weakness of contractual relationships could have some real effects on the competitiveness and the effectiveness of markets. Touching on the various complications, he remarked that it is very hard to distinguish between the efficiency aspect of these problems and other less familiar aspects, such as questions of social justice. He pointed to another key finding: the clear complementarity between contract law, commercial law and competition law. Therefore, competition law must be seen in the wider context of the legal order of each country and that perhaps there are justifications for having diversity in the scope and style of competition laws because of the diversity of legal systems.

3. Specific viewpoints on the issue of Buyer Power under the AMA

As mentioned in the ICN discussion, countries differ on how to assess the impacts on competition caused by buyer power, which a buyer exercises against a seller, from the viewpoint of competition law. If exercising such a power falls under an unfair trade practice(Article 19 of the AMA) as an abuse of dominant bargaining position, then it is regulated by the JFTC.

3.1 The provisions of the AMA

Article 19 of the AMA stipulates, "No entrepreneur shall employ unfair trade practices." The term "Unfair Trade Practices" includes those acts prescribed in each Item of Paragraph 9 of Article 2 of the AMA which tend to impede fair competition and are designated by the JFTC.

In Item 5, Paragraph 9 of Article 2 of the AMA, "Dealing with another party by unjust use of one's bargaining position" is stipulated. Based on this stipulation, the designation of "Abuse of Dominant Bargaining Position" is prescribed on Paragraph 14 of the "Designation of Unfair Trade Practices" (Fair Trade Commission Public Notice No.15, 1982) (hereinafter referred to as "General Designation").

There are two types of JFTC notifications concerning unfair trade practices. One is the "General Designation" which is applied to all categories of businesses in principle. And the other is the "special designation" which is applied to a specific category of businesses. For the case of buyers corresponding to "large-scale retailers", the JFTC established a special designation named "Designation of Specific Unfair Trade Practices by Large-Scale Retailers Relating to the Trade with Suppliers" (Fair Trade Commission Public Notice No.11, 2005) (hereinafter referred to as "The Large-Scale Retailers Notification"). If buyers engage in transactions with sellers by unjustly making use of one's dominant bargaining position, and therefore meet the definition of the "Large-Scale Retailers", such act is regulated by "The Large-Scale Retailers Notification". An abuse of dominant bargaining position which is not stipulated in "The Large-Scale Retailers Notification" is regulated under the General Designation of unfair trade practices.

3.2 Abuse of Dominant Bargaining Position in Paragraph 14 of Unfair Trade Practices designated by the JFTC

3.2.1 General Designation Paragraph 14

Five types of abuse of dominant bargaining position are prescribed in the General Designation Paragraph 14. Actions prescribed in this paragraph are prohibited.

(Abuse of Dominant Bargaining Position)

(14) Taking any act specified in one of the following items, unjustly in light of the normal business practices by making use of one's dominant bargaining position over the other party:

- Causing the said party in regular transactions to purchase goods or services other than the one pertaining to the said transaction;
- Causing the said party in regular transactions to provide for oneself money, services or other economic benefits;
- Establishing or changing trade terms in a way disadvantageous to the said party;
- In addition to any act coming under the preceding three items, imposing a disadvantage on the said party regarding terms or execution of transaction; or

- Causing a corporation which is one's transacting party to follow one's instruction in advance, or to get one's approval, regarding the appointment of officers of the said corporation (meaning those as defined by paragraph 3 of Article 2 of the Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade. (The same shall apply hereinafter)).

3.2.2 The Large-Scale Retailers Notification

The JFTC established a special designation designed for large-scale retailers as "The Large-Scale Retailers Notification" and developed the "Guidelines Concerning Designation of Specific Unfair Trade Practices by Large-Scale Retailers Relating to the Trade with Suppliers" (JFTC Secretary General Notification No.9, 2005).

The Guidelines explain the aim to regulate transactions between retailers and suppliers as follows:

> "This conduct by large-scale retailers prevents suppliers from freely and independently making decisions on trading, creates disbenefits for suppliers that cannot be calculated in advance and places them in disadvantageous positions in competition with other suppliers. In contrast, benefiting from this unjust conduct, large-scale retailers obtain a competitive edge over other retailers. This conduct is detrimental to competition among suppliers and also to competition among retailers. In addition, the conduct is at odds with rational management based on cost awareness, as it hinders market players from setting reasonable trade conditions. This leads to the conclusion that fair trade based on the market mechanism is inhibited, that market efficiency is degraded and that consumers are hampered from reaping the benefits of an efficient market. "

The viewpoints of "The Large-Scale Retailers Notification" are as follows:

Definition of the large-scale retailers

The term "large-scale retailer" means an entrepreneur that engages in the retail sale of goods that are used by general consumers on a daily basis, including an entrepreneur that can generally exert its buying power against suppliers. A retailer's sales and the range of the store floor spaces are used as guides to the definition. The franchiser, which is deemed to provide franchisees with a specific trademark and at the same time control, instruct and assist them in the sale of their goods in a uniform manner to the effect that the franchiser and the franchisees engage in sales to consumers under a specific trademark in an integrated manner, also corresponds to a "large-scale retailer".

Definition of the suppliers

The term "supplier" means an entrepreneur that supplies a large-scale retailer or its franchisees with goods for their own sales or for sales on consignment, excluding any entrepreneur whose bargaining position is not inferior to that of the large-scale retailer in question.

Whether "bargaining position is recognized as not being inferior to that of the large-scale retailer" is determined in the application to specific cases by considering the following conditions comprehensively: (1) a supplier's sales, (2) level of business dependency on the large-scale retailer, (3) importance of the status of the large-scale retailer as a customer of the supplier (the large-scale retailer's status on the market including market shares, ranking in sales and advantages of a brand, growth potential in the future, the amount of trade with the large-scale retailers, and the possibility of a change to other suppliers), and (4) demand-supply relation of the goods handled by the supplier and so on.

"Designation of Specific Unfair Trade Practices by Large-Scale Retailers Relating to the Trade with Suppliers" (Abridgment)

Remarks

(1) For the purposes of this Notification, the term "large-scale retailer" means an entrepreneur that engages in the retail sale of goods that are used by general consumers on a daily basis, including any retailer engaged in a designated chain business (which refers to the designated chain business provided in paragraph 1, Article 11 of the Act Concerning the Promotion of Small and Medium Retail Business (Act No. 101 of 1973); the same shall apply hereinafter), and which falls under any of the following items:

- An entrepreneur with sales of 10 billion yen or more in its last completed fiscal year. If the business is a designated chain business, the sales earned by the franchisees of the designated chain business shall be taken into account.

- An entrepreneur owning a store that falls under either of the following descriptions:

  - A store with a floor space (meaning the floor area for the retail store; the same shall apply hereinafter) of three thousand square meters (3,000 m²) or more within the limits of the Tokyo metropolitan area (special wards only) and designated cities prescribed in paragraph 1, Article 252-19 of the Local Governmental Act (Act No. 67 of 1947).

  - A store with floor space of one thousand five hundred square meters (1,500 m²) or more within the limits of cities other than those falling under (a), towns and villages.

- For the purposes of this Notification, the term "Franchisee" means a franchisee participating in a designated chain business operated by a large-scale retailer.

- For the purposes of this Notification, the term "Supplier" means an entrepreneur that supplies a large-scale retailer or its franchisees with goods for their own sales or for sales on consignment, excluding any entrepreneur whose bargaining position is not inferior to that of the large-scale retailer in question.

Prohibited Acts

The following acts are prohibited:

(1) Unjust return of goods

A large-scale retailer returns goods in all or in part, which the retailer itself or its franchisees (hereinafter referred to as "the retailer, etc.") purchased from a supplier, to that supplier (including acts materially equivalent to the return of goods, for example changing the contract from a purchase contract to a consignment sales contract or replacing the goods with other goods; the same shall apply hereinafter), except in the following cases:

- Return of goods to a supplier for a reason attributable to the supplier within a reasonable period from the day of receipt and limited to a quantity deemed appropriate given the reason,

- Return of goods to a supplier in accordance with fixed conditions for return based on an agreement with the supplier at the time of purchasing the goods (limited to cases in which it is a

normal trade practice in general wholesale trade, excluding trade between large-scale retailers and suppliers, to return goods within a fixed period after the date of receipt and limited to a fixed quantity, or limited to a quantity in fixed proportion to the total quantity received and in which the conditions for the return of goods are set forth within the scope of the normal trade practice),

- Return of goods to a supplier with the supplier's prior consent, provided that the large-scale retailer accepts the loss that would normally be incurred by the supplier arising from the return of goods already delivered, and

- Return of goods to a supplier at the request of the supplier, provided that the disposal of the returned goods leads to direct benefits for the supplier.

(2) Unjust price reduction

A large-scale retailer coerces a supplier into accepting a price reduction of the delivery price of goods purchased by the retailer, etc. after purchasing the goods from the supplier, except when the supplier accepts a reduction of the delivered price for any reason attributable to the supplier within a reasonable period from the date of receipt and to an extent deemed appropriate given the reason.

(3) Unjust consignment sales contract

A large-scale retailer coerces a supplier into accepting a consignment sales contract with the retailer, etc. under conditions that are excessively disadvantageous to the supplier in light of normal trade practices carried out in general transactions of consignment sales excluding trade between large-scale retailers and suppliers.

(4) Forcing suppliers to lower prices for bargain sales, etc.

A large-scale retailer sets delivery prices for particular goods that are excessively lower than the ordinary delivery prices of equivalent goods to the retailer, etc. for purposes such as bargain sales and forces a supplier to deliver the goods at the said prices.

(5) Refusal to receive specifically ordered goods

A large-scale retailer refuses delivery of all or part of specific goods for reasons not attributable to the supplier after having entered into a contract in which the large-scale retailer designated specific standards, designs, types, etc. of the goods to be delivered, except in cases in which it obtains the supplier's consent for the refusal and in which the large-scale retailer accepts the loss that would normally be incurred by the supplier as a result of the refusal.

(6) Coercion to purchase, etc.

A large-scale retailer coerces a supplier into purchasing any goods or services designated by the retailer, unless there is due cause.

(7) Unjust assignment of work to employees of suppliers, etc.

A large-scale retailer coerces a supplier into dispatching employees to assist with the ordinary operations of the retailer, etc., or the large-scale retailer coerces the supplier into paying the labor costs of employees hired by the retailer, etc. in lieu of coercing the supplier into dispatching employees, except in any of the following cases:

- With the prior consent of the supplier, the large-scale retailer assigns dispatched employees solely to sales operations of those goods delivered by the supplier (or sales and inventory operations for those goods if the dispatched employees of the supplier are regularly stationed at a store of the large-scale retailer), and limited to the extent that enables effective use of sales techniques or other ability possessed by the dispatched employees that leads to direct benefits for the supplier.

- The large-scale retailer reaches a prior agreement with the supplier with respect to the dispatch terms and conditions, such as the types of duties assigned to dispatched employees, working hours and the period of dispatch, and it pays the cost generally required for the dispatch of employees.

(8) Unjust receipt of economic benefits, etc.

In addition to those acts set forth in the preceding paragraph (7), a large-scale retailer coerces a supplier into providing the retailer, etc. with economic benefits including money and services that the supplier clearly should not have to offer or that exceeds the limit recognized as reasonable in consideration of the benefits reaped by the supplier.

(9) Unfavorable treatment in response to refusal of requests

A large-scale retailer gives unfavorable treatment including delayed payment for goods delivered, reduction in trade volume, suspension of trade with a supplier on the grounds that the supplier refuses any of the requests set forth in any of the preceding paragraphs.

(10) Unfavorable treatment in response to notification to the Fair Trade Commission

A large-scale retailer gives unfavorable treatment including delayed payment for goods delivered, reduction in trade volume, suspension of trade with a supplier on the grounds that the supplier notified, or attempted to notify the Fair Trade Commission of the fact that the large-scale retailer conducted, continued to conduct or continues to conduct any of the acts described in one of the preceding paragraphs.

4. Actual Condition of a buyer power

The JFTC has conducted surveys to look at the actual situation of trade practices between large-scale retailers and their suppliers several times in the past. In 2006, with the aim of looking at the situation of trade between large-scale retailers and their suppliers after the enforcement of The Large-Scale Retailers Notification in 2005, the JFTC conducted questionnaire surveys and interviews and thereafter published a report on the fact-finding surveys.

Among the trade practices between large-scale retailers and their suppliers, the largest number of respondents specified as problematic acts “unreasonable requests for offering economic benefits”, followed by “unjustifiable return of goods” and “unreasonable requests for dispatching employees and others”.

However, the number of respondents answering that they received “unreasonable requests for offering economic benefits,” “unjustifiable return of goods” and “unreasonable requests for dispatching employees” respectively decreased to about one third of the level confirmed in the preceding survey, the results of which were published in February 2005, before the enforcement of The Large-Scale Retailers Notification. These results suggest that the measures taken, including the establishment of The Large-Scale Retailers Notification, were effective to some extent.

Those large-scale retailers aspiring to relatively low-price sales, such as home improvement retailers, drugstores, food-specialized supermarkets, discount stores, specialized mass retailers and general supermarkets, were found to have been particularly likely to engage in unjustifiable conducts.

5. Cases of Abuse of Dominant Bargaining Position by Large-Scale Retailers

5.1 Case against Valor Co., Ltd. (Cease and desist order on 13 October 2006)

- Valor Co., Ltd (hereinafter referred to as "Valor") operates supermarkets that engage in the retail sale of food products as well as home centers that engage in the retail sale of housing-related goods and convenience goods, etc. Valor's grocery supermarket sales in fiscal year 2005 were the largest in the grocery supermarket industry in the area including Gifu, Aichi and Mie prefecture. Also in the home improvement retailers industry in the same area, Valor's home center sales were the third largest. Valor's sales and the number of stores have increased annually in recent years.

- On the occasion of selling seasonal gift items, Valor coerced suppliers for the supermarkets[1] into purchasing gift items, its own gift certificates and beer coupons, taking advantage of the transaction with the suppliers.

- On the occasion of launching a new store and reopening a store after refurbishment, Valor coerced suppliers for the supermarkets and those for the home centers[2] to dispatch their employees for assigning them to displaying and restocking works for the sales of the party concerned.

- On the occasion of launching a new store and reopening a store after refurbishment in the supermarket business, Valor coerced suppliers to provide monetary contributions with the aim of securing a gross margin for account settlement without sufficient prior explanation to the suppliers of the grounds for the calculation and use of the contributions, and coerced suppliers related to daily foods or groceries into offering the initial deliveries related to goods sold continuously for a certain period of time, free of charge.

- On the occasion of launching a new store and reopening a store after refurbishment with a floor addition in the home center business, Valor coerced suppliers to provide monetary contributions with the aim of securing a gross margin for the account settlement without sufficient prior explanation to the suppliers of the grounds for the calculation and use of the contributions under the pretext of "advertising balloon support".

- On the grounds that sales in August and December were expected to increase, Valor coerced suppliers for the supermarkets into offering monetary contributions as much as 1% of the amounts of their transactions in both months every year under the pretext of "1% return".

- On the occasion of acquiring stores that were managed by another company and launching them as new ones in the home center business, Valor coerced suppliers into purchasing goods with the aim of disposing of the store's inventories, taking advantage of the transaction with the suppliers.

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1 "Suppliers for the supermarkets" mean suppliers that have continuous transactions of commodities, which Valor sells in its grocery supermarkets, with Valor in the area. A lot of their bargaining positions are inferior to Valor.

2 "Suppliers for home center" mean suppliers that have continuous transactions of commodities, which Valor sells in its home centers, with Valor. A lot of their bargaining positions are inferior to Valor.

- The JFTC found these acts to be in violation of Section 19 of the AMA, specifically falling under Paragraphs 6, 7 and 8 of Specific Unfair Trade Practices by Large- Scale Retailers Relating to the Trade with Suppliers and under Item 1, Paragraph 14 (Abuse of Dominant Bargaining Position) of Unfair Trade Practices, and issued a cease and desist order against Valor pursuant to the provisions of Paragraph 1 and 2, Article 20 of the AMA.

5.2 Case against Nishimuta CO., Ltd (Cease and desist order on 27 March 2007)

- Nishimuta Co., Ltd (hereinafter referred to as "Nishimuta") is a company that engages in the retail sales of mainly housing-related goods. Nishimuta is the largest retailer selling housing-related goods, whose head office is located in the South Kyushu area. Nishimuta is also the largest retailer that develops so-called "supercenters" selling not only housing-related goods but also food products and clothing products in the same area. Its sales have increased annually in recent years.

- Even when there is no reason attributable to the suppliers[3], Nishimuta returned goods in all or in part that were suffering from a low turnover ratio to the suppliers and on which it decided not to make any discount sales on its own account.

- Even when there was no reason attributable to the suppliers, Nishimuta coerced the suppliers into accepting a price reduction of the delivery price of goods purchased by it by such amounts as were necessary to make up for the decreased profitability as a result of discount sales that it decided to make.

- In a case where Nishimuta refurbished its shop and made discount sales on stocked merchandise for the purpose of disposal, Nishimuta coerced the suppliers of such merchandise to reduce Nishimuta's invoiced price by an amount corresponding to one half of the discounted amount, even when there was no reason attributable to the suppliers.

- Nishimuta returned goods in all or in part that remained unsold despite discount sales made under i) above to the suppliers, even when there was no reason attributable to the suppliers.

- When refurbishing their stores, Nishimuta coerced their suppliers to dispatch employees to engage them in displaying or replenishing goods as part of its own business operations.

- The JFTC found these acts to be in violation of Article 19 of the AMA (under Paragraphs 1, 2 and 7 of Specific Unfair Trade Practices by Large-Scale Retailers Relating to the Trade with Suppliers"). Accordingly, the JFTC issued a cease and desist order against Nishimuta, pursuant to the provisions of Paragraph 1, Article 20 of the AMA.

5.3 Case against Yamada Denki Co., Ltd. (Cease and Desist Order on 30 June 2008)

- Yamada Denki Co., Ltd. (hereinafter referred to as "Yamada Denki") is a company that engages in retail sales of TV sets, refrigerators, PCs, digital cameras and family video game software, etc. Yamada Denki is the largest retailer selling home electric appliances in Japan, which has expanded the scale of its retail business by making other home electric appliance retailers its subsidiary companies, etc.

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3 "Suppliers" in this case mean entrepreneurs that engaged in the retail sale of housing-related goods, food products or clothing products, continuing their transactions with Nishimuta, and whose bargaining position is inferior to Nishimuta.

- Yamada Denki coerced the suppliers of TV sets, refrigerators, PCs, digital cameras and family video game software etc., which have continuous dealings with it and are in positions inferior to it, to dispatch their employees, etc. Yamada Denki had such employees display and restock goods and attend to customers, etc. at its newly opened or remodeled shops regardless of whether or not the goods were from such suppliers though it had not concluded any agreement on dispatching conditions with the suppliers and did not bear the cost usually required to have temporary staff dispatched.

- Yamada Denki coerced the suppliers of PCs and digital cameras at positions inferior to it to dispatch their employees, etc. without concluding any agreement on dispatching conditions with the suppliers and without bearing the cost usually required to have temporary staff dispatched. It had such dispatched employees initialize the settings of the goods used for display at the shops or returned from customers among those purchased from such suppliers so that it could sell them as “Discounted goods used for display."

- The JFTC found these acts to be in violation of Article 19 of the AMA (Paragraph 7 of Specific Unfair Trade Practices by Large-Scale Retailers Relating to Trade with Suppliers). Accordingly, the JFTC issued a cease and desist order against Yamada Denki, pursuant to the provisions of Paragraph 1 and 2, Article 20 of the AMA.

KOREA

1. Definition

1.1 General theory and definition under the Monopoly Regulation and Fair Trade Act

Buyer power is defined as the ability of a buyer with superior bargaining position to reduce the price of an input or purchase of the input, thereby causing more disadvantageous results to sellers compared to the case in which there is competition among buyers.

The Korea Fair Trade Commission (hereinafter the "KFTC") has no specific provisions under laws and other subordinate statutes by which to define buyer power. However, as Article 2 (7) of the Monopoly Regulation and Fair Trade Act (hereinafter the "MRFTA") states that a "market-dominating enterprise" means any enterprise holding a dominant market position to determine, maintain or change the price, quantity, quality or other terms and conditions of goods or services as a supplier or a customer in a particular business area individually or jointly with other enterprises, the MRFTA sees monopsony power, just like monopoly power, as market power.

Meanwhile, Article 3-2 of the MRFTA prohibits abuse of market dominance in order to regulate behaviors of monopolising or oligopolising enterprises (dominant enterprises) while separately regulating "abuse of superior bargaining position" by an enterprise with relatively superior position, short of monopolising or oligopolising position, in transactions. The latter corresponds to an act making transactions with a transaction partner by unfairly using his superior position.

In general, a monopolising or oligopolising enterprise can independently determine his terms and conditions of trade in the market. In principle, whether an enterprise is monopolising or oligopolising should be determined case by case and this is not an easy task in practice. Therefore, the MRFTA has a provision regarding presumption of market-dominating enterprise in Article 4. Under the provision, where □) an enterprise has 50% or more market share □) the combined market share of top three enterprises is 75% or more, excluding enterprises with less than 10% market share, the concerned enterprise(s) are presumed to be (a) market-dominating enterprise(s). This provision provides the statutory basis on which the buyer with market share high enough, just like the seller with such status, can be considered as a market-dominating enterprise.

Meanwhile, the provision regarding abuse of superior bargaining position of Article 23 of the MRFTA requires the existence of such position, without detailed standards.

To sum up, the exercise of buyer power through monopsony or oligopsony is regulated by Article 3-2of the MRFTA, while the exercise of other types of buyer power is regulated by Article 23 of the MRFTA.

1.2 Definition under the Fair Subcontract Transaction Act

The Korean economy has developed, largely depending on the structure where a small number of large business groups produced and exported finished products whose parts were supplied by a large number of small-and medium-sized enterprises or so-called "business partners." During this process, large business groups would exercise their buyer power, forcing their suppliers to accept disadvantageous transaction terms. To address this problem, the KFTC enacted in 1984 the Fair Subcontract Transaction Act (hereinafter the "FSTA") and has been enforcing it to date. While the FSTA does not state buyer power specifically, Article 2 (2) of the FSTA is applied to□)subcontracting transaction between large and

small companies and □)subcontracting transaction between SMEs in which one SME's turnover or number of employees of the previous business year is twice or more than that of the other SME. This is based on the presumption that large companies have superior bargaining position to SMEs, and an enterprise with twice turnover or number of employees has superior bargaining position to its transaction counterpart.

1.3 Definition under the Notification on Large-scale Retailing Business

The KFTC has set types and standards of unfair trade practices that might occur between large retailers and their suppliers and made them public since 1985. Under the Notification on Types and Standards of Unfair Trade Practices in Large Retailing Business (hereinafter the "Notification"), large retailers are defined as follows. Where□)a retailer recorded turnover of the previous year worth 100 billion won or more and □)a retailer has stores whose combined floor space is 3000㎡ or more, it is considered a large retailer. Once a retailer meets the conditions, the Notification is applied to the retailer, regulating its business activities more as opposed to non-large retailers'. The KFTC is implementing the Notification on the premise that large retailers have superior bargaining position to producers, but we do not apply it to cases where one's bargaining position is not superior enough in specific transaction relationship.

2. Prohibited acts

2.1 Prohibited acts under the MRFTA

An enterprise with monopsony power shall not commit the following acts pursuant to Article 3-2 of the MRFTA:

…

1. An act unreasonably interfering with business activities of other enterprises

2. An act unreasonably impeding the participation of new competitors

3. An act unfairly excluding competitive enterprises or which might considerably harm the interests of consumers

Meanwhile, under Article 23 of the MRFTA and the Enforcement Decree, an enterprise with more general buyer power shall not commit the following acts:

…

2. Coercion of undue benefits provision : an act coercing its transaction partner to provide economic benefits in the form of money, goods or services in favor of oneself

…

Provision of disadvantages : an act giving disadvantages to its transaction partner by setting, changing or enforcing transaction terms in ways other than those mentioned above

3. Interference with management : an act interfering with its transaction partner's management activities by requiring its instruction or approval when it comes to employing or dismissing personnel or restricting the scope of production items, facility size, production volume and transaction items.

2.2 Prohibited acts under the FSTA

The FSTA imposes various obligations on contractors (buyers), and prohibited acts directly related to abuse of buyer power are as follows:

- Prohibition of determining unreasonable subcontracting prices (Article 4): an act using undue means to fix the subcontracting price at a level substantially lower than the price usually paid for delivered goods or to force the subcontractor the subcontracting price at such a level

- Prohibition of coercion of goods, etc. (Article 5): an act unreasonably coercing suppliers (sellers) to purchase items designated by contractors

- Prohibition of unduly cancelling subcontracts (Article 8): an act cancelling or changing subcontracts for product manufacturing without reasons to attribute a fault to the subcontractor

- Prohibition of unduly returning delivered goods (Article 10): an act returning goods delivered by the subcontractor without reasons to attribute a fault to the subcontractor

- Prohibition of unduly reducing the subcontract price (Article 11): an act unreasonably reducing the subcontract payment originally agreed without reasons to attribute a fault to the subcontractor

- Prohibition of unreasonably asking undue benefits (Article 12-2): an act unreasonably asking the subcontractor to provide benefits in favor of them or a third party without reasons

- Prohibition of unreasonable payment in substitutes (Article 17): an act paying the subcontractor the subcontract price in kind against the will of subcontractor

- Prohibition of undue interference with management (Article 18): an act interfering with the subcontractor's management activities by controlling the subcontracting volume, etc.

- Prohibition of retaliation (Article 19): an act giving disadvantages to the subcontractor in the form of restricting bidding opportunities or suspending transactions for the subcontractor's reporting to the relevant authority.

2.3 Prohibited acts under the Notification

Under the Notification, the transaction relationship between large-scale retailers (buyer) and their suppliers (seller) is divided in the following three types, separately stipulating prohibited acts according to the classification.

- Direct transaction in goods between the buyer and the seller

- Transaction where the buyer purchases goods on credit and returns goods in stock to the seller

- Transaction where the seller manufactures goods on commission based on certain standards, design and format set by the buyer and the buyer purchases those goods and sells them

Meanwhile, albeit not falling under the buyer-seller relationship, the transaction relationship between large-scale retailers and store renters is separately defined as well.

- Transaction where the store renter leases part of the retailer's floor to sell goods and pays rent out of its sales earning.

Prohibited acts under the Notification are as follows

Prohibited acts(No. of Article)	Details	Types of transactions regulated
Prohibition of undue return of goods (Art. 3)	Act returning goods purchased from the supplier	A, C
Prohibition of undue reduction of payment (Art. 4)	Act reducing payment of goods after purchasing them from the supplier	All(Except for D)
Prohibition of undue delay of payment (Art.5)	Act delaying the payment to the supplier without reasons	All
Prohibition of undue coercion (Art.6)	Act forcing the supplier to provide goods at a price lower than usually paid for its discount events or to purchase goods	All
Prohibition of undue refusal to receive goods (Atr.7)	Act delaying or refusing the receipt of goods without reasons to attribute a fault to the supplier	C
Prohibition of undue coercion to pay promotion expenses (Art.8)	Act passing promotion expenses on to the supplier	All
Prohibition of undue receipt of economic benefits (Art.9)	Act receiving undue benefits from the supplier at the expense of the supplier's interests	All
Prohibition of obstruction of business activities (Art.10)	Act forcing the supplier to make an exclusive deal, etc.	All
Obligation to sign a written contract (Art.11)	Act failing to sign a written contract containing essential content or to issue a written contract	All
Prohibition of disadvantages including unreasonably changing the contract (Art.11-2)	Act giving disadvantages to the supplier for changing the contract unfavorably or reporting to the KFTC	All

However, where a transaction of type C is to be subject to the FSTA, provisions of the FSTA, not the Notification, are applied to the transaction.

3. Case – a violation of the Notification

The KFTC has not handled a case concerning monopsony involving related investigation or enforcement. On the contrary, we have accumulated much experience in handling cases regarding abuse of superior bargaining position or infringement of the FSTA or the Notification.

3.1 Abuse of three department stores' superior bargaining position (2008)

3.1.1 Findings

Lotte Department Store, Hyundai Department Store and Shinsegae Department Store (hereinafter the "examinees") are oligopolistic players in the Korean department store market, with their combined market share recoding 78% in 2007. The examinees establish an electronic contract with sellers to make transactions through the information and communications network and maintain sales information.

Between 2006 and 2008, the examinees obtained IDs and passwords from suppliers (sellers) in business relationship with their competitors to log on to the information networks of the competitors. They were found to have sneaked sales information including suppliers' real-time or daily sales volume or amount out of competitors' networks to use it for their management strategies.

Moreover, Lottee Department Store was found in August 2005 and April 2006 to have given disadvantages to its suppliers in the form of rearranging or expelling their stores on the pretext of their entering to the main store of Shinsegae Department Store.

3.2 Illegality judgment

The KFTC decided that the examinees' obtaining sales information of competitors constitutes abuse of superior bargaining position (in breach of Article 23 of the MRTTA). The examinees as large retailers have superior bargaining position to their suppliers (sellers). In this case, to determine whether to recognise their superior bargaining position, the KFTC comprehensively considered their market position, probability of substituting transaction partner and supply and demand of goods and services, focusing on transaction partner substitutability in particular. This is in line with the Korean Supreme Court's ruling that a firm's superior bargaining position means not so much absolute superiority holding monopolistic and dominant position in the market as relative superiority to its partner in individual transaction relationship.

In other words, abuse of superior bargaining position does not require the concerned buyer to be a monopolistic or oligopolistic enterprise, but to have superior position in individual transactions. Provided that market shares of the examinees are considerably high, with Lottee 42%, Hyundai 21% and Shinsegae 15%, and suspension of transaction with the examinees would put their suppliers into trouble in recouping their investment and securing alternative transaction partners, the examinees are considered to have superior bargaining position. The examinees' argument that they do not hold superior bargaining position in transactions with the world's major brands like Lancome, Channel and Samsung Electronics was not accepted.

The KFTC decided that for the same reason, Lotte Department Store's interference with its supplier's entering to its competitor's store constitutes a violation of Article 23 of the MRFTA and Article 10 of the Notification.

3.3 Imposed remedies

The KFTC imposed 728 million won on Lotte Department Store and 320 million won on Hyundai and Shinsegae Department Stores respectively in surcharge.

4. Conclusion

The KFTC is closely watching the market situation out of considerable concerns about abuse of buyer power. Especially, the KFTC is increasingly reinforcing law enforcement on abuse of superior bargaining position against sellers in distribution sector which is oligopolised with a few retailers and in some finished product markets (electronics, automobiles, shipbuilding and construction) where a few large conglomerates have high market shares.

Yet, the KFTC is not using any clear economic measurements to evaluate buyer power and subsequent changes in consumer welfare. In addition, when it comes to the merger review between retailers, since the KFTC is using a set of traditional criteria focused on market shares, the review often fails to lead to intensive scrutiny on buyer power.

NETHERLANDS

1. Introduction

This paper contains several comments with regard to the subject of 'monopsony' and 'buyer power'. Several aspects of this topic will be briefly discussed, illustrated by a few examples from an antitrust point of view. The number of cases that have touched upon this topic and that the Netherlands Competition Authority (NMa) so far has handled has not been considerable. The experiences drawn from these occasions might nevertheless be useful for the Roundtable.

We will limit ourselves to describing only those aspects of monopsony and buyer power about which the NMa has written before. Although the topic certainly involves a lot more aspects than the ones the NMa has written about, which also merit an extensive discussion (e.g. the theoretical economics of the topic, the applicability to competition law, the appropriate legal standards), we think that a proper discussion of all these aspects, based on the background paper, is better relegated to the Roundtable itself. We may also be able to offer additional viewpoints then.

Over the years, both the Dutch Ministry of Economic Affairs and the NMa have received complaints about buyer power[1]. The Dutch Healthcare Authority (NZa) received similar ones very recently[2]. These complaints came from SME-associations, suppliers to supermarket buyer associations and many healthcare suppliers, complaining about healthcare insurance companies, e.g. pharmacists, physiotherapists, general practitioners, dentists, psychologists and dental hygienists.

One of the following two lines of reasoning can be applied to most of the complaints. The first argument is the 'countervailing power' argument, which holds that the Dutch Competition Act does not allow suppliers to bundle their negotiation power in order to obtain countervailing power against buyer power. The second argument concerns refusal to negotiate. Healthcare insurers, in particular, do not negotiate with individual care suppliers, but offer standardised contracts only (the 'like it or lump it' argument).

The NMa has dealt with some of these arguments by publishing a white paper on buyer power, and by investigating two complaints ('physiotherapists' and 'dental hygienists').

In this paper, we describe our white paper, the two investigations and recent developments.

2. The NMa's 'White Paper on Buyer Power'[3]

Having received several complaints, some of which were not substantiated[4], the NMa launched a public debate on the topic of buyer power, based on a discussion paper. This resulted in the White Paper.

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1 In this contribution, we will not distinguish between different kinds of market power on the demand side of markets; we will use the general term 'buyer power' instead.

2 See below for some more detail on the NZa.

3 On the NMa's website (http://www.nmanet.nl/engels/home/) this is referred to as the "White Paper on Procurement Power".

The Dutch Competition Act closely follows EC-competition law. Dutch competition law thus prohibits the emergence or strengthening of dominant positions through mergers. It prohibits the abuse of existing dominant positions and anticompetitive agreements, including agreements between competitors as well as agreements between suppliers and buyers/procurers. These agreements, however, fall outside of the scope of the cartel prohibition if they meet the criteria in a block exemption or in a statutory exception to the prohibition of cartels. The question that the White Paper addresses is whether and, if so, how the NMa can use these competition enforcement instruments in cases where procurement power exists.

2.1 Mergers

With regard to a merger on the buyers' side of the market, the NMa takes the following elements into consideration when exercising merger control: the market position of the undertakings that are to merge, the position of these undertakings on their own downstream markets, the position of suppliers, and the opportunities that a merger offers to exclude competitors and suppliers.

Mergers on the procurement side of the market can restrict competition when the undertakings that intend to merge have big market shares and a powerful position on their own downstream markets and on markets where there are many, small suppliers. The reason for this is that, as a result of the merger, the undertakings that intend to merge will be in a position to tie the suppliers to them or to restrict access to the market.

In the event of countervailing buyer power, a merger between suppliers that involves large market shares may be permitted in certain cases. In such cases, it might be concluded that a dominant position on the suppliers' side of the market will not arise or will not be strengthened. This was for example the case in a Dutch merger notification involving two major producers of savoury snacks. Supermarkets, which bought most of their products, had a strong negotiating position because of their size and had the possibility to switch to alternative suppliers if necessary. This reasoning combined with the fact the there were low entry barriers, led to the NMa's decision not to object to the merger.

2.2 Abuse of a dominant position

To prove the abuse of a dominant position on the procurement side of the market, it is necessary to establish that a dominant position exists on the relevant market and that it has been abused. An analysis of the buyer's position is based on an analysis of the sales opportunities of suppliers, the market position of the procurer on the procurement side of the market, and of those factors that may affect whether a large market share also means that a dominant position exists. Important factors in this regard are the existence of countervailing power and the role and position that the undertaking has on its own downstream market.

Abuse may exist if the undertaking with a dominant position on the procurement side compels suppliers to accept certain conditions, resulting in exploitation or exclusion. However, an undertaking with a dominant position enjoys contractual freedom. The refusal to negotiate, for instance, does not necessarily lead to abuse.

Cooperation on the sales side, even if procurement power exists, is permissible if there is no appreciable restriction of competition or if a statutory exception applies. The assessment of cooperation on the sales side with a view to offering countervailing power against presumed procurement power occurs in accordance with competition law within the framework of the cartel prohibition.[5]

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4 According to some associations, suppliers are afraid to complain about a (large) buyer, because they fear to lose their business ties.

5 Sections 6 (1) and (3) of the Competition Act, equivalent to articles 81(1) and 81(3) EC-treaty.

2.3 Agreements

Agreements between firms about joint buying, which would pass on the advantages to their customers, will generally not be prohibited. This may, for instance, be the case if the joint buying agreement does not involve competitors on the selling side of their downstream markets.

If the joint buying agreement involves competitors, the question is whether they meet fierce competition from other firms - ones that are not engaged in the agreement. If so, it might be assumed that advantages will be passed on. Otherwise, the agreement might be illegal.

In one specific case[6], a joint buying agreement was illegal due to the high market shares of over 90 per cent (on the buying side of the involved markets). The NMa did not expect advantages to be passed on to the customers of the parties involved.

The NMa generally does not tolerate an agreement between suppliers that basically boils down to a marketwide price-fixing agreement in order to constitute countervailing power to a dominant buyer. The NMa has, for instance, prohibited marketwide joint negotiation by general practitioners with health insurers.

2.4 Government agencies

During the consultation rounds that were held in preparation of the NMa's white paper, several businesses complained that public authorities acted as powerful buyers. However, often when public authorities act as buyers, they do so as part of their public duty. In this role, public authorities are acting in the public interest and not subject to the Competition Act. The Competition Act only applies to companies involved in economic activities ('undertakings').[7]

3. Selected case

The NMa has dealt with two complaints after it had published the White Paper: one complaint from physiotherapists and the other from dental hygienists. Since the facts of these cases are highly similar, we will deal with them together in this paper. Both cases concerned the fact that health insurance companies do not negotiate with the individual suppliers, but, instead, offer them standardised contracts (‘like it or lump it’-contracts). These suppliers feel as if they are left with no choice but to sign the contract out of fear of losing clients. Suppliers feel that such a situation implies that health insurers have buyer power, and they also feel that insurers abuse this position by not negotiating with them. The complaints in question concerned one specific insurance company, but we will refer to ‘insurance companies’ in general in this paper, since they all seem to offer standardised contracts.

In order to better understand the case, it is useful to have a little bit of background information on the Dutch healthcare system.

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6 Decision of the NMa, 13 October 2000, Joint buying agreement health services VGZ, OZ and CZ.

7 Of course, public bodies involved in economic activities will be qualified as undertakings in the sense of and subject to competition law.

3.1 Background information of the case

Until 2006, most but not all Dutch people had mandatory healthcare insurance through so-called 'ziekenfondsen'[8], which were public bodies that had the obligation to provide (hence, also to buy) specified medical care in a certain, officially appointed geographical area to the people in that area.

This system started to change from 2006 onwards. From then on, *every* Dutch citizen was required to take out healthcare insurance, which in practice meant taking out at least a pre-specified healthcare package that all insurers would offer. Meanwhile, all 'ziekenfondsen' became private insurance companies that had to compete with existing private health insurers. Furthermore, the geographical restrictions were lifted. The idea behind this change was to stimulate competition among insurance companies by introducing the mandatory, pre-specified insurance package. This was also to act as an incentive for insurers to cost-effectively buy medical care.

The package could be offered in kind or by repayment, or any combination thereof. Also, a regulator was introduced: the Dutch Healthcare Authority (NZa).

3.2 Description of the case

The NMa decided that, assuming buyer power[9], the fact that insurers do not negotiate does not in itself constitute an abuse (essentially because of a reduction in transaction costs). It also seems to be the case that insurers compete with one another with regard to insurances. None of the conditions in the contracts offered to dental hygienists appeared to be a problem from the point of view of the quality of care or availability of dental care by hygienists. All dental hygienists that are willing to sign the contract may do so; dental care all over the Netherlands is contracted.

At the appeal stage, the court disagreed with the NMa. According to the court, the NMa should have investigated more thoroughly the specific circumstances of the case (also including possible dominance), which might have led to the conclusion that there actually was an abuse in this particular case. So, basically, the court reproached the NMa for not having done a sufficiently thorough investigation. The court based its conclusion (that an abuse could not be ruled out in this case) on the facts that the healthcare insurers concerned not only did not negotiate, but also only reimbursed their clients if they had visited a dental hygienist with a contract with that insurer. Since it was not unlikely that the insurer had a dominant position, this "gatekeeper's" role might also imply abuse. One reason why the insurer might have a dominant position (in a certain geographical area, smaller than the Netherlands) is based on the idea that the insurer used to be a 'ziekenfonds', and, thus, already had a strong position in its former 'ziekenfonds'-area. Yet another reason that the court put forward is that each individual dental hygienist's relevant (geographical) market is very small.

The case is now pending before the highest court in the Netherlands.

4. Recent developments

Most problems with 'buyer power' now seem to be restricted to the healthcare system: 'like it or lump it'-contracts and the inability for healthcare suppliers to jointly negotiate marketwide with insurance companies.

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8 A much smaller group of people did not qualify for this 'national health'-type of insurance scheme and had to insure privately. These private insurances could be obtained with private insurance companies, not with the 'ziekenfondsen'.

9 Dutch courts allow the NMa to investigate (the absence) of 'abuse' before investigating a dominant position.

Also, the NMa finds that the appeal court is very skeptical about competition possibilities, particularly with respect to the healthcare industry, as the following case briefly illustrates.

4.1 Psychologists

This case involved three trade associations for psychologists. These associations offered fixed and equal advice on tariffs to be used by psychologists - though differentiated with respect to specific types of psychological help, for example, 'psychotherapy' or 'labor psychology'. The NMa considered this market to be a contestable market, open to competition between psychologists.

The court, however, was very skeptical about the actual possibilities for psychologists to compete. The court pointed out that the NMa should have established, based on facts, that the psychologists indeed had room to compete, given the role of health insurers and the way people requiring psychological help ('consumers') were directed by their general practitioners to certain psychologists. The court, in other words, seemed to suggest that the specific circumstances in this market ('consumers' do not choose their own psychologist, nor would they be very interested in doing so, given the nature of their insurance policies), meant that competition was weak to begin with. If psychologists did not compete or did not have the need to compete with one another within this specific economic environment, then there was no competition to be restricted either.[10]

4.2 Steps to take

The court's skepticism with regard to competition and competition problems in the healthcare sector, as well as the steady flow of complaints from healthcare suppliers, imply an additional effort that the NMa must make in order to much better understand the competitive surrounding(s) of suppliers and insurers. Only when the NMa has a clear and deep understanding of the competitive processes in the healthcare sector will it be able to win its cases in court.

The NZa too wants to have a better understanding of the competitive process. One of its duties is to prevent 'abuse of significant market power', hence an area that is related to those of the NMa ('abuse of a dominant position')[11]. Obviously, buyer power can be dealt with by both authorities.

In order to gain a better understanding of the possible problems of buyer power in the healthcare system, the NMa and the NZa are jointly organising a series of 'roundtable conferences'. Both insurers and different groups of healthcare suppliers will be able to offer their views and arguments during these conferences.

In the preparation of the conferences, the NMa and NZa have investigated the specific complaints in more detail. This will result in several questions that will be asked to insurers, associations of healthcare suppliers and individual suppliers in order to be able to analyse how to deal with the problems.

The end result is scheduled to be ready by the end of 2008.

In conclusion, most of the cases that the NMa faces involve, either the bundling of negotiation power or the refusal to negotiate. We investigate these complaints carefully and would be pleased to hear other members' experiences.

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10 Basically, the court seems to demand not only a detailed economic 'story' behind a case, but also requires this 'story' to be supported by the facts in the file and demonstrate that a restriction of competition did indeed take place. This case is also pending before the higher court.

11 By protocol between both authorities, overlap of duties is dealt with.

POLAND

1. Monopsony under Polish competition law and in practice of the Polish Competition Authority

The provisions of the Polish Competition and Consumer Protection Act prohibit an abuse of a dominant position. Even though it is not stated, whether the dominant position should be held on the supply or on demand side, it is understood (and confirmed by the Supreme Court rulings) that both situations are possible: abusing a position of a dominant supplier, as well as that of a dominant purchaser.

The Office of Competition and Consumer Protection (OCCP) does not have extensive experience in analysing cases that deal with the markets where one can identify monopsony/buyer power. Cases where market power on the demand side is an issue are very rare. Analytically, they are generally treated in the same way, as cases, where an abuse of supply-side market power is suspected, i.e. market shares, barriers to entry and other competitive pressure indicators are analysed, to see, whether the entity in question can actually act to a large extent independently of actual or potential competitors. However, given the fact that most of the cases involve a statutory monopolist (state health insurer), the analysis of market power does not usually require sophisticated economic thinking.

2. Cases

As mentioned above, most of the OCCP investigations that dealt with monopsony/buyer power issue concerned public health insurance sector, specifically the practices of the National Health Fund (Narodowy Fundusz Zdrowia, the NFZ) in the area of contracting health services. Usually no doubts arise concerning the NFZ's dominant position in the relevant market, which is normally defined as a national market for organising health-care services under the general health insurance. This is due to the fact that the NFZ enjoys statutory monopoly under the National Health Fund Act – it is the entity solely responsible for the organisation of the universal health-care system in Poland.

In most of them (12 out of 18 cases since 2003) the OCCP came to a final conclusion that there was no infringement of the competition law. Most of the cases where infringement was found, concerned applying discriminatory or unfair conditions to health-care contracts, while one case involved imposing unfairly low prices for dental services. As a result of statutory monopoly, the NFZ was clearly an unavoidable trading partner to health-care providers, who were not in a position not to sign contracts with it.

The above can be illustrated with a decision in the proceedings that the OCCP instituted in order to verify whether the NFZ violated the abuse of a dominant position prohibition through direct imposition of unfairly low purchase prices while contracting dental services for the year 2004.

According to the facts established during the proceedings, the NFZ imposed a dental services price that was very low – it neither took into account the reasonable costs nor did it guarantee fair (in many cases any) profits for dental services providers. An important argument was that the NFZ did not put sufficient effort to run all the necessary calculations before setting the contracting price, as it simply divided the collected money by a number of services required, leaving completely aside any considerations of the real costs of services. This type of behaviour was only possible because of the NFZ's monopsony power that enabled it to act independently of its contractors.

This kind of cases always raise a question about an impact on consumer welfare and whether there is a chance that lower prices will be transferred to customers. The rationale for intervention in this case was

that in the long run the imposition of the dental services contracting price that is too low to reimburse reasonable costs would tend to inhibit investment and decrease service standards provided by the NFZ's suppliers. It might also force some of the contractors to leave the market – especially those that are public and do not have a possibility to provide private services simultaneously with those contracted by the NFZ - leaving the market underserved.

An interesting non-NFZ case on the subject dealt with the competitive effects of the housing co-operative's practices (Suwalska Spoldzielnia Mieszkaniowa w Suwałkach, the cooperative) on a local market for thermal energy purchase. It was found that the co-operative infringed Polish competition law by refusing to accept a new purchase price for thermal energy, which was justified by an increase in costs.

That case had some interesting points that are worth emphasising. First, it is important to note that the provider/producer (Przedsiebiorstwo Energetyki Cieplnej) was a natural monopoly in an area restricted to its network and this delineated the relevant geographical market. Nonetheless, as it was established during the proceedings, the producer, constrained by regulation, did not have any bargaining power over its contractors and due to that had no possibility to unilaterally impose unfavourable contracting conditions on them. On the identified local market the producer was the monopoly provider and it already contracted all of the interested consumers. Nevertheless it was not a realistic option for it to limit output or change its distribution of energy as it would inevitably lead to huge financial losses, since unit cost would go sharply up and there were no alternative consumers who would be interested in buying a surplus of heat, withheld from current purchasers. The above limitations on the supply side increased the bargaining power of thermal plant's contractors. One of them was a housing co-operative, which had a dominant market share on the demand side. Due to those facts the OCCP defined it as an undertaking with a dominant position in the local market for thermal energy purchase. It was found that by refusing to accept the justified change in price proposed by the producer the cooperative abused its dominant position in the relevant market and jeopardised the financial situation of its supplier. As mentioned earlier, the provider of thermal energy, while setting the price, had to follow legal guidelines as the prices for thermal energy were regulated by law. The OCCP found that the thermal plant kept to the regulations.

The decision was upheld by the Supreme Court. It is somewhat controversial though, since it might be argued, that both sides of the market possessed market power, with the thermal plant a clear natural monopolist. It was, however, constrained by regulation and costs of stopping supplying the co-operative, which put the latter at an advantage. It would be more appropriate then, to say that the case was more about bargaining power than monopsony one (as measured by market shares).

Buyer power issues also occur occasionally in merger cases. One of the recently decided ones involved a concentration between two dairy cooperatives, which was found to lead to a creation of an entity with an over 40% share in one of the regional milk purchase markets. There were three decisive factors which lead to the concentration being cleared unconditionally. First, in all the parts of the regional market there was always at least one alternative milk purchaser. Second, dairy co-operatives in question are vertically integrated – they buy milk predominantly (99%) from their own members – which limits their incentives to exploit milk providers. Finally, the law provides for the possibility of creating producer groups in the dairy sector, which could increase the bargaining power of milk producers vis-à-vis purchasers.

SLOVAK REPUBLIC

1. Introduction

Problems relating to buyer power have been a subject of political and social discussions in Slovakia for many years. In our country this phenomenon is discussed mainly in connection with the retail chains. Therefore, the first part of our written contribution is focused on problems concerning retail chains. We will briefly describe the legislation regulating conduct of retail chains and we will present activities of The Antimonopoly Office of the Slovak Republic (hereinafter as "the Office") in this area.

The Office has also come across buyer power issues in several cases of assessment of agreements restricting competition. We will describe two cases of horizontal agreements, where the Office had taken buyer power into account in the second part of our written contribution.

In the last part of our contribution we will outline our opinions on buyer power arising from both our practical experience and considerations about these problems.

2. Buyer power and retail chains

2.1 Legislation

There were significant structural changes in retail trade in SR around the turn of years 2000/2001. They were caused mainly by sharp entry of new foreign retail chains and also by expansion of retail chains already active on the market. This changed the long-time pattern of the Slovak retail trade considerably. As retail chains introduced new relations, cooperation forms and trade practices, discussion on contributions or defectiveness of their buyer power was opened. Lower prices and wider range of products for consumers were usually mentioned as positives of the presence of retail chains in SR. On the other hand, possible negatives of retail chains´ activities like elimination of small retailers and some suppliers were pointed out, which may probably cause an increase of consumer prices in the long run. In connection with this fact, a social and also political pressure to adopt some legislative solution or regulation of retail chains´ buyer power arose.

In 2003 the Act on Retail Chains[1] was adopted, which ought to be the solution of the situation. Enforcement of this act is ensured by the Ministry of Economy of SR. However, the wording of the act implies that it does not deal with real impacts of buyer power of retail chains, but it prohibits certain practices of retail chains. Since the time this act has been in force no official request for its enforcement has been submitted, that is why this act has not been applied so far.

In 2007, complaints of suppliers, mainly of food products, opened discussions about retail chains and their buyer power again. According to suppliers retail chains abuse their buyer power and exert unfair pressure on them - mainly within the price area. Newly adopted ***Act on Inappropriate*** Conditions in

[1] Act No. 358/2003 Coll. on Retail Chains as amended

Business Relations[2], which will replace the Act on Retail Chains from January 1, 2009, is a result of the discussion.

The new act is in principle based on the same grounds as the old one, since it also prohibits certain practices without assessment of their impacts on the market and consumer.

The principles of the act are based on definition of economic dependence defined as follows: "a situation when one of the parties to the contract accepts unfair terms and conditions, because the possibilities to conclude a contract with other undertakings on the market in Slovakia are limited". Further, particular practices prohibited by the act are listed. As an example of such practices requiring payments from a supplier for listing, for timely limited placement of goods of a supplier in customer`s store, for trade activities of a customer, for placement of goods at certain place, etc. can be mentioned. These payments are prohibited, if their total amount exceeds 3% of annual revenues of a supplier for goods that were sold to the partner requiring these payments.

It is clear from facts described above that the aim of the act is to tackle the negative impacts of buyer power. However, we assume that a purely form based approach is applied here. In our opinion the act should, on the contrary, be set on an effect based approach. Form based approach applied in the act will lead to purely technical application of it. It actually means that particular practices may be punished, even if they do not have any real negative impact on the market. On the other hand, other cases which might indeed have a negative impact of buyer power on the market may not be covered by this approach.

The act basically covers only the area of retail chains and their relations with suppliers what we find to be another weakness of this legislation. In our opinion, this act constitutes a regulation of individual customer-supplier relations, which is not in the line with competition point of view.

It is worth mentioning that within the process of passing both acts (Act on Retail Chains and Act on Unfair Conditions) there were efforts to entrust the Office with supervisory competencies of their application. Due to above described wording and concept of both acts the Office refused these initiatives. The new act has remained under the competence of the Ministry of Economy of SR, while some competencies relating to the control of the application of it have been given also to the Ministry of Agriculture of SR.

The Office is not principally rejecting being entrusted with competencies to enforce legislation dealing with buyer power. But the given concept would have to be legislatively adjusted in such a manner that it would be possible to fight the negative effects of buyer power on the markets without any conflicts with traditional concepts of competition protection.

2.2 Sector Inquiry into retail chains

Recently, several representatives of suppliers of retail chains have repeatedly approached the Office with requests to protect them from practices of retail chains arising from their buyer and bargaining powers. According to suppliers, retail chains abuse their buyer power mainly by charging unfair prices for trade services and forced suppliers to agree with business conditions which are highly disadvantageous for them. Suppliers also stated that given conditions are applied identically by retail chains, what might indicate a possible cartel agreement between retail chains on conditions of trade relations towards their suppliers. Representatives of suppliers also claimed that practices of retail chains have negative economic impacts on them, which may force some suppliers to leave the market.

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2 Act No. 172/2008 Coll. on Inappropriate Conditions in Trade Relations and on amendment of the Act of the Slovak National Council No. 30/1992 Coll. on the Slovak Agricultural and Food Chamber as amended

Taking these facts into consideration the Office decided to initiate an inquiry into retail chains area in July 2007.

In order to examine possible buyer power and cartel behaviour of retail chains the Office had repeatedly tried to find out, which particular sectors of supply to retail chains suppliers considered being problematic. However, representatives of suppliers refused to specify their claims. They stated concerns about "off-listing" of their products in retail chains as the reason. We see that "fear factor" of mainly the small suppliers of retail chains is obvious in SR.

Preliminary results of our ongoing investigation prove that there is effective competition in downstream market between retail chains acting in SR, which according to statistics causes downward pressure on prices of consumer goods.

With regards to upstream market, conditions towards suppliers are bilaterally bargained and depend to a great extent on bargaining power of a particular supplier. It is shown that these conditions are bargained to a great extent differently in different retail chains, what disproves claims of suppliers on same conditions of retail chains.

On the other hand it is not disputable that retail chains are very important trade partners for some food suppliers in SR. Data from the year 2006 show that the market share of 8 large retail chains (including one buying alliance and one co-operative association) in the retail sale of food was approx. 80 %. The two most significant players had market shares ranging from 15 to 25 %. Market share of others was lower than 10 %.

In the opinion of the Office it is very important not to let the concentration on the retail market increase. We assume that if this market is competitive, then there is an assumption that welfare of buyer power exercised on the upstream market could be passed also on to the consumer. Therefore, the effort of the Office is to ensure sufficient competitive environment in this market[3].

3. Cases

Although our Office has not dealt with problems of buyer power in depth so far, we suppose that two cases of horizontal agreements where the buyer power was taken into consideration are worth noting.

3.1 Producers of sheep cheese

In January 2007 the Office received a request to assess the intention to establish a sales alliance of sheep cheese producers. The aim of this association was to increase bargaining power of these producers towards retail chains. Sheep cheese producers argued that the retail chains used their buyer power to exert pressure on the decrease of their purchase prices of sheep cheese. The sales alliance ought to work as a counterweight to this buyer power of retail chains.

Therefore the Office conducted a general inquiry into the sector of production and distribution of sheep cheese. Investigation showed that there were 9 sheep cheese producers active on the market in SR and they sell 50-70%[4] of their production through retail chains. Seven of them were interested in

[3] Result of this aim was for example also decision of the Office, by which in year 2006 it prohibited concentration of undertakings TESCO and CARREFOUR. Subjected decision was accompanied both by in-depth investigation and also by consideration of structural changes in case of approval of given concentration.

[4] Exact data are subject to business secrecy.

participation in this sales co-operative. Joint market share of these seven producers was ranging from 50 to 70% and they sold only approximately 50% of their production through retail chains. It is worth mentioning that imports are of minor importance.

Based on assessment of these facts and mainly on the proclaimed aim of the intended alliance, being the common price policy towards not only retail chains, the Office informed that it had objections against the establishment of this association.

The Office concluded that given alliance would in principle constitute a price cartel affecting considerable part of the market. Furthermore, given the share of their production realized through the retail chains, the buyer power of retail chains was unlikely to counterweight the results of such a price cartel.

3.2. Pig breeders

Another decision in which the Office took buyer power into consideration was the one in which it assessed an agreement of pork production. The agreement consisted in fixing of minimal prices of pork meat sold to meat processors. In the time when the Office assessed the agreement, there were dozens of undertakings, mainly small farms active on the market for fat pig sale. Thus this market was significantly fragmented. The fragmentation was obvious especially in comparison with the meat processors´ market, which was strongly concentrated[5].

It is worth saying that one year before the conclusion of the agreement there had been liberalization of pork prices, leaving the demand and supply to determine the price. Lower prices of imported pork had caused a rapid decrease of prices of pork in domestic market. Producers had been unprofitable and some of them had been forced to liquidate breeds.

Efforts of meat producers to individually bargain better price conditions with meat processors had not been successful. Consequently, meat producers agreed on minimal sale price of meat for processors. They concluded the agreement to defend themselves against the buyer power of meat processors, against which they were not able to fight individually. Subjected agreement ought to strengthen bargaining position of pig breeders towards meat processors, which according to opinion of breeders used their buyer power to decrease purchase prices under costs of breeders.

The Office considered the case to be agreement restricting competition, but when setting the amount of fine, it took into consideration the above mentioned facts. Thus, the amount of fine reflected also the fact that in time of conclusion of the agreement the breeders were in position of the weakest bargaining power at the whole fat pig vertical chain.

4. Conclusion

Given our limited experience in buyer power concept we do not dare to make clear conclusions or standpoints in this field. From the described inquiries and mainly from considerations on buyer power, which accompany them, it seems to us that buyer power is clearly a different concept from the antitrust concept. In our point of view, the tools of classical antitrust are not very suitable to deal with buyer power. Perhaps the only area of their application would be specific case of abuse of dominance in purchase market, which would result in consumer harm demonstrably. We assume that consumer harm could only occur only in case of lack of effective competition both on the upstream and downstream market, allowing the undertaking dominant on the upstream market to exercise its market power without passing the welfare on to the consumers.

[5] The market for meat processing is even more concentrated today.

In our point of view it could be generally said that if competition works on the downstream market, there is low probability that potential buyer power on the upstream market would have negative impacts on consumers.

On the other hand buyer power changes the structure of upstream markets; in SR this fact is proved by cases, such as the mentioned effort to establish sales co-operative of sheep cheese producers and similar effort of bakers. Also it is likely that activities of retail chains accelerate the process of mergers and acquisitions on supplier market and may cause some small producers to exit the market. We observe significant consolidation in many food industries, for example beer industry and butchery, in Slovakia.

However, in our opinion these effects of buyer power cannot be addressed by antitrust instruments, as its role is not to protect individual small producers from the pressure of strong players. It is rather a political question, whether it is socially desirable trying to keep small producers on the market and if yes, then what tool – different from antitrust – should be created.

SPAIN

1. Legal framework

The Spanish Competition Act 15/2007, of 3 July[1] (CA) makes no explicit reference to buying power in the description of collusive (Article 1), abusive (Article 2) or unfair (Article) behaviour but, in principle, many of the conducts that are explicitly defined in Articles 1 and 2 of the CA can apply to both supply and demand positions.

Regarding merger control, Article 10 of the CA expressly mentions, among the factors to be considered in the assessment, the negotiating power of demand or supply and its ability to compensate the market position of the companies concerned. This wording admits that the power of demand can act, on the one hand, as a compensating factor of the anticompetitive effects deriving from the merger on the supply side and, on the other hand, as an anticompetitive effect itself when the merger is on the demand side of the market.

2. The practice of the Spanish Competition Authorities

2.1 Prohibited conducts

When assessing market power on the demand side of a market, the Spanish Competition Authorities have addressed the question whether the buyer has the ability to behave independently from the rest of the market, i.e., whether it is capable of unilaterally establishing commercial and contractual conditions regardless competitors' and costumers' likely reactions. In the CNC's view, a buyer that has market power will typically set up lower prices by restricting purchases. However, in the complex bargaining process that happens in reality, a number of different practices, besides those with effects in prices, can amount to an indication that buyer power exists. For instance, the pre-eminent buyer in a market may compel the seller to strike an exclusive supply deal, preventing other possible transactions, to the detriment of the supplier and other potential buyers.

A Decision against buyers on the grounds of anti-competitive conduct consisting of jointly imposing conditions on supply in the retail sector is found in case 589/05 FIAB/GRANDES SUPERFICIES[2], where the big commercial retailers in Spain agreed to impose their providers a homogeneous anti-steal labelling system that had to be incorporated to the products at their expense. The *Tribunal de Defensa de la Competencia* (in September 2007 the former two competition authorities, the *Tribunal de Defensa de la Competencia* and the *Servicio de Defensa de la Competencia*, merged into the *Comisión Nacional de la Competencia*, CNC hereinafter) ruled on 22 May 2006 that the establishment of such a system infringed Article 1 CA as it constituted a collusive agreement between horizontal competitors that modified commercial conditions by imposing on providers the additional burden of covering the costs of the anti-steal system, aimed at tackling a problem for retailers in the context of their relation with end consumers.

In 612/06 ACEITES 2[3], a case of vertical parallel agreements between the first olive oil supplier and the main distribution chains in Spain in order to set a fixed retail price for the product, the *Tribunal* took

1 http://www.cncompetencia.es/PDFs/legislacion/47ing.pdf .

2 http://www.cncompetencia.es/PDFs/resoluciones/2006/2103.pdf .

3 The Decision, of 21 June 2007, is available at http://www.cncompetencia.es/PDFs/resoluciones/2007/2193.pdf.

into account the countervailing power of buyers. Indeed, it stated that the existence of interest in both sides of the agreements was reinforced by the fact that *Grupo SOS Cuétara* (the provider or seller in the upstream market) and the retailers (the buyers in that same market) had a very balanced market position and negotiating strength.

Finally, the *Tribunal* has understood buying pools (joint buying arrangements) as legitimate reactions to the market power of a provider, and not as collusive agreements prohibited by Article 1 CA. See Decisions in cases 345/94 MÁQUINAS RECREATIVAS[4], 354/94 ELECTRODOMÉSTICOS ALICANTE[5] and r 218/1997 PETRÓLEOS CANARIAS.[6]

2.2 Merger control

As mentioned before, in the context of merger control buyer power can be analysed from two perspectives (a) as a countervailing factor against the potential anticompetitive effects of the merger and (b) as a factor to consider within the overall anticompetitive effects of the transaction.

2.2.1 Buyer power as a countervailing factor

The possibility that the anticompetitive effects of a merger could be alleviated with the compensatory buying power of customers has been considered by the Spanish Competition Authorities in some precedents in the food distribution sector, in particular in the context of the wholesale market for beverages.

Indeed, in case C 44/99 HEINEKEN-CRUZCAMPO –a merger between brewers-[7], the *Tribunal de Defensa de la Competencia* stated, referring to the relevant product market, that there was a high degree of concentration of buying power of commercial retailers which contrasted with the extreme fragmentation of the same in the *horeca* channel (hotels, restaurants and cafes). Supermarkets and hypermarkets accounted for 57% and 33% of the retail market and, more importantly, six large food retailers accounted for 47% of the value of sales. Their bargaining power compared to that of the brewers was strengthened by their financial capacity. As a result, sales in *horeca* offered greater potential for brewers' profitability than the retailers' channel.

Similarly, in case C 87/05 AREHUCAS / ARTEMI[8] –a merger between two rhum fabricants present in the Canary Islands- the *Tribunal* considered that retail distribution in the relevant geographic market had experienced a process of concentration and internationalisation in the previous years that had resulted in the emergence of large national and international groups holding substantial buying power vis-à-vis their suppliers. These buyers had a very strong bargaining power, which made it necessary to analyze whether they had effective power as to offset or compensate a hypothetical abuse of a dominant position on the supply side.

4 http://www.cncompetencia.es/resultadosResolucion.asp

5 http://www.cncompetencia.es/PDFs/resoluciones/1995/825.pdf

6 http://www.cncompetencia.es/PDFs/resoluciones/1995/825.pdf

7 http://www.cncompetencia.es/PDFs/concentraciones/4499.pdf

8 http://www.cncompetencia.es/PDFs/concentraciones/8705.pdf

Such reasoning has also been followed in cases such as C58/00 MAHOU/SAN MIGUEL, affecting brewers as well[9] [10].

2.2.2 Buyer power as a countervailing factor to consider within the overall anticompetitive effects of the transaction

In certain situations, the merger of two companies may entail an increase in the buying power of the resulting company in the upstream market where it is present and acting as a buyer. So far, however, the Spanish Competition Authorities have not found any significant concentration of buying power in that sense and so the possession or exercise of excessive buying power has not been considered as the main problem in any merger case.

Again in the context of the retail sector, an analysis of the effects of the merger on the upstream market is always carried out. Indeed, an assessment is always made on how the merger adds up to the bargaining position of the buying group the parties belonged.

2.3 Advocacy

In the framework of sector enquiries the notion of buyer power has also been taken into account in order to assess the conditions of competition in a market. For example, in the recently published *Report on Competition in the Markets for the Acquisition and Exploitation of Football Broadcasting Rights in Spain*[11], the CNC analyzes the markets for acquisition and exploitation of audiovisual rights of Spanish football competitions. The analysis is based on the historical existence -somewhat broken in recent years- of a monopsony in the upstream market for the acquisition of rights. This market's organisation and functioning favours the existence of a single purchaser or, where there are more than one, coordination among them, with the result that the bargaining power of the buyer is stronger than that that can be exercised by each club when they sell their rights individually, particularly when the club has limited "audiovisual appeal". And this situation naturally leads to the sellers' tendency to constitute sales pools.

Also, the CNC has considered that buying power is more likely to give rise to competition problems when the buyer holds a high degree of market power, or even a dominant position, in the downstream market, where he acts as a seller.

9 http://www.cncompetencia.es/PDFs/concentraciones/5800.pdf

10 For an example outside the food sector, see the report of the former *Servicio de Defensa de la Competencia* on case N-04004 KAYABA / A. P. AMORTIGUADORES (market for car crash dampers).

11 http://www.cncompetencia.es/PDFs/OtrosInf/11ing.pdf. See the *Upstream Market* section within the description of the Spanish football championships system.

TURKEY

The Competition Board encountered certain cases where it discussed monopsony and buyer power. This contribution tries to address some issues raised in the call for country contributions.

Buyer power is discussed in case-law of the Competition Board in two instances; first while considering whether an undertaking holds a dominant position and secondly in the evaluation of merger and acquisition cases. First of all, it should be mentioned that Article 6 of the Act No 4054 on the Protection of Competition (the Competition Act) prohibits abuse of dominant position[1]. Therefore, buying power falling short of dominant position cannot be challenged under provisions concerning abuse of dominant position in the Competition Act. Secondly, the relevant test while assessing mergers and acquisitions is the dominance test. Therefore, mergers and acquisitions creating or strengthening buying power falling below dominance level are not prohibited.

Buying power is discussed in case-law of the Competition Board mostly while considering whether an undertaking holds a dominant position. For instance, the Competition Board takes into account whether the customers have a sufficient level of countervailing buying power to constrain the market power of the producing undertakings.[2] In this sense, a buying power of 15-20% held by top five customers was considered low by the Competition Board.[3] Similarly, existence of strong buyers in merger context is regarded as among the factors that has negative impact on the parties' obtaining market power following the transaction.[4] For example, in one case regarding an acquisition, the Competition Board mentioned that in case buying power of top five customers was above 40%, it could be said that buying power existed.[5] In this particular case, share of top five customers in total sales in the relevant market was 61% indicating high buying power and inability of the relevant parties to the acquisition to act independently of the customers following the transaction.

In mergers and acquisitions in retail markets, concentration ratios in selling markets countrywide are important since they produce direct effects in procurement markets.[6] Increase in buying power as a result of concentration in selling markets enables purchasing under more convenient conditions and this, when reflected in prices, brings increase in market share in selling market in return. This so-called spiral effect will continue until a dominant position is created in the market. With decreasing competition in the selling market, the advantages derived from buying power may not be reflected to the consumers. Again, analysis of buying power in this case is limited to whether a dominant position is created in procurement markets as

1 Dominant position is defined in Article 3 of the Competition Act as "*the power of one or more undertakings in a particular market to determine economic parameters such as price, supply, the amount of production and distribution, by acting independently of their competitors and customers.*"

2 *Coca-Cola*, dated 10.9.2007 and numbered 07-70/864-327.

3 *Mey İçki*, dated 10.9.2007 and numbered 07-70/863-326.

4 *OMCO İstanbul,* dated 25.4.2001 and numbered 01-20/189-48.

5 *Henkel KGgA/Codant S.A.*, dated 4.7.2007 and numbered 07-56/659-229.

6 See *Migros/Tansaş*, dated 31.10.2005 and numbered 05-76/1030-287.

a result of the transaction involving retail trade.[7] However, it is emphasised by the Competition Board that buying power of modern retailers especially operating countrywide cannot be measured solely by considering quantity they purchase.[8] Presence of their products on the shelves of retail chains is considered important by producers due to brand image of the products. Therefore, bargaining power of modern retailers is not limited to the quantity they purchase.

Based on this background information, in a recent case[9], the Competition Board mentioned that there had to be certain conditions in the market for the exercise of monopsony power. Such conditions were realisation of significant amount of purchases in the market by the buyers and the number of total buyers, existence of entry barriers in the procurement market, supply curve with a positive slope and communication among buyers. In this case, monopsony power was defined as the one that could reduce the price of the product below competitive levels and depress it.

In another case,[10] three methods are mentioned that are used to measure buying power. These are 1 - concentration ratio in the procurement market 2 – elasticity of supply 3 – performance measurements. Although concentration ratio is the easiest one to measure, high concentration ratios in procurement markets are not sufficient alone to designate that an undertaking is dominant unlike selling markets. In case sellers are large undertakings, high concentration ratios in the procurement markets disprove dominance of the relevant undertaking. Therefore, it is essential to examine the structure of the selling markets as well.[11]

In one case regarding a purchasing cartel[12] where exporting undertakings fixed the earliest date of purchase and maximum purchasing price of cherry, the Competition Board took into account whether there were conditions enabling the exercise of monopsony power. It was considered that the exporting undertakings realised a significant part of the purchases in the market and their combined market share was 60,18% based on value. The CR_4 in the market was 70,60%, and HHI was 3684. That HHI was above 1800 indicated high concentration level. Moreover, although entry was likely in the long term, such entry did not constitute a timely and sufficient alternative in a market which lasted 30 days on average. Based on these considerations, the Competition Board adopted the view that the exporting undertakings created monopsony power via a cartel agreement.

In this case, a monopsonistic market was defined as a market where purchasing decision taken by a large buyer affected purchasing prices and monopsony power as the one that could determine the purchasing price below competitive levels. Moreover, the decision referred to the Horizontal Merger Guidelines of the Department of Justice which states "*Market power also encompasses the ability of a single buyer (a "monopsonist"), a coordinating group of buyers, or a single buyer, not a monopsonist, to depress the price paid for a product to a level that is below the competitive price and thereby depress*

7 In *Migros/Tansaş* case, the parties to the transaction purchased 10,4% of the sales of main manufacturers of detergents. Moreover, the parties to the transaction purchased 18,1% of sales of the main producers of frozen foods. It was decided that these market shares were far from creating dominant position in the procurement markets for detergents and frozen foods.

8 See *CarrefourSA/Gima-Endi*, dated 17.6.2005 and numbered 05-40/557-136.

9 *Leaf Tobacco*, dated 19.9.2002 and numbered 02-56/699-283.

10 *Arçelik*, dated 17.10.2000 and numbered 00-39/436-242.

11 In this case, CR_4 in the supply market was 45,1% whereas the relevant buyer realised 53% of the total purchases. In addition to the low level of CR_4, the relevant buyer was not dominant in the procurement market because there was only one other buyer in the market nearly with a market share of 47% (duopsony) and therefore the relevant buyer could not act independently of its rival.

12 *Purchase of Cherry*, dated 24.7.2007 and numbered 07-60/713-245.

output. The exercise of market power by buyers ("monopsony power") has adverse effects comparable to those associated with the exercise of market power by sellers."

The decision states that although monopsony implies a single undertaking, it is possible that several undertakings obtain monopsony power by acting like a single buyer. The impact caused by such undertakings which obtained monopsony power by acting together is generally emergence of purchasing quantity and prices below competitive levels. This is the derivative of welfare loss, created by cartels in selling markets, in purchasing markets.

The decision mentions that literature cites small number of buyers, whether products are homogenous, sealed bids, and inelastic supply as four main factors that may lead undertakings to obtain monopsony power by coming together. For instance, in this case, number of undertakings in the relevant geographic market was less than the number of undertakings operating countrywide, they realised a significant share of purchases in the relevant geographic market, the product was homogenous, and supply elasticity was low because of the fact that supply of agricultural products was definite and limited.[13]

While discussing whether the purchasing cartel benefited from exemption, among the factors that led to denial of exemption by the Competition Board were decrease in producers' income and loss in their welfare as a result of price offered below competitive levels as well as absence of any benefits for the consumer.

1. Collective Purchasing

An arrangement which seeks collective purchasing may be exempted under the Competition Act if it is restrictive of competition.[14]

In one case[15], Shell agrees with the operators of filling stations to set up a central purchasing system for the products to be sold in retail markets in these stations. As an important feature of the system, Shell was to negotiate with suppliers on behalf of operators of filling stations and purchase relevant products to be sold in retail markets of the relevant filling stations. Shell planned to purchase the products at low prices by using the bargaining power as done by big retailers. Two points in the system were considered relevant under the competition law. The first was the fact that operators of filling stations would be obliged to purchase the products exclusively via the system. Second point was a likely risk of acting in concert or parallel prices as membership of the retail markets in a purchasing organisation would cause identical purchasing prices meaning that the retail markets refrained from being rivals in the procurement market.

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13 The fact the supply elasticity is relatively low enables the buyers to decrease the purchasing price significantly without decreasing their purchases to a great extent. Moreover, the greater the power of the buyers to exert pressure to lower purchasing prices, the higher the likelihood of creating a purchasing cartel. Definite and limited nature of supply of agricultural products decreases their supply elasticity to a great extent thereby facilitating a purchasing cartel.

14 In order to benefit from exemption, following conditions should be satisfied:

a) Ensuring new developments and improvements, or economic or technical development in the production or distribution of goods and in the provision of services,

b) Benefiting the consumer from (a),

c) Not eliminating competition in a significant part of the relevant market,

d) Not limiting competition more than what is compulsory for achieving the goals set out in (a) and (b).

15 *Shell*, dated 26.5.2005 and numbered 05-36/482-113.

The decision favoured central purchasing system as it would permit the operators of filing stations to have a similar buying power that big retailers had vis-à-vis the suppliers enabling them to purchase and sell at relatively low prices. Among benefits for consumers taken into account, the decision mentioned that the central purchasing system would bring improvements especially in prices of the products and consumers would buy at more convenient prices in markets of the filling stations where prices might generally be high. Moreover, as the retail trade in Turkey was competitive, it was not possible that central purchasing system would eliminate competition. Finally, the risk of coordination among the retail markets of filling stations and sale of the relevant products at retail level at uniform prices through single purchasing price for the products were not considered credible as such systems were regarded as a healthy way to protect small retailers from competition exerted by big retailers and pro-competitive rather than anti-competitive in highly competitive markets like retail trade in Turkey. Moreover, it was considered that applying uniform prices was neither important nor a rational behaviour in competitive markets. As a result, it was decided that the system benefited from exemption.

2. Customer Foreclosure

One concern taken into account by the Competition Board regarding buying power arose in a case[16] regarding a JV in airline catering services market. According to JV agreement, Turkish Airlines, one of the parties to the transaction, would sign a contract with the JV to purchase airline catering services exclusively from the JV for a period of five years. Such an exclusivity contract would mean that a significant part of the market could be foreclosed for the providers of airline catering services as 50% of the total turnover in the market was realised via purchases by Turkish Airlines. Moreover, as Turkish Airlines was a disruptive buyer in the market, the transaction could cause elimination of a factor that created significant competitive pressure on providers of airline catering services.

The Competition Board did not consider the article of the JV agreement that foresaw signature of a contract for the purchase of airline catering services by Turkish Airlines exclusively from the JV for a period of five years as an ancillary restraint directly related and necessary to the transaction. The Competition Board required that the contract should be notified after signature so that it could be examined under articles of the Competition Act that prohibit anti-competitive agreements and regulate conditions for exemption.[17] The Competition Board concerned that the exclusivity clause in the contract for the purchase of airline catering services could foreclose the biggest customer operating in the downstream market of airline passenger transport services to the existing and potential rivals operating upstream market of airline catering services for five years and produce important effects on competition in the market.

Apart from these, the Competition Board permitted the transaction on the condition that Turkish Airlines would realise purchase of airline catering services under competitive conditions after the termination of the relevant contract for the purchase of airline catering services to be concluded with the JV.

16 *THY/DoCo*, dated 29.12.2006 and numbered 06-96/1224-369.

17 The Competition Board ruled that it could not grant negative clearance certificate and the contract could not benefit from exemption when it was notified. However, the Competition Board decided that a negative clearance certificate indicating that the contract did not violate the Competition Act could be granted if exclusive purchasing clause was removed from the contract. The reasoned decision dated 11.09.2008 has not been published yet.

UNITED KINGDOM

1. Summary

This is a joint submission of the Competition Commission (CC) and Office of Fair Trading (OFT) to the OECD. Both authorities have examined issues related to buyer power in the course of their competition work and are pleased to make this submission. There has been renewed interest in this topic with the greater public scrutiny across Europe within grocery retailing especially, a sector in which both authorities have recently been active.

There are many important differences between buyer power and market power on the supply side. This submission highlights how this affects the assessment of buyer power, the welfare effects and hence the policy implications. The direct effects of the exercise of buyer power fall upon upstream firms. However, both the OFT and the CC take their decisions with regard to detrimental effects on consumers[1]. Consequently, assessment of the effects of buyer power in competition investigations requires an understanding of the linkages between buyer power and effects on consumers.

Measuring buyer power is not straightforward. Most of the theories of harm resulting from buyer power require there to be supplier market power downstream, as well as buyer power upstream. It might therefore be necessary to define and analyse markets at a number of different levels in the supply chain. Analysis of data on prices to consumers of different sizes might provide evidence of buyer power, but without confidential data on costs (and therefore margins) it will be hard to distinguish between buyer power and cost-related volume discounts. Assessment therefore often falls back on considering whether the characteristics of the firms and markets under consideration are likely to result in buyer power. We set out some recent casework by the OFT and CC in assessing buyer power below.

Even when buyer power can reliably be identified, the implications for competition analysis will depend upon the purpose of the investigation. The most common reason for assessing buyer power is as a benign constraint upon seller market power (for example, exerting a countervailing effect in mergers). The OFT and CC have cleared mergers on this basis, and in some cases actively promoted the enhancement of buyer power (notably in Government procurement). Indeed the pressure from buyers for suppliers to cut prices plays an important role in driving upstream competition. This is true even where the downstream firm has market power. Likewise the pressure on the buyers to achieve cost efficiencies in order to survive in a competitive market is one of the ways competition enhances productivity.

However, there are circumstances in which buyer power can lead to adverse effects for consumers. We discuss three such theories: demand-withholding; reductions in competitive rivalry or incentives to innovate arising from bargaining strength; and buyer power facilitating downstream collusion. In each case, we discuss the logical conditions necessary for harm to consumers to arise. Usually (albeit not in all

[1] See speech by John Fingleton, 'Using competition and consumer interventions to make markets work well for consumers', September 2008 and Competition Commission 30 June 2008, *Market Investigation into the Supply of Groceries in the UK,* p 156: "We would expect to be able to identify current harm to consumers or have an expectation that harm to consumers would result in the future, in order to take remedial action."

cases), downstream market power[2] is a prerequisite for adverse effects to arise from buyer power, and in these circumstances, authorities could assess downstream market power as a screen for buyer power or be clear about the negative downstream effect of the conduct. We provide examples from recent UK cases of how the OFT and CC have assessed whether these conditions hold, or have assessed direct evidence about the predictions of the theories.

The CC's recent market investigation into the market for groceries[3] in the UK addressed a number of elements of buyer power, and was a good example of the need to distinguish between wide-ranging concerns of suppliers (and some sections of the public) and the assessment criteria required of a competition agency. The economic analysis involved was complex and detailed. In its final report, the CC found an adverse effect on innovation resulting from some risk-transferring practices of large retailers: one particular aspect of buyer power. However, it also investigated numerous other broader theories of harm relating to buyer power and did not find evidence that consumers were likely to be harmed, concluding that "Grocery retailers' buyer power is of benefit to consumers since part of the lower supplier prices arising from this buyer power will be passed on to consumers."

When considering buyer power, the immediate effect of an action is on other firms, but the interest of the authorities is primarily in harm to the process of competition to the detriment of consumers. Just as in other areas (such as most exclusionary practices) where other firms are directly affected, authorities must guard against inappropriate intervention, particularly driven by the complaints of suppliers. Type I errors[4] can be particularly costly given the efficiency enhancing nature of the conduct which benefits consumers. The risk of inappropriate intervention highlights the need to ensure an alignment of the economic and legal assessment of buyer power.

From these considerations we would suggest any structured rule of reason test for assessing competition concerns from buyer power should start with an assessment of the plausibility of downstream effects on consumers. We would be interested in any authorities which currently apply a structured rule of reason test in this area.

2. Definition

The OFT and CC adopt similar definitions of buyer power. The CC has stated that "Buyer power is a form of market power that a firm is able to exercise in relation to its suppliers." Buyer power will typically lead to lower input prices. This will not normally have adverse effects for consumer welfare; indeed in most circumstances the effects will be positive. Most instances of buyer power will therefore be of no concern to the competition authorities.

The authorities consider buyer power in two circumstances: beneficially as a possible constraint on the exercise of supplier market power and, more rarely, as a possible theory of harm in itself.

When considering possible constraints on supplier market power, the OFT guidelines state 'Buyer power exists where buyers have a strong negotiating position with their suppliers, which weakens the

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2 Here we mean the screen to cover both collective market power and the acquisition of market power.

3 Competition Commission 30 June 2008, *Market Investigation into the Supply of Groceries in the UK*. Available at www.competition-commission.org.uk.

4 A false conviction.

potential market power of a seller'[5]. Similarly, both authorities' merger guidelines discuss countervailing buyer power as a constraint on post-merger supplier market power[6].

In general, therefore, buyer power is considered to have a benign effect on consumer welfare. However there are circumstances in which consumers may be harmed as a result of the exercise of buyer power.

1. Monopsonists, or oligopsonists, able to withhold demand in order to depress the purchase price of inputs, resulting in reduced supply to final consumers. There have been relatively few cases in which this theory has been assessed in the UK, but we provide some examples when considering welfare effects, below.

2. Concerns relating to the strength of a buyer(s) when bargaining with sellers. There are several theories as to how this can harm final consumers including:

   - Harm to the process of competition (including foreclosure);
   - Waterbed effects;
   - Diminished incentives for investment and innovation.

3. Bargaining power facilitating downstream collusion and hence leading to higher prices or lower quality to final consumers. For example firms with collective downstream market power might use cooperative buying to facilitate downstream market sharing.

In the remainder of this document, we first consider the welfare effects of buyer power in different circumstances, and then discuss some techniques and experiences in identifying buyer power (whether benign or malignant).

3. Welfare Effects

There is a growing literature on bargaining models, buyer power and the application of competition law with contributions from Salop, Inderst, Blair & Harrison, Majumdar and Dobson[7] among others. The following sections draw on this literature and examine the potential beneficial and detrimental welfare impacts of buyer power.

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5 See OFT415 (2004), *Assessment of Market Power,* para 3.3, available at www.oft.gov.uk

6 See OFT516, *Mergers: Substantive assessment guidance,* 2003 and CC2, *Merger References: Competition Commission Guidelines*, 2003. Note that that OFT and CC are together revising their substantive merger guidelines and intend to issue joint merger guidance replacing these two documents, in 2009.

7 For example see Dobson, P. W. *Exploiting Buyer Power: Lessons from the British Grocery Trade*, Antitrust Law Journal 72: 529., Majumdar, A.N. *Waterbed Effects and Buyer Mergers*, CCP Working Paper No 05-7, June 2005, Blair, R.D. and Harrison, J.L *Monopsony: Antitrust Law and Economics,* Princeton University Press, 1993, Inderst, R. and Mazzarotto, N. *Buyer Power: Sources, Consequences and Policy Responses*, Mimeo, London School of Economics and Salop, S.C., *Anticompetitive Overbuying by Power Buyers*, 72 Antitrust L.J. 669-715 2005.

3.1 Beneficial welfare effects of buyer power

Overall, buyer power is typically either neutral or benign for consumer (and total welfare).[8] Buyer power will normally allow firms to reduce their costs, usually to the benefit of their consumers. Indeed the pressure for suppliers to cut prices is an important part of the process of rivalry which provides firms with incentives to achieve lower input costs. This competition to become the most efficient least cost producer, in aggregate across the economy, enhances productivity[9]. Prohibiting such conduct could be particularly costly. Hence buyer power can be seen as presumptively benign and harmful only in rare cases. This is in contrast to market power on the supply side, which can normally be expected to lead to adverse outcomes under both welfare standards.

In BA Travel Agents[10] the OFT considered a complaint by the Association of British Travel Agents (ABTA) concerning a reduction in the commission British Airways (BA) paid for sales of tickets. BA effectively cut this commission substantially to a large group of small suppliers. As such this could be characterised as an abuse of dominant position by excessively reducing payments, especially as BA was extremely large relative to each individual travel agent. In this case the OFT decided this did not infringe competition law even if BA was dominant (which was left open). In essence, these price cuts were associated with greater upstream efficiency (i.e., move to online booking and incentivising travel agents to be more cost efficient) with pass through to consumers, and were thus seen as beneficial for consumers.

Effective negotiating power of buyers can offset the potential for a substantial lessening of competition to occur in mergers or the likelihood of dominance to occur when assessing abuse of dominance cases under Article 82 of the EC Treaty or Chapter II of the UK Competition Act. This is the most common reason for the OFT and the CC to assess buyer power: as a benign counter to supplier market power, and therefore a welfare-enhancing factor.

Where gains from buyer power take the form of reductions in marginal input costs for the buyers, any gains will typically be passed on. The degree of pass on will depend on the extent of competition in the downstream market, but it is noteworthy that even a downstream monopolist will tend to pass on at least a proportion of any reduction in marginal input costs. Where gains from buyer power take the form of reductions in fixed input costs for the buyers, the situation is less clear. Such gains may or may not be passed through, depending on the nature of competition in the downstream market.

Increased bargaining power can itself be viewed as an efficiency, at least where lower input costs are likely to be passed on to final consumers. This can be an important feature of merger assessment.

For example, in the CC's assessment of HMV/Ottakars[11] an outcome of the merger was that the increased size of the retailer relative to other retailers would be likely to enable HMV Ottakars to negotiate improved buying terms resulting in lower prices for consumers. These lower prices might have been

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8 In common with many other competition authorities, the OFT and CC both adopt a consumer welfare standard when assessing their actions, as opposed to a total welfare standard. In practice, however, the implications of buyer power will typically be the same (in terms of direction at least) under both possible welfare standards.

9 See OFT887 (2007) *Productivity and Competition: An OFT perspective on the productivity debate.* Available at www.oft.gov.uk.

10 See Case CE/1471-02, *Decision of the Director General of Fair Trading: The Association of British Travel Agents and British Airways plc,* 11 December 2002. Available at www.oft.gov.uk

11 Competition Commission 2006, *Final Report on HMV Group plc and Ottaker's plc.* Available at www.competition-commission.org.uk.

considered as a relevant consumer benefit, had the CC reached an SLC finding[12], but in the event the CC found no SLC on other grounds.

In addition, both the OFT and CC have actively encouraged the exploitation of buyer power in the case of public sector procurement. For example:

- The OFT carried out a market study on public procurement, which examined the ways in which public sector procurement can effect competition for better and worse as well as screening for sectors worth further investigation in this regard .[13]

- The OFT has also made a number of specific recommendations in the area of procurement of waste disposal services. For example, local authorities have been encouraged to disaggregate their requirements at tender stage, in order to encourage more competition and innovation in the supply of elements of the service.[14]

- In the assessment of the Drager/Air Shields merger case, the CC recommended that the NHS make better use of its buyer power to mitigate some of the market power arising from the merger.[15]

- An OFT investigation into the UK Pharmaceutical Price Regulation Scheme[16] (the system under which the government procures from pharmaceutical companies within the UK) pointed to inefficiencies within the supply chain driven by the procurement system. It advocated a move to value based pricing[17] and a removal of a profit cap which may distort innovation.

3.2 Possible detrimental welfare effects of buyer power

Nonetheless, as set out earlier, there are some circumstances in which buyer power can result in adverse outcomes for consumers. In the remainder of this section, we focus only on those exceptions to the general rule that buyer power will act in the consumer interest.

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12 Consumer benefits ("efficiencies") are usually taken into account at the remedies stage in a CC merger inquiry, and therefore only become relevant in the event of a provisional SLC finding.

13 These sectors include sewage and refuse disposal, manufacture of weapons, health, shipbuilding and repair and parts of the construction industry. See OFT742 (2004) *Assessing the impact of public sector procurement on competition: A study carried out for the Office of Fair Trading by DotEcon.* Available at www.oft.gov.uk.

14 For example, certain potential bidders may incur higher set up costs than others, by allowing longer contracts these bidders are likely to be more competitive see OFT841 (2006) *More competition, less waste: Public procurement and competition in the municipal waste management* sector, and OFT and OGC (2006), *Making competition work for you: A guide for public sector procurers of construction.* Available at www.oft.gov.uk.

15 Competition Commission 2004, *Final Report on Dräger Medical AG & Co KgAa Hillenbrand Industries, Inc.* Available at www.competition-commission.org.uk.

16 OFT (2007), *The Pharmaceutical Price Regulation Scheme: An OFT market study.*

17 Whereby the price paid for drugs more closely reflected their therapeutic value. Available at www.oft.gov.uk.

3.2.1 Demand withholding, under monopsony and oligopsony

Just as a supplier with market power can reduce supply to force up output prices, so a buyer with buyer power can reduce demand to force down input prices. This results in reduced production, with consequential consumer (and total) welfare losses, in a manner analogous to the deadweight loss of monopoly[18].

However this situation can only come about under some restrictive assumptions:

- there must be a single 'market' price for the input, rather than negotiated prices for different consumers;
- there must be an upward-sloping supply curve (so that a fall in price reduces production); and
- the buyer must have market power downstream, to allow total supply of the finished good to be restricted (and prices to rise).

Because of these restrictive assumptions, cases are rare. However, the CC recently reached an SLC finding in a merger case along these lines. In the Clifford Kent/Deans Food merger[19], the CC concluded that increased buyer power as a result of the merger would lead in the long term to higher prices for consumers. The merged entity would have been the buyer of approximately 70 per cent of all shell eggs giving the entity monopsony power. Lower prices to producers of eggs could benefit consumers if passed on to them. However, the CC considered the quantity of eggs produced would fall, ultimately increasing prices to retailers and final consumers, particularly since the merger also enhanced downstream market power. The downstream market power of the merged entity was essential to this finding.

In its Groceries investigation[20], the CC examined whether demand withholding might be taking place in the UK fruit supply chain. This industry potentially met the three conditions set out above, as:

- Fruit is a commodity, typically with a single market price;
- Fruit is produced using a scarce resource (land), and so the supply curve is likely to slope upward (marginal costs increase as output increases); and
- the four largest intermediaries account for 80 per cent of UK-produced fruit sold to supermarkets.

The CC analysed the correlation of volume and farmgate prices for apples and pears over time and the retail price movements for orchard fruit and food. The correlation analysis did not provide a statistically significant result to support this theory of harm. Furthermore, total supply to UK consumers increased during a period where concentration in the retail sector also increased. The CC concluded that the evidence did not suggest that demand withholding was occurring.

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18 See OFT239 (1998), *The Welfare Consequences of the Exercise of Buyer Power: A Report Prepared for the Office Of Fair Trading by Paul Dobson, Michael Waterson and Alex Chu.* Available at www.oft.gov.uk.

19 Competition Commission 2007, *Final report on Clifford Kent Holdings Ltd and Deans Food Group Ltd.* Available at www.competition-commission.org.uk.

20 Competition Commission 30 June 2008, *Market Investigation into the Supply of Groceries in the UK*. Available at www.competition-commission.org.uk.

3.2.2 Bargaining theories

Where a buyer has or increases its bargaining power this may lead to a decrease in its input price. This is not usually of concern to Competition Authorities as this will at the least be neutral for the final consumer (if the buyer does not pass on cost savings) or will more likely be positively beneficial (if it does).

Adverse effects can arise, though, if the exploitation of buyer power affects incentives or market structure in such a way that it reduces output or diminishes competitive constraints over the long run. There are a number of mechanisms through which such adverse effects on consumers could arise.

Indirect competitive harm: damage to the competitive process of rivalry

There are several theories as to how powerful buyers could harm downstream competition via actions in the upstream market[21]. A buyer could deliberately exercise its bargaining power to damage the terms its rivals receive for the same inputs (raising rivals' costs). It could strike exclusive supply relationships with suppliers in order to prevent rivals receive important inputs (or raising the cost of these inputs). These actions are essentially about eliminating or substantially reducing downstream competition and are similar to theories of vertical foreclosure. Such adverse effects will not arise without downstream market power[22] and the factors necessary to support it (such as barriers to entry).

In practice the OFT has never reached a infringement decision concerning exercise of buyer power under Article 81/ 82 of the EC Treaty or Chapter I/II of the Competition Act, although the issue of the creation of buyer power has influenced merger references to the CC. Generally, buyer power has been considered beneficial.

The OFT has received Competition Act complaints in respect of buyer power, most notably in BetterCare[23] where the complaint alleged unreasonably low contract prices and unfair terms paid by North & West Belfast Health & Social Services Trust, a public purchaser of residential and nursing home care services. In practice, there was no evidence in the BetterCare case of the payment of excessively low purchase prices, and the OFT also stated in its non-infringement decision (rejecting the complaint) that "paying excessively low purchase prices is likely to amount to an abuse…only in exceptional circumstances…"[24] No such exceptional circumstances were considered to be present in this case.

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21 See OFT863 (2007), *The Competitive Effects of Buyer Groups*: a report prepared for the OFT by RBB Economics, for a good discussion of this.

22 We include within this definition, collective market power and the acquisition of market power.

23 Case No CA98/09/2003 *BetterCare Group Ltd/North & West Belfast Health & Social Services Trust,* December 2003. It should be noted that at the time of decision, European Court of Justice judgments material to the notion of whether a purchaser should be considered an undertaking were pending. Accordingly, the OFT did not reach a conclusion as to whether the purchaser in question was, when engaging in its purchasing activities, acting as an undertaking for the purposes of the Chapter II prohibition. When deciding questions under the Competition Act, the OFT is required, as far as possible and having regard to any relevant differences between the provisions concerned, to secure consistency with European Court judgments on corresponding questions in Community law. See Policy note 1/2004, OFT443 (2004), *The Competition Act 1998 and public bodies.* Available at www.oft.gov.uk

24 *BetterCare*, at para. 58. This case was to do with exclusion through low input prices.

The CC has also considered theories of foreclosure effects as a result of buyer power, for example in response to supplier concerns in merger cases[25], but has not reached an SLC or AEC[26] finding under the Enterprise Act as a result of such concerns.

The "waterbed" effect

Waterbed effects are similar to theories of foreclosure, but arise without necessarily deliberate attempts to limit competition, on the part of firms possessing buyer power.

If competing firms (for example retailers) enjoy very different levels of buyer power, then competition at the distribution level might be distorted. Suppliers might worsen the terms offered to competitors who have less buyer power. These competitors might be forced to respond by raising their own retail prices so as to cover their higher costs, probably at reduced sales volumes. This is a waterbed effect: lower input prices achieved by one firm increase the input prices for its competitors[27].

The immediate effect will depend upon market conditions. Some input costs have gone up and some have gone down. If the firms facing higher input costs previously constrained the pricing of those facing lower input costs, the final market price might rise. If the firms facing lower input costs constrain each other, their final prices will go down and the effect on the overall market price will be ambiguous. It is theoretically possible that the effect of increased final prices outweighs that of reduced prices, and average market prices rise (although substitution from products whose prices are rising to those whose prices are falling will make this unlikely).

Furthermore there may be dynamic effects if the cost differential leads to the exit of some retailers or a worsening of their offer, reducing competitive rivalry to the detriment of consumers.

The CC examined waterbed effect theories of harm in its Groceries inquiry[28]. It began by assessing the input price differential between large and small retailers. It found that the four largest grocery retailers paid on average between 4 and 6 per cent less than the mean, although the difference between prices paid by larger and smaller retailers varied greatly, by retailer and by product.

The CC noted that these price differentials do not constitute an adverse effect on competition in themselves, and therefore proceeded to evaluate the logical coherence and likely applicability to the UK grocery sector of theories of harm arising from waterbed effects. The CC set out several conditions for such an effect to result in harm to consumers:

- Upstream supplier competition must not be such as to prevent suppliers charging large grocery retailers and smaller grocery retailers different prices. It follows that waterbed effects are unlikely in a highly competitive upstream market.

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25 See for example SDEL/Coors (2005) and Hamsard/Academy (2007). Available at www.competition-commission.org.uk.

26 "Adverse effect on competition" – the substantive test in CC market investigations under the Enterprise Act.

27 This is a simplified account of the mechanism by which waterbed effects might theoretically arise. See for example Majumdar, A. (2005),'Waterbed Effects and Buyer Mergers', *Centre for Competition Policy (CCP) Working Paper 05-07*, Norwich. or Inderst, R. and T. Valletti (2006), 'Price Discrimination in Input Markets', mimeo. for formal models.

28 Competition Commission 30 June 2008, *Market Investigation into the Supply of Groceries in the UK*, particularly paragraphs 5.19 to 5.43. Available at www.competition-commission.org.uk.

- If small retailers can aggregate purchases through wholesalers, the difference in input costs between large grocery retailers and smaller grocery retailers would diminish or vanish.

- If discounts are given exclusively in the form of lump-sum payments, they would tend to result in a transfer of profits between suppliers and retailers without affecting the final retail price. With this type of payment arrangement, there is no scope for a waterbed effect to arise, except in the long run through changes to market structure.

The CC assessed a waterbed effect model submitted by a party to the inquiry[29]. The CC concluded that this model was logically coherent, but that the effect would arise only under the specific circumstances set out in the model. However, these circumstances did not reflect the competitive dynamics that the CC observed in UK grocery retailing (for example, the model assumed that large supermarkets' pricing was constrained primarily by small retailers, rather than rival supermarket chains). Furthermore, the evidence on pricing did not support the predictions of the model (for example, the price differential between large and small retailers had not been widening over time, as might have been expected given increased concentration). Nor was there unambiguous evidence of an overall decline in convenience store numbers and revenues.

Overall, although it found differentials in input costs, the CC did not find evidence of a causal relationship: that lower supplier prices for the four largest grocery retailers resulted in higher supplier prices to other grocery retailers or wholesalers. Nor did it conclude that the input price differentials observed were likely to lead to harm to consumers through the waterbed effect models it assessed.

Incentives to innovate

Buyer power may lead to adverse effects for consumers by affecting suppliers' incentives to invest and innovate. If so, consumers could suffer goods of lower quality, fewer new products and possibly at a higher price as they may be produced with inferior (and more costly) technology. This theory could apply to both competitive and concentrated supplying industries regardless of whether they can be characterised by a "market" or a "bargaining" framework and as such may be more common than the other welfare effects discussed in this section.

In inefficiently driving down innovation, buyers may damage their own long-run interests, but might be unable to commit not to do so because of free-rider problems. Downstream market power is not a precondition for this theory of harm, as the reduction in quality affects all market participants.

Following an investigation of supermarkets' purchasing practices (including the required disclosure of substantial e-mail traffic between purchasers and suppliers), the CC found in the Groceries inquiry that excessive risk was transferred from grocery retailers to suppliers, either through retrospective adjustments to the terms of supply or up-front agreements. For example, a requirement for a price adjustment after goods have been ordered, or products delivered, was a typical practice that was a source of unexpected cost to suppliers. Even where risk sharing had been agreed upfront, in some cases these allocations seemed inefficiently to result in moral hazard: for example, where suppliers were liable for shrinkage (goods lost or stolen), but the retailer was better placed to control those risks. As a result, the CC concluded that "this is likely to lessen suppliers' incentives to invest in new capacity, products and production process. If unchecked, we conclude that these practices will ultimately have a detrimental effect on consumers." It therefore found these practices to be a feature of the market which prevents, restricts or distorts competition, and sought remedies.

[29] The Association of Convenience Stores (ACS). The assessment of this model is set out in Appendix 5.4 to the CC report. Available at www.competition-commission.org.uk.

However, this finding related only to these specific practices, and the risk transfers that they cause, rather than to buyer power overall. Indeed, the CC noted that the exercise of buyer power can spur innovation in the supply chain, and there is some evidence[30] that on balance it does so.

Theories related to coordination

There are several theories relating to coordination, again to enhance downstream market power, which can arise from, or be facilitated by, buyer power.

"Vertical collusion" may occur where a powerful buyer (or buyers) induces suppliers to facilitate downstream collusion, for example through the imposition of resale price maintenance (RPM) or more generally through refusing to supply retail discounters.[31,32] In some cases, the suppliers will then be given a share of the resulting rents in return for facilitating the collusion.

More directly, buyer power may arise from joint purchasing. Buyer groups are common and usually beneficial, in that they allow smaller retailers to benefit from a lower input price and thereby compete more effectively in the downstream market. However, if in aggregate such purchasers represent a substantial amount of downstream supply, such agreements may facilitate the creation of downstream market power. For example:

- by fixing the quantity of input purchased they directly fix the downstream output and represent a horizontal cartel,

- by providing a means of restricting entry into a cartelised industry through requiring suppliers to deal exclusively with the purchasing group,

- by providing a forum for exchange of information, introducing homogeneity into the products stocked (and hence maybe eliminating an important form of competition) and the input price they face (hence their costs), buyer groups can facilitate either implicit or explicit downstream collusion.

However this should not be seen as indicating buyer groups are necessarily harmful. Such buyer cartels do have a greater likelihood of being beneficial than other cartels[33], as they can lead to cost reductions being passed on to consumers[34]. Indeed, the CC's Groceries report noted that smaller buyers could aggregate their demands to achieve buyer power, to limit the problems associated with 'waterbed' effects, as discussed above.

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30 Competition Commission 30 June 2008, *Market Investigation into the Supply of Groceries in the UK*, paragraph 9.4 and footnote. Available at www.competition-commission.org.uk

31 There is a separate OECD submission which examines issues in retail price maintenance in more depth.

32 The Toys 'R' Us case in the US may be an example of a powerful buyer facilitated collusion by brokering agreements not to supply to discounters.

33 The European Commission Guidelines on Horizontal Co-operation Agreements OJ 2001 C3/2 deal with buyer power at para. 126 -- 131. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001Y0106(01):EN:NOT. It notes that shares can be indicative but are not sufficient to show harm and that a more detailed assessment will be required.

34 There are several ways in which buyer cartels can facilitate downstream collusion and this paper is not a comprehensive examination of this issue.

The OFT considered a 'buyer cartel' case in Cityhook. This case concerned an alleged collective boycott of a supplier (Cityhook Limited) by a group of buyers (the United Kingdom Cable Protection Committee (UKCPC)) and the alleged collective setting of wayleaves[35] by this group of buyers.[36] The OFT decided to close the case on grounds of administrative priority.[37] The final closure letter noted (among several factors taken into account in that decision) that there was little, if any, evidence of consumer detriment. For the alleged collective boycott there was no evidence of Cityhook's technology lowering costs for telecommunications companies which could then be passed on to consumers in the form of lower call charges. With regard to the alleged collective setting, the amount spent in respect of wayleave fees when compared to the entire installation of networks was insignificant and therefore it was unlikely that there would have been significant consumer benefit or detriment.[38]

4. Identifying Buyer Power

Although the concepts of supplier market power and buyer power have some superficial similarities, this does not imply that the same techniques can be used to identify them. For example, market shares can provide an indicator of market power, but the relationship between share of purchases and buyer power is far more tenuous. In the following sections, we set out practices and experiences of the OFT and CC in identifying buyer power.

4.1 Market Definition

Market definition will depend upon the theory of harm being considered.[39] Where buyer power is being assessed as a potential, benign, constraint on the exercise of supplier market power, buyer power will be assessed within the supply market of concern. In a horizontal merger, for example, we would assess whether existing consumers in the markets in which the merging firms overlap have the ability to resist price increases.

When buyer power is itself being assessed as a possible driver of harm, the potential markets affected will depend on precisely which theory of harm is being considered. Downstream markets would be defined in the normal way using the hypothetical monopolist test and then the degree of potential buyer power is assessed in this context. Hence the market where consumers may be harmed is the one which is defined in the first instance.

However, markets might also need to be assessed at other levels of the supply chain, if the concern is that firms might exercise buyer power in one market, with adverse consequences for consumers in another, linked, market. For example if the concern was about foreclosure by a powerful downstream buyer enforcing exclusivity agreements then understanding both upstream and downstream markets will be important.

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35 A wayleave is the right to use the land of another for a special purpose.

36 See OFT Press release 59/07, *Competition Appeal Tribunal dismisses appeal against OFT decisions to close two competition investigations.* Available at www.oft.gov.uk

37 This case closure is currently the subject of a judicial review in the Administrative Court.

38 See CAT18 [2008] Judgment on Cityhook Limited v Office of Fair Trading. Case No. 1071/2/1/06, Para 24. Available at www.catribunal.org.uk

39 This can also vary between the substantive test being considered, for example the Substantial Lessening of Competition test of mergers does differ to the test used within market investigation references for example. This paper does not examine all our legal tests under competition law, previous papers to the OECD cover these topics.

4.2 Assessing Buyer Power

Buyer power both within a monopsony framework of analysis and within a bargaining framework (where we have more experience and on which we largely focus) can be assessed either directly, or indirectly by measuring factors which might be considered to contribute to buyer power. OFT and CC have experience of both.

Recent casework examples of direct measurement include:

- In assessing the Cott/Macaw merger, between two suppliers of own-label products to supermarkets, margin data from the two parties was used to conduct a multivariate econometric analysis of the difference in buyer power for retailers of different size.[40] Margin analysis was used, rather than price, to distinguish between cost-related volume discounts and buyer power. Large retailers seem to have been able to negotiate a price which provided the suppliers with only fractionally lower margins than those earned from other retailers (i.e. size conferred no real buyer power).

- In the CC's market investigation into the UK Groceries market[41], econometric analysis was undertaken to determine the extent to which supplier prices vary between individual grocery retailers and wholesalers. This analysis found that an increase in the volumes purchased by a retailer or wholesaler is associated with a reduction in both the unit and net price paid. However, this econometric analysis did not allow separate identification of the effects of buyer power associated with size, from lower prices resulting from economies of scale.

- A survey of suppliers was also used in the Groceries investigation to assess buyer power. Respondents were asked to identify the type of consumer from which they received the highest and lowest margins. Suppliers indicated that the lowest margins were most commonly earned on sales to the four largest grocery retailers. However, these four quite often also paid the highest margins too. The CC also asked respondents about their perceived level of bargaining power with grocery retailers and wholesalers. Suppliers generally considered themselves to have less bargaining power with large retailers, but many reported minimal bargaining power with any of their consumers.[42]

- Overall the Groceries inquiry concluded that all large retailers, wholesalers and buying groups have buyer power in relation to at least some of their suppliers. However, the buyer power of even the largest grocery retailers may be offset by the market power possessed by suppliers of the most prominent branded goods.

- In Genzyme the OFT considered the ability of the National Health Service (NHS) as a sole buyer of a drug to offset the market power of Genzyme. Here evidence included the NHS's inability to achieve price reductions following a fall in Genzyme's manufacturing costs as an indicator of a

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40 Competition Commission 28 April 2006, *Cott Beverages Limited and Macaw (Holdings) Limited: A report on the acquisition by Cott Beverages Limited of Macaw (Holdings) Limited,* Appendix C. Available at www.competition-commission.org.uk.

41 Competition Commission 30 June 2008, *Market Investigation into the Supply of Groceries in the UK,* Appendix 5.3. Available at www.competition-commission.org.uk.

42 Competition Commission 30 June 2008, *Market Investigation into the Supply of Groceries in the UK,* p 159. Available at www.competition-commission.org.uk.

lack of such countervailing buyer power.[43] A similar finding was made and upheld on appeal in Napp Pharmaceuticals.[44]

When such direct measures are not available, OFT and CC assess indirectly through the presence of factors likely to confer bargaining power.

One well-known factor here is the scale of the buyer in relation to its suppliers. However, when assessing the relative bargaining strengths of buyers and sellers, it is important not to focus on scale alone, but rather to consider it as part of an assessment of the credible threats a buyer could use to leverage better prices, terms or conditions from a supplier. These relate to the outside options[45] of both purchaser and seller.

In assessing such 'outside options', CC and OFT will typically collect evidence on whether the buyer:

- is well informed about alternative sources of supply and could readily, and at little cost to itself, switch substantial purchases from one supplier to another while continuing to meet its needs[46]
- could commence production of the item itself or 'sponsor' new entry by another supplier (e.g. through a long-term contract) relatively quickly and without incurring substantial sunk costs
- is an important outlet for the supplier (i.e. the supplier would be willing to cede better terms to the buyer in order to retain the opportunity to sell to or through that buyer)
- can impose costs on the suppliers (for instance by delaying purchases). [47]

In addition[48], a buyer's ability to substitute or delay purchases of one set of products might enhance its bargaining strength over another set of products sourced from the same supplier.

In the Cott/McCaw merger[49], the CC considered evidence on all of these factors. Consumers' opportunities to switch to alternative suppliers, or sponsor new entry, were considered to be strong enough to prevent an SLC taking place as a result of the merger. It was not fully clear whether this represented 'buyer power' or simply inherently highly competitive supply conditions (for example because products

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43 See paragraph 270 Case CP/0488-01, *Decision of the Director General of Fair Trading: Exclusionary behaviour by Genzyme Limited,* 27 March 2003. Available at www.oft.gov.uk.

44 Case 1001/1/101 *Napp Pharmaceutical Holidings Limited and Subsidiaries v DGFT* [2002] CAT 1 at [168], [2002] CompAR 13. Available at www.catribunal.org.uk

45 This can be viewed as the next best alternative to purchasing (or reducing purchasing) the input for the buyer and the next best alternative to selling to the buyer when looking at the seller.

46 This is more than just the degree of competition but the extent to which buyers can enhance competition through, for example, threatening to switch large volumes of business.

47 See OFT415, *Assessment of market power: Understanding competition law*, 2004. Available at www.oft.gov.uk.

48 This point is brought out in the CC merger guidelines, see CC2, *Merger References: Competition Commission Guidelines,* 2003.. Available at www.competition-commission.org.uk.

49 Competition Commission 28 April 2006, *Cott Beverages Limited and Macaw (Holdings) Limited: A report on the acquisition by Cott Beverages Limited of Macaw (Holdings) Limited,* Appendix C. Available at www.competition-commission.org.uk.

were undifferentiated, and production technology allowed for easy expansion of capacity). In practice, this distinction did not matter.

Historical examples of, for example, purchasers' ability to sponsor new entry can be a direct indicator. A research report by PWC[50] evaluating ten mergers cleared by the CC in the 1990s, indicated that this was quite common in response to the temporary creation of market power through merger. In one case (Klaus Jakobs/SCIA), buyers encouraged a management buy-out to create a competitor; in another (CHC/Helicopter) they sponsored an entrant.

In addition to the quantitative analysis described above, the CC in its Groceries inquiry also assessed qualitative evidence on buyer power. This was helpful in describing the factors that seemed to affect different consumers' buyer power. For example, future growth potential was considered an important factor, in addition to the current scale of purchases.

More generally, a notable finding of the analysis in Groceries, Cott/McCaw and Clifford Kent/Deans Food merger[51] was how complex the determinants of buyer advantage seemed to be. In particular, size was by no means determinative. In all of these cases, some small purchasers appeared to getting deals as good as those achieved on average by the larger buyers, while some large buyers appeared to be paying a premium. For example, smaller buyers can be treated as 'incremental demand' and not required to pay an allocation of fixed costs, or smaller grocery retailers might not regard particular brands as "must stock" items as would a full-range supermarket (and might therefore have better outside options).

The OFT has recently cleared several mergers at Phase 1 where the primary reason for clearance was countervailing buyer power.[52,53] The factors used in these clearances were:

- the effective use of purchase processes by buyers to intensify competition (such as sophisticated use of multi-sourcing and the use of auctions);

- the ability to sponsor new entry (either confirmed by buyers or illustrated through previous examples).

In merger analysis, both the CC and OFT have examined whether some but not all consumers in a market might possess countervailing buyer power.[54] If they do, this is unlikely to affect the decision as to whether an SLC would result from a merger (because the SLC would arise to the detriment of those consumers without buyer power), but by limiting the scope of the detriment that arises, it might affect the remedies.

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50 OFT767 (2005), *Ex post evaluation of mergers: a report prepared for the Office of Fair Trading, the Department for Trade and Industry and the Competition Commission by PricewaterhouseCoopers LLP*. See in particular paragraph 5.11. Available at www.oft.gov.uk.

51 All discussed above.

52 In this respect we note that the existence of countervailing buyer power is not sufficient on its own. It is also important that the merger will not substantially reduce this, for example by removing choice.

53 See OFT merger clearances on the anticipating acquisition by Europcar UK Limited of Vanguard Car Rental EMEA Holdings Ltd, the anticipated acquisition by Halliburton Manufacturing and Services Limited of PSL Energy Service Limited and the anticipated acquisition by Seawell Holding (UK) Limited of Noble Drilling (UK) Limited.

54 See for example the CC's EWS/Marcroft inquiry (2006). Available at www.competition-commission.org.uk.

5. Conclusion

The assessment of the competitive effects of buyer power is not straightforward. It is rendered more difficult still by the business interests at stake when it is under review. Buyer power mostly serves to reduce prices or otherwise increase competitive tensions in the marketplace. It is no surprise, therefore, that businesses will lobby for its removal. Just as when assessing exclusionary abuses, it is essential for competition authorities to ensure that they intervene only when necessary to protect the process of competition, in the interests of consumers, rather than protecting competitors and suppliers.

The dangers of Type I errors are more pronounced here for several reasons. Firstly, as outlined above, there are good reasons to believe competition authorities will receive complaints aimed at protecting suppliers rather than consumers. Secondly and a related point, given the potential efficiency benefits which derive from buyer power there is a danger that errors will be costly for consumers and the economy. Lastly the incentives to acquire and use buyer power to drive down upstream costs is part of the competitive process, deterring such behaviour can have wide ranging consequences on a productivity enhancing aspect of competition.

Two key points come out of our experience and consideration:

- Economic analysis has a key role to play in the assessment of buyer power. There is a danger of over-intervention against the exploitation of buyer power, which would prevent and deter beneficial behaviour. Key to determining when to intervene is the assessment of when consumers (as opposed to suppliers) are likely to be harmed.

- The assessment of buyer power typically requires an examination of the downstream market power of the buyer(s) or the acquisition of downstream market power. In many situations, this can be used as an initial screen as to when concerns are likely to be unwarranted. The plausibility of a downstream effect on consumers could be part of structured test for assessing potential competition concerns regarding buyer power.

UNITED STATES

1. Introduction

The 1890 debates in both houses of the United States Congress demonstrated concern with the exercise of market power on both the buying and selling sides of the market.[1] Many legislators singled out large meat packers for condemnation, and they were condemned as much for reducing the prices paid to cattle farmers as for raising prices to consumers.[2] In response, Congress passed the Sherman Act, "aimed at preserving free and unfettered competition as the rule of trade."[3] "The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated."[4]

The Sherman Act prohibits anticompetitive agreements and exclusionary conduct and both may be found unlawful on the basis of effects on the buying side of the market. Buyer cartels are unlawful per se and prosecuted criminally. Other collaborations among competing buyers may be unlawful if they create market power on the buying side of the market. Single-competitor exclusionary conduct is unlawful if it maintains, creates, or threatens to create, a high degree of market power on the buying side of the market.

The Clayton Act prohibits mergers and acquisitions "having demonstrable anticompetitive effects"[5] and authorises the injunction of a proposed merger on the basis of a "prediction of the merger's impact on competition."[6] Mergers may be found unlawful on the basis that they are likely to create or enhance market power on the buying side of the market.

2. Monopsony and Buyer Power Concepts

A "monopsony" is a single (or dominant) buyer dealing with multiple sellers. In important respects, monopsony is the mirror image of monopoly.[7] In the simple textbook treatment, a monopolist forces up the market price for what it sells by restricting the amount it produces and thus moves up the market demand curve; a monopsonist forces down the market price for what it buys by restricting the amount it

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1 *See* 21 CONGRESSIONAL RECORD 2461 (1890) (statement of Sen. John Sherman) ("These trusts and combinations . . . operate as a double-edged sword. They increase beyond reason the cost of necessaries of life and business, and they decrease the cost of raw material, the farm products of the country. They regulate prices at will, depress the price of what they buy and increase the price of what they sell.").

2 *See id.* at 2470 (statement of Sen. John H. Reagan), 2606 (statement of Sen. William M. Stewart), 4098 (statement of Rep. Ezra B. Taylor), 4099 (statement of Rep. Richard P. Bland); 4101 (statement of Rep. John T. Heard).

3 *National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 104 n.27 (1984) (quoting *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4 (1958)).

4 *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 472 (1982) (quoting *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948)).

5 *Brown Shoe Co. v. United States*, 370 U.S. 294, 319 (1962).

6 *Federal Trade Commission v. Procter & Gamble Co.*, 386 U.S. 568, 577 (1967).

7 Ways in which monopsony does not mirror monopoly as a practical matter are discussed by Jonathan M. Jacobson & Gary J. Dorman, *Joint Purchasing, Monopsony and Antitrust*, 36 ANTITRUST BULLETIN 1, 10–17 (1991); Jonathan M. Jacobson & Gary J. Dorman, *Monopsony Revisited: A Comment on Blair & Harrison*, 37 ANTITRUST BULLETIN 151, 154–58 (1992); Roger G. Noll, *"Buyer Power" and Economic Policy*, 72 ANTITRUST L.J. 589 (2005).

buys and thus moves down the input supply curve. Although output reduction is generally associated with both monopoly and monopsony, it need not occur with either. By practicing price discrimination, with all-or-nothing offers, a monopolist can extract the maximum from consumers, and a monopsonist can extract the maximum from suppliers, without any reduction in output.[8]

The economic impact of monopsony depends somewhat on the monopsonist's position as a seller in the associated output market. If the monopsonist is a monopolist in the output market, restricting input purchases leads to reduction in output, which raises the price to downstream consumers. In contrast, if the monopsonist has no ability to affect the price in the output market, restricting input purchases has no impact on downstream consumers. This latter scenario can arise if the geographic scope of the relevant input market is far narrower than the geographic scope of the relevant output market. It also can arise if the monopsonist employs a different technology, using different inputs, than its output-market rivals.

In both economics and law, "market power" refers to the ability of a seller profitably to charge more than the competitive price for what it sells or to the ability of a buyer profitably to pay less than the competitive price for what it purchases. Market power is a matter of degree and is not of concern unless present to a significant degree. The degree of market power on the selling side of the market is determined mainly by the market demand curve, especially its elasticity. The degree of market power on the buying side of the market is determined mainly by the input supply curve, especially its elasticity. Substantial and durable market power on the part of a seller is "monopoly power," and substantial and durable market power on the part of a buyer is "monopsony power."

The term "buyer power" describes either market power or "bargaining power" on the buying side of the market.[9] The latter form of buyer power is the ability of a buyer to negotiate a favourable price that is nevertheless above the competitive level.[10] The term "countervailing power" was coined to describe the latter form of buyer power when it has the effect of mitigating the adverse effects of seller power on the opposite side of the same market.[11]

3. Buyer Cartels

Cartels have always been a major focus of antitrust enforcement in the United States, and buyer cartels have always been treated just as seller cartels. One of the earliest Sherman Act cases involved, among other things, a conspiracy among meat packers to reduce the price they paid for cattle.[12] The per se rule against cartel activity began to emerge in the early decisions interpreting the Act,[13] and it has never

8 *See* ROGER D. BLAIR & JEFFREY L. HARRISON, MONOPSONY: ANTITRUST LAW AND ECONOMICS 73–74 (1993).

9 *See, e.g.*, ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 323 (2007).

10 *See, e.g.*, Zhiqi Chen, *Buyer Power: Economic Theory and Antitrust Policy*, *in* 22 RESEARCH IN LAW AND ECONOMICS 17, 19–20 (2007).

11 JOHN K. GALBRAITH, AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER 111–23 (1952).

12 *United States v. Swift & Co.*, 122 F. 529 (C.C.N.D. Ill. 1903), *aff'd*, 196 U.S. 375 (1905).

13 *See United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898); *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 331 (1897).

distinguished between seller cartels and buyer cartels.[14] All cartel activity is prohibited because of its "threat to the central nervous system of the economy."[15]

In 1948 the Supreme Court of the United States specifically addressed price fixing by competing buyers.[16] Within a highly localised market, growers of sugar beets could sell to only three refiners, and the three refiners entered into a price-fixing arrangement. Because the refiners sold sugar in competition with other refiners throughout the United States, their price fixing affected the price they paid to growers but not the price at which they sold refined sugar. The Supreme Court held that: "It is clear that the agreement is the sort of combination condemned by the [Sherman] Act, even though the price-fixing was by purchasers, and the persons specially injured . . . are sellers, not customers or consumers."[17] The Court also declared that the effects of the price fixing "fall squarely within the Sherman Act's prohibitions, creating the very injuries they were designed to prevent."[18] Modern court decisions agree that the per se rule against cartel activity makes no distinction between seller cartels and buyer cartels.[19]

The U.S. Department of Justice makes no distinction between seller cartels and buyer cartels in its cartel enforcement program. During the 11-year period 1997–2006, the Department brought 70 criminal cases against buyer cartels. All involved collusion among bidders in auctions; 51 involved real estate foreclosure auctions. The limited evidence on buyer cartels in auction settings suggests that they have had substantial competitive effects. A study of real estate auctions found that bid rigging reduced winning bids an average of 32%.[20] A study of auctions for used police cars found that bid rigging reduced winning bids by 17–28%.[21]

4. Purchaser Collaborations Other than Cartels

Section 1 of the Sherman Act prohibits any "contract, combination . . . or conspiracy, in restraint of trade." The three named forms of conduct "are understood to embrace a single concept"—that of an agreement among distinct economic entities,[22] and Section 1 is read "to outlaw only unreasonable

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14 *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940) ("Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se.").

15 *Id.* at 225 n.59.

16 *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948).

17 *Id.* at 235 (footnotes omitted).

18 *Id.* at 242.

19 *See, e.g.*, *Todd v. Exxon Corp.*, 275 F.3d 191, 201 (2d Cir. 2001) ("a horizontal conspiracy among buyers to stifle competition is as unlawful as one among sellers"); *Vogel v. American Society of Appraisers*, 744 F.2d 598, 601 (7th Cir. 1984) (Posner, J.) ("[B]uyer cartels, the object of which is to force the prices that suppliers charge the members of the cartel below the competitive level, are illegal per se. Just as a sellers' cartel enables the charging of monopoly prices, a buyers' cartel enables the charging of monopsony prices."); *International Outsourcing Services, LLC v. Blistex, Inc.*, 420 F. Supp. 2d 860, 864 (N.D. Ill. 2006) ("The broad prohibition against price fixing also extends to the less common situation of price fixing among horizontal competitors who are buyers.").

20 John E. Kwoka, Jr., *The Price Effect of Bidding Conspiracies: Evidence from Real Estate "Knockouts*," 42 ANTITRUST BULLETIN 503 (1997).

21 Jon P. Nelson, *Comparative Antitrust Damages in Bid-Rigging Cases: Some Findings from a Used Vehicle Auction*, 38 ANTITRUST BULLETIN 369 (1993).

22 6 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1400a, at 1; ¶ 1403 (2d ed. 2003).

restraints."[23] The "criterion to be used in judging the validity of a restraint of trade is its impact on competition."[24] A "horizontal restraint—an agreement among competitors on the way in which they will compete with one another"[25]—is the type of restraint most likely to be found unreasonable. Horizontal restraints other than cartels can be deemed unreasonable per se, but "[r]esort to *per se* rules is confined to restraints . . . 'that would always or almost always tend to restrict competition and decrease output.' To justify a *per se* prohibition a restraint must have 'manifestly anticompetitive' effects and 'lack . . . any redeeming virtue.'"[26]

Relatively few cases have considered non-cartel horizontal restraints by competing buyers.[27] An important recent case involved a rule adopted by an organisation of colleges effectively limiting wages paid to a category of basketball coaches.[28] The court of appeals held that the per se rule did not apply because the organisation's rules "serve the procompetitive purpose of making college sports available;"[29] however, the court held that an anticompetitive effect had been shown through evidence of reduced salaries for some coaches.[30] Consequently, the court held that the restraint was unlawful unless adequately justified, and the court rejected the organisation's proffered justifications. The court rejected the justification that the rule reduced the schools' costs because doing otherwise would permit "any group of competing buyers [to] agree on maximum prices" and thereby "rob[] the suppliers of the normal fruits of their enterprises."[31]

A common form of horizontal restraint imposed by competing buyers involves a purchasing cooperative. The Supreme Court has observed that "purchasing cooperatives . . . are not a form of concerted activity likely to result in predominantly anticompetitive effects" but rather increase economic efficiency.[32] The federal enforcement agencies in the United States have advised that purchasing cooperatives generally "do not raise antitrust concerns and indeed may be procompetitive" because they "may enable participants to centralise ordering, to combine warehousing or distribution functions more efficiently, or to achieve other efficiencies."[33] The agencies are concerned, however, about the possibility

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23 *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

24 *National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 104 (1984). *See Board of Trade of the City of Chicago v. United States*, 246 U.S. 231, 238 (1918) ("The true test for legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.").

25 *National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 99 (1984).

26 *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2713 (2007) (quoting *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723 (1988); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 (1977); and *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289 (1985)).

27 An exhaustive survey of the cases is presented by Jonathan M. Jacobson & Gary J. Dorman, *Joint Purchasing, Monopsony and Antitrust*, 36 ANTITRUST BULLETIN 1, 25–36 (1991).

28 *Law v. National Collegiate Athletic Ass'n*, 134 F.3d 1010 (10th Cir. 1998).

29 *Id.* at 1016–19.

30 *Id.* at 1019–20.

31 *Id.* at 1022.

32 *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 295 (1985).

33 FEDERAL TRADE COMMISSION & U.S. DEPARTMENT OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 3.31(a) (April 2000), *available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf.

that purchasing cooperatives "create or increase market power" in purchasing.[34] But this concern arises only if the cooperative accounts for a significant share of total purchases. In the context of "joint purchasing arrangements among hospitals or other health care providers," the agencies have stated that, absent extraordinary circumstances, they will not challenge joint purchasing on the basis of buyer market power if "the purchases account for less than 35 percent of the total sales of the purchased product or service in the relevant market."[35]

5. Merger Enforcement

Section 7 of the Clayton Act prohibits mergers and acquisitions the effect of which may be "substantially to lessen competition." Section 7 is enforced principally by the federal enforcement agencies, which have promulgated guidelines explaining how they assess the likely competitive effects of mergers.[36] The guidelines state that their "unifying theme . . . is that mergers should not be permitted to create or enhance market power or to facilitate its exercise" and indicate that market power encompasses both the ability of sellers to maintain prices above the competitive level and the ability of buyers to maintain prices below the competitive level."[37] Rather than detailing the agencies' approach to the assessment of buying-side competitive effects, the guidelines just state that the agencies "apply an analytical framework analogous to the framework" set out for assessing selling-side effects.[38]

The delineation of the relevant market for the analysis of buying-side competitive effects is very similar to the delineation of the relevant market for the analysis of selling-side competitive effects. The process begins by identifying a product of interest and the location at which it is bought. For example, with an agricultural product, that location could be a processing facility. One then asks whether a hypothetical monopsonist at that location would maximise profits by reducing the price paid below prevailing levels. The answer normally is no, because there is an actual monopsonist at the location, and it already is maximising its profit. Assuming that the product scope of the market already is fairly clear, one then gradually expands the region within which there is a hypothetical monopsonist, continually asking whether it would maximise profits by reducing the price paid below prevailing levels. The smallest region for which the answer is yes, or some slightly larger region, is the relevant geographic market for the starting location.

The primary factual issues in delineating the geographic scope of the relevant market for the analysis of buying-side competitive effects typically relate to transportation. In most cases, sellers can find alternative purchasers, but if they are too far away, they may not be economically viable alternatives. The

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34 *Id.* The agencies also are concerned about the possibility that purchasing cooperatives "may facilitate collusion by standardizing participants' costs or by enhancing the ability to project or monitor a participant's output level through knowledge of its input purchases." *Id.*

35 U.S. DEPARTMENT OF JUSTICE & FEDERAL TRADE COMMISSION, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE statement 7 (August 1996), *available at* http://www.usdoj.gov/atr/public/guidelines/1791.pdf. The Department of Justice had long applied this rule more broadly, as stated in a October 21, 1985 speech by Deputy Assistant Attorney General Charles F. Rule. To guard against the possibility that joint purchasing facilitates downstream pricing coordination, the agencies apply a second condition, which is that "the cost of the products and services purchased jointly accounts for less than 20 percent of the total revenues from all products or services sold by each competing participant in the joint purchasing arrangement."

36 U.S. DEPARTMENT OF JUSTICE & FEDERAL TRADE COMMISSION, HORIZONTAL MERGER GUIDELINES (April 1992, revised April 1997), *available at* http://www.usdoj.gov/atr/public/guidelines/hmg.pdf.

37 *Id.* § 0.1.

38 *Id.*

time frame for analysis also is important in evaluating sellers' alternatives. Over a very short period of time, sellers of an already produced perishable product may be easily exploited, but one-time exploitation is not properly viewed as the exercise of market power. The relevant time frame may be a year or more for determining whether sellers can adjust their production levels and possibly reallocate resources to the production of other products. Monopsony power exists only if the relevant productive resources (what the monopsonist buys or what is used to produce what the monopsonist buys) can be exploited over a long period of time because they cannot easily be moved or converted to other productive uses.

A relatively small number of mergers have been challenged wholly or partially on the basis that they would create or enhance market power on the buying side of the market. The most recent example is the merger of two companies offering competing health insurance plans. The U.S. Department of Justice challenged the merger on the basis of likely anticompetitive effects in the sale of health insurance and also in the purchase of physicians services.[39] In an earlier case, the Department challenged the merger of two of the largest purchasers of grain in the United States. The complaint alleged that competition would be lessened substantially in the purchase of particular grains within five specific areas within which the companies proposing to merge accounted for a large portion, and in some cases nearly all, of total purchases.[40] The Federal Trade Commission challenged the merger of two large oil companies, alleging that the merger would lessen competition in, among other things, bidding for rights to explore the Alaskan North Slope.[41]

In recent decades, only one government merger challenge clearly focused on the buying side of the market was litigated to judgment.[42] In 1984 the Department of Justice challenged a transaction involving rice milling operations. The Department alleged that it would substantially lessen competition in two relevant markets in which the merging firms competed as sellers and one relevant market in which they competed as buyers. The court held the merger unlawful solely on the basis of its likely anticompetitive effects in this third market—the "purchase or other acquisition for milling of paddy rice grown in California."[43]

Although mergers are rarely challenged in the United States on the basis that they create or enhance market power on the buying side of the market, the subject of buyer power often is raised nonetheless. Mergers that are challenged on the basis of anticompetitive effects on the selling side of the market often

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39 *United States v. UnitedHealth Group Inc. and PacifiCare Health Systems* (filed Dec. 20, 2005), http://www.usdoj.gov/atr/cases/f213800/213815.pdf (complaint), 71 FEDERAL REGISTER 13,991 (2006) (competitive impact statement), 2006-1 Trade Cases (CCH) ¶ 75,255 (final judgment). A similar case is *United States v. Aetna Inc. and The Prudential Insurance Co. of America* (filed June 21, 1999), http://www.usdoj.gov/atr/cases/f2500/2501.pdf (complaint), 64 FEDERAL REGISTER 44,946 (1999) (competitive impact statement), 1999-2 Trade Cases (CCH) ¶ 72,730 (revised final judgment).

40 *United States v. Cargill, Inc. and Continental Grain Co.* (filed July 8, 1999), http://www.usdoj.gov/atr/cases/
f2500/2552.htm (complaint), 64 FEDERAL REGISTER 44,046 (1999) (competitive impact statement), 2000-2 Trade Cases (CCH) ¶ 72,967 (final judgment).

41 *In re BP Amoco, p.l.c.* , FTC Docket No. C-3938 (filed Aug. 25, 2000). Materials related to the case are available at http://www.ftc.gov/os/caselist/c3938.shtm.

42 In another litigated case, the Department of Justice argued that the anticompetitive effects of the consummated merger of motion picture exhibitors were largely in the licensing of films from distributors. The district court, however, was confused about what was being argued, and the court of appeals held against the Department on the basis that entry would prevent any lasting anticompetitive effects. *United States v. Syufy Enterprises*, 712 F. Supp. 1386 (N.D. Cal. 1989), *aff'd*, 903 F.2d 659 (9th Cir. 1990).

43 *United States v. Rice Growers Ass'n of California*, 1986-2 Trade Cases (CCH) ¶ 67,288 (E.D. Cal. 1986).

are defended on the basis that buyer power will mitigate or even preclude those effects. The federal enforcement agencies, however, have concluded that: "Large buyers rarely can negate the likelihood that an otherwise anticompetitive merger between sellers would harm at least some buyers. Most markets with large buyers also have other buyers against which market power can be exercised even if some large buyers could protect themselves. Moreover, even very large buyers may be unable to thwart the exercise of market power."[44] Although buyer power has been cited by several decisions as one factor supporting the rejection of merger challenges,[45] other decisions have explained that the presence of powerful buyers is apt to affect only the pattern of anticompetitive price increases following a merger.[46]

6. Single-Firm Exclusionary Conduct

Section 2 of the Sherman Act makes it unlawful to "monopolize, or attempt to monopolize," and both offenses entail the use of "anticompetitive" or "exclusionary" practices.[47] Modern decisions hold that "a practice is 'anticompetitive' only if it harms the competitive process."[48] Single-firm exclusionary conduct can take myriad forms. Some involve the use of buyer power in dealing with key input suppliers to negotiate exclusive arrangements or otherwise to disadvantage rivals.[49] Very few cases have addressed single-firm exclusionary conduct designed to create or preserve monopsony power.[50]

In one of the very few monopolisation cases, the Supreme Court reversed a court of appeals decision upholding a jury verdict finding Weyerhaeuser Co. had unlawfully obtained a monopsony in the purchase of red alder logs.[51] Red alder is the most commercially important species of hardwood in the western

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44 U.S. DEPARTMENT OF JUSTICE & FEDERAL TRADE COMMISSION, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES 17–18 (Mar. 2006), *available at* http://www.usdoj.gov/atr/public/guidelines/215247.pdf.

45 *Federal Trade Commission v. Foster*, 2007-1 Trade Cases (CCH) ¶ 75,725, at 107,991–92 (D.N.M. 2007); *United States v. Archer-Daniels-Midland Co.*, 781 F. Supp. 1400, 1422 (S.D. Iowa 1991); *United States v. Country Lake Foods, Inc.*, 754 F. Supp. 669, 674 (D. Minn. 1990).

46 *See Federal Trade Commission v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 59–61 (D.D.C. 1998); *United States v. United Tote, Inc.*, 768 F. Supp. 1064, 1085 (D. Del. 1991); *Federal Trade Commission v. Bass Brothers Enterprises, Inc.*, 1984-1 Trade Cases (CCH) ¶ 66,041, at 68, 614–15 (N.D. Ohio 1984).

47 The elements of the monopolization offense are: "the possession of monopoly power in the relevant market" and "the acquisition or maintenance of that power" through anticompetitive conduct. *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004). The elements of the attempt to monopolize offense are: "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).

48 *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 21 (1st Cir. 1990) (Breyer, C.J.). *See United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc) ("to be deemed as exclusionary, a monopolist's act must have an 'anticompetitive effect.' That is, it must harm the competitive *process* and thereby harm consumers.").

49 *See, e.g.*, *Schine Chain Theatres v. United States*, 334 U.S. 110, 114–16 (1948); *United States v. Griffith*, 334 U.S. 100, 104–05 (1948); *United States v. Crescent Amusement Co.*, 323 U.S. 173, 181–82 (1944); *Toys 'R' Us, Inc.*, 126 F.T.C. 415, 592–96 (1998), *aff'd*, 221 F.3d 928 (7th Cir. 2000); Steven C. Salop, *Anticompetitive Overbuying by Power Buyers*, 72 ANTITRUST L.J. 669 (2005).

50 Of interest is *Telecor Communications, Inc. v. Southwestern Bell Telephone Co.*, 305 F.3d 1124 (10th Cir. 2002). The case involved monopolization of pay phone services and focused on harm to those who derived income from allowing their property to be used as pay phone locations. The court specifically held that no adverse effect need be shown on pay phone users. *Id*. at 1133–34.

51 *Confederated Tribes of Siletz Indians v. Weyerhaeuser Co.*, 411 F.3d 1030 (9th Cir. 2005). The jury found that Weyerhaeuser had not monopolized the downstream lumber market.

United States. Specialised sawmills convert red alder logs into lumber used to manufacture items such as furniture and kitchen cabinets. After several years of increasing prices for logs and decreasing lumber prices, one of Weyerhaeuser's rivals exited the market and filed suit alleging "predatory bidding," which the court of appeals defined as a scheme in which "a firm pays more for materials in the short term" to "squeeze out" competitors and "[i]n the long run . . . recoup the higher costs by paying less for the materials."[52]

The Supreme Court observed that "predatory bidding mirrors predatory pricing" in several important respects.[53] Like predatory pricing, the Court explained, a successful predatory bidding scheme is unlikely to occur because it "requires a buyer of inputs to suffer losses today on the chance that it will reap supracompetitive profits in the future."[54] Like the aggressive price cutting in predatory pricing, "actions taken in a predatory-bidding scheme are often the very essence of competition."[55] The Court stressed in particular that aggressive bidding, or pricing, may be "essential to competition and innovation on the buy side of the market,"[56] and it observed that "[h]higher prices for inputs obviously benefit existing sellers of the inputs."[57]

The Supreme Court reasoned that the "general theoretical similarities of monopoly and monopsony combined with the theoretical and practical similarities of predatory pricing and predatory bidding" lead to applying the same sort of test for both.[58] Thus, the Court held that a plaintiff "must prove that . . . the predator's bidding on the buy side . . . caused the cost of the relevant output to rise above the revenue generated in the sale of those outputs" and "that the defendant has a dangerous probability of recouping the losses incurred in bidding up input prices through the exercise of monopsony power."[59] The Court thus rejected jury instructions used by the trial court that would have permitted the jury to find an antitrust violation if it found that Weyerhaeuser merely "purchased more logs than it needed or paid a higher price for logs than necessary, in order to prevent [the plaintiff] from obtaining the logs [it] needed at a fair price."

7. Buyer Power in Distribution

Recent academic and policy discussions of the impact of buyer power in distribution bring a fresh perspective and refined tools to issues debated in the United States throughout much of the last century in connection with the rise of chain stores. Their growth, and the discounts and other concessions they negotiated from suppliers, led to intense scrutiny by Congress and the federal enforcement agencies. In 1936 this scrutiny resulted in the Robinson-Patman Act. Subject to defences, it prohibits charging different prices to competing retailers as well as offering retailers various other concessions.[60] The wisdom of the

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52 *Id.* at 1037–38.

53 *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069, 1077 (2007).

54 *Id.*

55 *Id.*

56 *Id.*

57 *Id.* at 1077 n.4.

58 *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069, 1077–78 (2007).

59 *Id.* at 1078.

60 *See generally* ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 483–548 (6th ed. 2007).

Robinson-Patman Act has been questioned many times,[61] and last year a bipartisan commission appointed by Congress and the President recommended its repeal.[62]

Particular attention was focused on the Great Atlantic & Pacific Tea Co. (A&P), which operated over ten thousand grocery stores during much of the 1920s and 1930s. In 1938 the Federal Trade Commission issued a cease and desist order against A&P to prevent it from accepting discounts and other concessions from suppliers in violation of the Robinson-Patman Act.[63] In 1944 the U.S. Department of Justice charged that A&P violated sections 1 and 2 of the Sherman Act. The Department alleged, and the court found, that many of A&P's practices were unlawful, including extracting concessions from suppliers.[64] The wisdom of the Department's case was hotly debated for more than a decade, after which no academic consensus emerged.[65] What did emerge was agreement that "on average it was probably true that the countervailing power of the chains was no more than enough to extract from suppliers what they saved them in cost."[66]

Recent scholarship on buyer power in distribution applies the tools of modern economics. For example, buyer power now is often approached from the perspective of the economic theory of bargaining.[67] A critical insight from economic theory is that the negotiation between a buyer and seller is over the division of their incremental gains from making the sale.[68] The incremental gains depend on the alternatives the buyer and seller have to dealing with each other. A buyer or seller is in a strong bargaining position if it can make a comparable deal on good terms with another party.

It was long assumed that larger buyers necessarily would be in a stronger bargaining position than smaller ones, but recent scholarship teaches that large size is neither necessary nor sufficient to confer a

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61 In 1977 the Department of Justice concluded that the Act had produced significant anticompetitive effects to the detriment of competition and consumers. U.S. DEPARTMENT OF JUSTICE, REPORT ON THE ROBINSON-PATMAN ACT 99–100, 260 (1977). For economic analyses with similar conclusions, see Daniel P. O'Brien & Greg Shaffer, *The Welfare Effects of Forbidding Discriminatory Discounts: A Secondary Line Analysis of Robinson-Patman*, 10 JOURNAL OF LAW, ECONOMICS, & ORGANIZATION 296 (1994); Marius Schwartz, *The Perverse Effects of the Robinson-Patman Act*, 31 ANTITRUST BULLETIN 733 (1986).

62 ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 311–32 (2007).

63 *Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 106 F.2d 667 (3d Cir. 1939) (affirming order).

64 *United States v. New York Great Atlantic & Pacific Tea Co.*, 67 F. Supp. 626 (1946), *aff'd*, 173 F.2d 79 (7th Cir. 1949). *See generally* MORRIS A. ADELMAN, A&P: A STUDY IN PRICE-COST BEHAVIOR AND PUBLIC POLICY (1959).

65 With respect to buyer power issues, two notable scholarly contributions were: Morris A. Adelman, *The A&P Case: A Study in Applied Economic Theory*, 63 QUARTERLY JOURNAL OF ECONOMICS 238, 247–57 (1949); Joel B. Dirlam & Alfred E. Kahn, *Antitrust Law and the Big Buyer: Another Look at the A&P Case*, 60 JOURNAL OF POLITICAL ECONOMY 118 (1952).

66 JOEL B. DIRLAM & ALFRED E. KAHN, FAIR COMPETITION: THE LAW AND ECONOMICS OF ANTITRUST POLICY 239 (1954).

67 *See, e.g.*, Roman Inderst & Nicola Mazzarotto, Buyer Power in Distribution, *in* 3 ISSUES IN COMPETITION LAW AND POLICY 1953 (W. Dale Collins ed., 2008); Chris Doyle & Roman Inderst, *Some Economics on the Treatment of Buyer Power in Antitrust*, 28 EUROPEAN COMPETITION LAW REVIEW 210 (2007).

68 For an accessible presentation of bargaining theory, see, e.g., SAMUEL BOWLES, MICROECONOMICS: BEHAVIOR, INSTITUTIONS, AND EVOLUTION 167–83 (2004). For more technical treatments, see MARTIN J. OSBORNE & ARIEL RUBINSTEIN, BARGAINING AND MARKETS (1990); John C. Harsanyi, *Bargaining*, *in* 1 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 190 (John Eatwell et al. eds., 1987).

strong bargaining position.[69] Suppose that, if a seller fails to strike a deal with a particular large buyer, the seller's best alternative is not to produce the particular product at all, and therefore not to incur the associated fixed costs. In that situation, the large buyer ends up paying a share of the seller's fixed costs, while the remaining buyers do not because the fixed costs will be incurred even if no deal is struck with them.[70] Alternatively, suppose that, if a seller fails to strike a deal with any particular buyer, its best alternative is to reduce production by the amount the buyer would have purchased. In that event, larger buyers can end up paying more per unit if the seller's marginal cost is decreasing because the average cost of producing the incremental units sold to the large buyer exceed the average cost of the incremental units sold to smaller buyers.[71] Empirical research finds that this latter phenomenon exists with respect to cable television advertising, so larger cable operators pay more.[72]

Recent scholarship on buyer power has identified a potential effect from the exercise of buyer power that had not been considered previously.[73] This so-called "waterbed effect" operates through feedback between competition in the input market and competition in the output market.[74] According to proponents of this theory, a lower input price for a powerful retailer reduces its retail price, which increases its sales, and that reduces the bargaining power of already less powerful downstream rivals and so weakens competition in the relevant retailing markets. These proponents suggest an effect that is based on the assumption that larger size confers upon a retailer greater bargaining power, although they acknowledge that there is no particular reason to believe that is true.

Recent scholarship does not indicate that competitive concerns relating to buyer power in distribution warrant either broad limitations on the purchasing practices of large retailers or any sort of presumption that a particular practice by a large retailer is anticompetitive. In addition, there may not be a sound basis for reliably concluding in a particular case that the waterbed effect has occurred. Yet there is ample reason to believe that errors in imposing liability or in formulating remedies could undermine price competition.

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69 *See, e.g.*, Zhiqi Chen, *Buyer Power: Economic Theory and Antitrust Policy*, *in* 22 RESEARCH IN LAW AND ECONOMICS 17, 31 (2007).

70 *See* Alexander Raskovich, *Pivotal Buyers and Bargaining Position*, 51 JOURNAL OF INDUSTRIAL ECONOMICS 405 (2003).

71 *See* Tasneem Chipty & Christopher M. Snyder, *The Role of Firm Size in Bilateral Bargaining: A Study of the Cable Television Industry*, 81 REVIEW OF ECONOMICS AND STATISTICS 326 (1999).

72 *Id.*

73 Recent scholarship also formalizes and clarifies effects that were already reasonably well understood. For example, the exercise of buyer power can allow a large buyer to grow and enhance its buyer power. *See* Roman Inderst, *Leveraging Buyer Power*, 25 INTERNATIONAL JOURNAL OF INDUSTRIAL ORGANIZATION 908 (2007). In addition, if seller profitability is reduced by the exercise of buyer power, the result over time may be reduced investment and innovation.

74 *See* Paul W. Dobson & Roman Inderst, *The Waterbed Effect: Where Buying and Selling Power Come Together*, 2008 WISCONSIN LAW REVIEW 331; Paul W. Dobson & Roman Inderst, *Differential Buying Power and the Waterbed Effect: Do Strong Buyers Benefit or Harm Consumers?*, 28 EUROPEAN COMPETITION LAW REVIEW 393 (2007); Roman Inderst & Tommaso M. Valletti, Buyer Power and the "Waterbed Effect," CEIS Research Paper No. 107 (January 2008), *available at* http://ssrn.com/abstract=1113318.

EUROPEAN COMMISSION

Buying power is an increasingly hot topic within the competition community. Recently it has been the focus of a number of conferences, studies and papers. On 19 February 2008 the European Parliament adopted a written declaration on "investigating and remedying the abuse of power by large supermarkets operating in the European Union". This declaration expressed concerns relating to competition, unfair commercial practices, consumer protection, employment and the environment and called on the Commission to investigate and address negative impacts arising from perceived concentration in the supermarket sector[1].

This interest comes against a background of food price rises worldwide and of ongoing mergers and increasing concentration between retailers. Although much of the current focus is on the retail sector, the principles applicable to buyer power must apply across all areas of competition law, and should not single out one particular sector. Nevertheless, there remains a correlation between the issue of buyer power and the retail sector, simply because retailers tend to be the last business buyer in the supply chain, just above the end consumer. Because of this, high concentration in the retail sector highlights the issue, and as a result it is in retail merger cases that it has been most thoroughly explored.

1. What is buyer power?

Negotiation power depends in principle on the opportunities of the other market side to switch to alternatives. Monopsony power emerges when a buyer, or a co-ordinated group of buyers[2] such as a buying alliance, purchases such a large share of an upstream suppliers' outputs that the suppliers ability to switch to alternatives quickly are limited. As a result, the monopsony buyer can obtain lower input prices or favourable contract terms, typically by withholding (or threatening to withhold) purchases.

2. Should the Commission address buyer power?

Much of the current interest in buyer power highlights the plight and problems faced by small suppliers. It is clear that some of these concerns relate to issues that are not a matter of competition law but rather highlight social or political concerns.

In terms of competition policy, the first question is whether competition between purchasers on the procurement side is to be protected to the same extent as competition between suppliers on the sales side.

European Commission policy is that the ultimate end user of any product – the consumer – should be at the centre of competition law. This means that ultimate focus should be on the demand side. It is competition that brings about low prices and better choice for consumers and guarantees that companies' offers adapt to the preferences of the demand side. It is also this process that drives efficiency, innovation and productivity benefits.

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1 A copy of the written declaration and response is attached at Annex A.

2 Acting in concert, buyers can orchestrate their purchase decisions to achieve precisely the same results as a single monopsonist.

Nevertheless, there are certain potential situations where buyer power can lead to a competition problem if it has an effect on competition on the sales market – either in terms of higher prices or loss of choice or quality (for instance if there is significant supplier exit). These would lead to direct disadvantages for the consumer which should be addressed by competition law. The rest of this paper addresses how the Commission has done this so far.

3. How does the Commission assess buyer power?

The most straightforward case of buyer power is that of a single input buyer (or buyer cartel) facing (perfectly) competitive sellers - so-called "pure monopsony". The economic analysis of pure monopsony is analogous to that of pure monopoly, but in reverse. A monopolist faces price-taking customers whose aggregate demand curve is downward sloping in price - i.e. at higher prices, fewer products are demanded. The monopolist raises price above the competitive level by restricting sales. A monopsonist faces price-taking sellers, whose aggregate supply curve is upward sloping – i.e. they will only produce greater volumes if a higher price is offered as marginal costs increase with the quality they supply. Turning this round, therefore, the suppliers will also charge a lower price for lower volumes, something a monopsonist can exploit by restricting demand below the competitive level (or threatening to do so).

However, it is relatively uncommon for there to be a single buyer as described in the pure monopsony scenario. More often a large buyer may coexist with a fringe of competitive buyers. Such dominant buyer can still exert monopsonistic power over its residual supply by withholding purchases. If the supply side is competitive but the demand side is oligopsonistic, then all other things equal, high buyer concentration generally results in lower purchases below the competitive level.

Although buyer concentration is no definitive proof of the existence of monopsonistic power and other factors need to be taken into consideration, it can serve as a useful first indicator. Prima facie, an assessment of market share on the sales side and procurement shares on the purchasing side may therefore appear to be a good place to look for evidence of buyer power. Where an undertaking has a large share of a downstream market, it can be expected to be taking a corresponding share of upstream supply.

With regard to Article 81, vertical agreements between undertakings at different levels in the supply chain are normally covered by the block exemption[3]. Where buyers at the same level enter a purchasing agreement, this is covered by the Commission's guidelines on horizontal cooperation. In reality, such agreements are far more likely to occur than pure monopsony. Here, the starting point is to determine if the parties have buyer power. This is defined in the Commission guidelines as "where a purchasing agreement accounts for a sufficiently large proportion of total volume of a purchasing market so that prices can be driven down below the competitive level." However, purchasing agreements are often concluded by small and medium-sized enterprises to achieve volumes and discounts similar to their bigger rivals. These agreements between small and medium-sized enterprises are therefore normally pro-competitive. It is therefore considered unlikely that a buying cooperation raises competitive concerns, when the participants have a combined market share of less than 15%. A market share above this threshold does not automatically indicate buyer co-ordination would raise concerns but requires a more detailed assessment involving factors such as the countervailing power of strong suppliers and efficiencies (which may lead to exemption under Article 81(3)). Nevertheless, it should be noted that purchasing agreements can constitute a violation of Article 81, when there are vertical restraints or when those agreements lead to competitive restrictions on downstream markets.

In some cases a firm may possess buyer power upstream vis-à-vis its suppliers but not also possess market power downstream. For example, when the geographic boundaries of the upstream and

[3] Regulation 2790

downstream markets differ, the merged entity may hold buyer power, without having any market power as a subsequent seller. This was the case in a transaction from 2005, which brought together slaughterhouses and meat sales activities of Sovion and Südfleisch. The Commission focused its investigation on the market for the slaughtering of pigs and cattle, in particular in Bavaria. The Commission verified whether, after the merger, the new company would have increased power as a major purchaser to depress the price paid to farmers delivering pigs to slaughterhouses, thereby forcing small farmers out of the market and ultimately reducing output to the detriment of consumers. To do so, the Commission investigated to what extent farmers and other suppliers of pigs and cattle can supply pigs and cattle to other slaughterhouses in Southern Germany and Austria. The Commission found that sufficient spare capacity is available at competing south German slaughterhouses and that slaughterhouses in neighbouring parts of Austria could serve as an alternative for pig and cattle farmers in south Germany. As a result, in the Commission's view, the market position of the merged entity did not allow it to determine or depress purchasing prices of pigs and cattle paid to Southern German pig and cattle farmers.

4. When does the Commission consider buyer power to be a problem?

Even in the situations described above, potential market position may not automatically lead to buyer power. Evidence has shown that larger purchasers do not always obtain the most favourable conditions – for example, small purchasers who can be flexible over volumes purchased may receive favourable terms where there is a surplus while a major buyer remains bound by pre-agreed contract.

It is also important to note that purchasing strength can also deliver benefits to consumers:

- If a lower price can be achieved without restricting supply, then in a competitive market place, any lower prices obtained by a powerful purchaser are likely to be passed on to consumers as part of a strategy to increase market share downstream.

- Although marginal costs may increase as production volumes increase, these may be offset to some extent by economies of scale, especially in transaction costs. Consider four examples. First, larger orders may allow the supplier to exploit economies of scale. Second, when buyers are able to demand several different inputs from the same supplier, they may be offered a discount if the supplier can benefit from economies of scope. For example, the supplier may have lower average costs because the different goods can be delivered together, saving on transport costs. (This is an economy of scope in distribution.) Third, as buyers become larger in relation to the market, the number of buyers that a seller has to deal with may decrease. This may reduce transaction costs, e.g. the costs of negotiating a contract, and thus allow suppliers to set lower trade prices. Finally, when orders are subject to random fluctuations, large buyers may be able to offer suppliers a more stable demand. Evidence has shown that suppliers will often bring themselves into the dependence of large buyers in order to realise lower costs and less complexity in transactions when compared with negotiation with a multitude of smaller buyers.

- If there is market power on the upstream supplier market, buyer power can exert important countervailing pressure against any increase in prices. This has been recognised in the case of buying co-operatives and was confirmed by the judgement of the European Court *Gøttrup-Klim e.a. Grovvareforeninger v. Dansk Landbrugs Grovvareselskab AmbA*[4].

Nevertheless, there are a number of possible problems that could lead to negative effects that the Commission addresses when looking at buyer power. The Commission guidelines for the assessment of horizontal mergers discuss two effects: the "output effect" and the "foreclosure" effect.

4 [1994] ECR 5641

As simple example of the **output effect** can be given using the pure monoposny situation described above, a buyer may try and obtain lower prices by withholding demand, lowering output. Restricting supply in this way would also restrict sales downstream, leading to negative welfare effects as prices rise and/or quality or choice is sacrificed. To maximise profits, a buyer monopsonist would acquire an input up to the point when the marginal revenue from purchasing an additional unit just equals its marginal input cost. But the marginal revenue obtained from an extra input unit will depend on the degree of market power the buyer holds downstream. Two polar cases can be considered:

- The monopsonist buyer sells its output in an intensively competitive downstream market and takes the output price as given - if so, downstream consumers are not significantly affected – positively or negatively – regardless of the degree of monopsonistic power upstream. Logically, it is entirely consistent for a firm to have significant buying power versus its suppliers yet little influence over the price (or other terms) in the output market. There are at least two reasons for this. The geographic scope of the input and output markets can be quite different. For example, the buyer can be a retailer purchasing lettuces from locally independent growers and selling nationally in a competitive retail market. The substitutable alternatives in the product market (as opposed to geographic) can also be very different for suppliers and consumers . Suppliers may be unable to switch from producing the particular input bought by the firm, while consumers may enjoy good alternatives to the product sold by the firm. Another common case is where downstream competition is highly fragmented but buying in the input market is coordinated through cooperative buying or buyer groups[5].

- The monopsonist has selling power in its output market. Here, buying and selling power reinforce each other.

For a downstream monopolist, or in a concentrated market, there may be benefits to this strategy, as it would enable it to potentially obtain higher prices and lower costs (although the lack of downstream competitive pressure may also reduce the incentive to push hard for lower input prices if the balance of the monopoly profit would in any case be earned through higher prices rather than lower costs).

On the other hand, such a strategy in a competitive market would not work, as consumers would simply circumvent any price increase by buying from the undertaking's rivals. At the same time, if the purchaser has withheld demand, he or she may not be able to satisfy the quantity requirements of the downstream market at any price – leading to a possible reputational effect that would benefit rivals. Therefore, a competitive downstream market would severely limit any benefit from a short term abuse of buying power.

Additionally, even in a market where purchasing is concentrated at around or beyond the level of the "threat point", there may still be scope for other purchasers to increase their purchasing levels. If buyer entry is easy and timely, or if the buyer's existing rivals can readily expand their capacity, the supplier can reject the large buyer's attempt to buy less and cheaper. Increased demand resulting from revenue-raising by the first company would mean that rivals would consequently both need, and be able to buy a greater amount from suppliers. This would have the effect of increasing the rivals' market power in both the downstream and upstream markets. Of course, for this effect to take place it is important that substitutability between products is perfect; one area considered in the case of retail, in particular one-stop shop formats, is that consumers do not compare individual items but rather baskets of daily consumer goods. Therefore an increase in price of one specific product might not lead consumers to switch between

[5] An example of a dominant position existing in both the downstream and upstream market was highlighted in the case British Airways, which has been a dominant buyer on the British market for air travel agency services.

retailers. However, if retailers were exercising buyer power in more than one product market then any effect would be felt in the wider basket.

In general, therefore, assessments by the Commission have reflected the fact that the outcome of this effect has been that any competition problems on the buying side were also present on the selling side. Therefore, it was also clear that the elimination of a competition problem on the selling side (for instance, by requiring adequate commitments) could lead at the same time to eliminate the problem of large-scale buying power. So far, assessments by the Commission have reflected this.

For instance, in the recent merger between REWE and Adeg[6], the most pressing concern was that end-consumers in the sales market would continue to have sufficient possibilities to buy from alternative supermarkets if the merged entity should increase prices or reduce output across the board. Thus there would be no output effect since the reduced output and the increased prices on the part of the merged entity would be outweighed by an increased sales volume of the rivals. Concerns only resulted from REWE's national pricing policy, and could be dealt with by remedies.

One caveat on the output effect is that it can only be evidence where the product supply curve is positive, with marginal cost increasing as volume increases. If the input supply curve is flat, the monopsonist cannot influence the input price by adjusting purchases. Thus, the conditions for exercising buyer power to produce an output effect are not present. In many cases, learning the true shape of an industry's supply curve is a daunting task, as information may not be complete. Nevertheless, in certain sectors it may prove highly useful. The "flatness" of the supply curve is related to the elasticity of supply. The elasticity of supply measures the responsiveness of the quantity supplied to changes in the price. It measures the ability of sellers to switch to other buyers of the product. Sellers that produce a "perishable" good or service, such as labour or perishable fruits and vegetables, have a very inelastic supply curve because inventories cannot be used to absorb shocks when prices do not clear the market[7]. For many goods, however, particularly in manufacturing industries, supply curves may not be upward sloping, limiting the ability for a buyer to restrict output.

The second effect of buyer power which is mentioned in the Commission's merger guidelines is the **foreclosure effect**. According to this theory, competition on the downstream market can be affected if the merged company uses its buyer power vis-à-vis its suppliers in a way that excludes rivals from the market. For example, a powerful buyer could force suppliers to stop supplying rivals (although such behaviour could be covered by provisions on vertical agreements) (perhaps the point of exclusive supply should be developed further). Alternatively, a large buyer (or merged company) may be able to pass on lower prices obtained from suppliers with the short-term intention of pricing rivals from the market.

A number of conditions must be present in a marketplace for a foreclosure strategy to work effectively. If these conditions are not met, then foreclosure is unlikely to lead to a significant decrease in the number of rivals, and, as a result, it will be end-users who benefit from both lower prices due to the buyer's purchasing power backed up by ongoing competitive pressure.

- Large and small enterprises must be alike apart from the purchasing conditions. Often small enterprises position themselves successfully in the market by providing better services compared to their bigger and usually cheaper rivals or by focusing on regional products. The described effects presuppose that there are no such differences.

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6 Case COMP/M.5047

7 The perishability of the goods also reinforces the risk of opportunistic behavior, since a supplier has very little time to find out an alternative distributor when a large retailer cancels its purchases.

- In the case of economies of scale, which reflect the size of a company, usually at some point countervailing cost effects occur. Large companies can in some areas obtain cost advantages due to their size, however, their costs rise in other areas. For example a larger and less efficient organisation of the company can result in increased costs. Smaller rivals are only increasingly pushed out of the market if such cost disadvantages do not occur.

- It must be difficult for a rival to re-enter the market after exit has occurred. Ultimately, the goal of any foreclosure action is to obtain a large enough market share to be able to obtain monopoly rents. Where market re-entry is easy, the possibility of achieving a monopoly is far more remote[8].

As shown, the standard of proof for this effect can be high. In British Airways[9], the Commission concluded that BA had infringed Article 82 by making so-called "marketing agreements with travel agents. These agreements had an exclusionary effect on rivals of BA. This exclusionary effect reduced competition on the downstream market without providing any corresponding efficiency or other economic benefits, and led, furthermore, to an unequal treatment of travel agents. The Commission's decision was upheld by the ECJ.

A final area of ongoing discussion is the impact of any possible dynamic effects resulting from buyer power. An example of such an effect is where a monopsonist has sufficient control to give a small seller a choice between supplying a certain quantity at a price less that its marginal cost or nothing at all. Where demand from other buyers is inelastic (for instance if they could look elsewhere for supply, or simply withdraw from an existing sub-market) then as long as the price offered by the monopsonist remains above average cost, the supply decision ultimately becomes a choice between operating at the indicated quantity and earning just enough to break even or shutting down, losing fixed cost expenditures. Here, by exercising monopsony power the buyer may be able to obtain higher profits without restricting levels of supply. Alternatively, in markets which overlap, the buyer may be able to offer lower prices to consumers in order to bring about leverage in to the related markets. Such effects are purely distributional rather than absolute, but it may be argued that these distributional effects can lead to inefficiencies in the longer run. Lower input prices may slow the rate of innovation and the adoption of socially desirable product improvements. This would clearly be the case if such innovation and changes were not in the interests of the buyer when compared to the immediate short-term benefit. However, normally, innovations are also asked for on the sales market of the buyer and provide him with higher turnover. Therefore the company with buyer power would not have an interest in decreasing the innovative strength of its suppliers, especially if it has to be afraid of market entry of more innovative competitors outside his geographical market. Such market entry with more innovative products would not only diminish its profit, but would threaten its whole existence[10]. So far, evidence seen by the Commission does not point to such dynamic effects but we welcome the OECD's discussion of this aspect of the subject in particular.

In conclusion, therefore, buyer power is a factor that the Commission takes into account when assessing cases, in particular where it causes or strengthens competition concerns on the sales market. Commitments, which in such cases effectively eliminate competition problems on the sales market, have so far solved possible problems of buyer power.

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8 This point explains why both predatory pricing, and – in terms of buyer power – "predatory overbuying" are both high-risk strategies in that, if unsuccessful, they simply mean the alleged predator is carrying a loss.

9 IV/D-2/34.780 Virgin/British Airways

10 This competition by innovation and the "creative destruction" of powerful market positions by new and technologically more advanced products was well described by the economist Schumpeter.

ANNEX 1

DECLARATION OF THE EUROPEAN PARLIAMENT ON INVESTIGATING AND REMEDYING ABUSE OF POWER BY LARGE SUPERMARKETS OPERATING IN THE EUROPEAN UNION

The European Parliament ,

– having regard to Rule 116 of its Rules of Procedure,

A. whereas, throughout the EU, retailing is increasingly dominated by a small number of supermarket chains,

B. whereas these retailers are fast becoming "gatekeepers", controlling farmers" and other suppliers" only real access to EU consumers,

C. whereas evidence from across the EU suggests large supermarkets are abusing their buying power to force down prices paid to suppliers (based both within and outside the EU) to unsustainable levels and impose unfair conditions upon them,

D. whereas such squeezes on suppliers have negative knock-on effects on both quality of employment and environmental protection,

E. whereas consumers potentially face a loss in diversity of products, cultural heritage and retail outlets,

F. whereas some Member States have introduced legislation attempting to limit such abuse, yet large supermarkets increasingly operate across national borders, making EU legislation desirable,

1. Calls upon DG Competition to investigate the impact that the concentration of the EU supermarket sector is having on small businesses, suppliers, workers and consumers and, in particular, to assess any abuses of buying power which may follow from such concentration;

2. Requests the Commission to propose appropriate measures, including regulation, to protect consumers, workers and producers from any abuse of a dominant position or other negative impact identified in the course of this investigation;

3. Instructs its President to forward this declaration, together with the names of the signatories, to the Commission, the Council and the parliaments of the Member States

ANNEX 2

COMMISSION RESPONSE TO EUROPEAN PARLIAMENT WRITTEN DECLARATION

1. **Declaration tabled by Caroline LUCAS (Verts/ALE/UK), Gyula HEGYI (PSE/HU), Janusz WOJCIECHOWSKI (UEN/PL), Harlem DÉSIR (PSE/FR) and Hélène FLAUTRE (Verts/ALE/FR) pursuant to Rule 116 of the European Parliament's Rules of Procedure**

2. **EP reference number**: DCL-0088/2007 / P6-TA-PROV(2008)0054

3. **Date of adoption of the declaration**: 19 February 2008

4. **Subject:** investigating and remedying the abuse of power by large supermarkets operating in the European Union

5. **Brief analysis/assessment of the declaration and requests made in it:**

The European Parliament has adopted a written declaration on "investigating and remedying the abuse of power by large supermarkets operating in the European Union" at the plenary session of 18-21 February 2008. The written declaration expresses concerns relating to competition, unfair commercial practices, consumer protection, employment and the environment. It:

- calls upon DG Competition to investigate the impacts that concentration of the EU supermarket sector is having on small businesses, suppliers, workers and consumers and, in particular, to assess any abuses of buying power which may follow from such concentration, and

- requests the Commission to propose appropriate measures, including regulation, to protect consumers, workers and producers from any abuse of dominant position or negative impacts identified in the course of this investigation.

6. **Response to the requests and overview of the action taken, or intended to be taken by the Commission:**

Introduction

The Commission welcomes the attention drawn by the EP to the retail sector and outcomes for consumers, producers and employees in the sector and agrees on the importance of a better understanding of how the sector is working. There is a very large variety of situations in the different EU countries as regards concentration of retailing markets.

Concentrations are under constant control of both the Commission and National Competition Authorities (NCAs), in line with the effective EC and national merger regulations. In the antitrust context, any abuses of a dominant position are subject to Article 82 EC Treaty or its equivalent in national laws.

In respect of retail markets, which in particular tend to be national with differing legal, economic, political and cultural characteristics, NCAs are often well placed to act under the competition rules. In fact, some NCAs are investigating the issue of buyer power in the retail sector, for instance in the UK and in Austria.

Apart from EC competition rules, several other policies at Community level govern the conduct of supermarkets in particular or the functioning of the retail sector in general. These include inter alia EC internal market rules and EC consumer law.

Any national legislation should comply with relevant requirements of Community law, notably the principles governing the Internal Market.

Point 1: The Parliament calls upon DG Competition to investigate the impacts that concentration of the EU supermarket sector is having on small businesses, suppliers, workers and consumers and, in particular, to assess any abuses of buying power which may follow from such concentration.

The Commission has not in recent years received any formal complaints against big supermarkets which claimed violation of Articles 81 and 82 of the EC Treaty. The Commission considers it important to consider all relevant factors affecting these markets, and will continue to gather evidence regarding factual claims relating to retailers allegedly controlling farmers' and other suppliers' only real access to EU consumers.

The primary objective of EC competition policy is to make markets work better to the benefit of consumers within the EU. The Commission therefore tackles buyer power to the extent that it harms, or could potentially harm consumers. As highlighted above, it is important to note that alongside the Commission, national competition authorities are able to take action against anti-competitive practices that violate the EC competition rules.

According to OECD figures[1] during the last 20 years earnings and consumer prices for all items have increased to a much greater extent than food prices in all European countries where data were available. Moreover, some of the most retail-concentrated countries show the lowest increase in food prices. However, recent developments have shown significant price increases in agricultural products and ingredients for the food industry, as well as an increase in retail prices of some basic food goods in some national markets. This is a cause of concern for both the consumers and the industry. Further analysis of the competitive structure of the food supply chain, including concentration and market segmentation of the retail and distribution sectors, and monitoring of developments in food consumer prices at product level in each Member State would allow to better assess the situation. The Commission will continue to further evaluate the potential link between recent retail concentration and consumer prices.

1 Source*:* *OECD. Stat* website (http://stats.eocd.org/wbos/Default.aspx).

Buyer power itself may have either beneficial or adverse effects on consumers and suppliers. With sufficient competition downstream, lower prices upstream can be passed on to consumers, which will be beneficial to consumers. When supermarkets use their buying power, suppliers, such as the agricultural sector, are put under pressure to sell at low prices. Commission figures[2] on producer prices show that the agricultural sector has contributed substantially to the low consumer prices. In the 8-year period 1995 – 2003 real producer prices in the EU-15 have declined by 18%.

It is important to note that building up a strong market position achieved through growth in a competitive environment is not necessarily problematic and may lead to efficiencies that benefit to consumers and businesses. On the supplier side, for example in the agricultural sector, the Commission recognises the important role producer organisations can play to help farmers working together to achieve various efficiencies. Based on the existing single market and competition rules, those organisations also play an intermediary role between individual farmers and retailers and thus enhance their bargaining position. The Commission is looking at this issue in the framework of the CAP Health Check.

The Commission will also gather additional evidence regarding factual claims that consumers potentially face a loss in diversity of products, cultural heritage and retail outlets. The evolution of retailing in the past fifty years seems to have led to a greater diversity of products and retail outlets. Additionally, there is no data as to whether or not consumers receive relatively lower quality products or have less choice in those Member States where retail concentration is the highest.

In terms of effects on employment or the environment, competition between undertakings is positive for long term employment opportunities and for creating a competitive economy able to face the environmental challenges. Competition law is not the appropriate instrument however to tackle certain employment or environmental concerns. These are better dealt with by inter alia labour and environment regulations which should address any legitimate concerns of society and EU citizens as a whole.

The retail sector plays an essential role in the Internal Market by allowing suppliers and consumers to access non - domestic markets and therefore benefit from the Internal Market. By facilitating cross-border selling, competition may be further strengthened and consumers may benefit from an increased choice of products and lower prices as a result.

Additionally, the Commission will touch upon the issue of the market power of distribution in the framework of a High Level Group on the Competitiveness of the Agro-Food Industry. This initiative will be launched by the Commission in order to analyse the food industry which in the recent years has faced new risks and challenges which questioned the sector's competitiveness.

[2] Source: EUROSTAT EC index of producer prices of agricultural products (website: http://epp.eurostat.ec.europa.eu/extraction/retrieve/en/theme5/apri/apri_pi95_proda?OutputDir=EJOutputDir_132&user=unknown&clientsessionid=EC27DD8478E0EDCC5B702FA892EF85BC.extraction-worker-1&OutputFile=apri_pi95_proda.htm&OutputMode=U&NumberOfCells=51&Language=en&OutputMime=text%2Fhtml&).

Point 2: The Parliament requests the Commission to propose appropriate measures, including regulation, to protect consumers, workers and producers from any abuse of dominant position or negative impacts identified in the course of this investigation.

The Commission and NCAs are vigilant to any infringement of EC competition law by supermarkets. The Commission takes specific care to ensure that concentrations of a Community dimension between supermarkets will not significantly impede effective competition to the detriment of consumers and businesses. It will further investigate the particular issue of buying power issue in collaboration with NCAs in the context of the ECN.

If the exercise of buyer power is found to lead to a lower profitability for suppliers, this may in specific circumstances induce suppliers to invest less in new products and therefore lead to a loss in product diversity and quality for consumers. This aspect is taken into account by EC competition policy when assessing the impact of the exercise of buyer power on consumers: consumer welfare includes not only prices but also diversity and quality. (However, it is important to assess whether the claimed loss of diversity, if at all a reality, could be attributed to the expression of consumers' preferences when they choose lower prices at the cost of a loss in diversity or a change in the retailing structure.)

Other aspects of the functioning of the retail sector may be better addressed, if it found required, by other policy tools, such as consumer policy, employment policy tools and rules governing unfair trading. At the same time, in the context of the Lisbon Strategy, the Commission supports national plans to reduce and remove unjustified regulation in the retail sector that would restrict competition to the detriment of consumers.

In addition, the Commission's Single Market Review has identified retail trade as one of the sectors that warrants in-depth market monitoring given its key role for consumer and supplier markets and its current level of fragmentation. A monitoring report will be prepared for 2009 to analyse the reasons for malfunctioning of retail services seen from both consumers' and suppliers' perspectives.

BRAZIL

1. Introduction

This paper aims to provide a brief overview of buyer power analysis by the Brazilian Administrative Council for Economic Defense ("CADE").

The Brazilian antitrust experience on dealing with monopsony and buyer power in general is still incipient and the main concepts and theoretical approaches regarding the theme have not yet been treated extensively by the antitrust authorities. Truth be told, the analysis of buyer power by other jurisdictions throughout the world, although already more mature in some cases, are not yet deeply consolidated either[1], hence the importance of roundtables such as the present. Nevertheless, the cases already analyzed by CADE provide an interesting analysis material, specially because of its remarkable similarities with the international experience.

Rather than engaging on deeper theoretical discussions involving buyer power, this paper intends to describe the practical experience of CADE when dealing with the theme. Furthermore, it is an attempt to demonstrate to what extent specific tendencies can already be verified in the handling of these cases by the Brazilian competition authorities.

2. Definition

Buyer power, as defined by the OECD, is "a situation which exists when a firm or a group of firms, either because it has a dominant position as a purchaser of a product or service or because it has strategic or leverage advantages as a result of its size or other characteristics, is able to obtain from a supplier more favourable terms than those available to other buyers".[2]

This is precisely the definition used by CADE when analyzing buyer power cases (in particular, a merger involving BR Participações e Empreendimentos S.A., G. Barbosa e Cia. Ltda. and Serigy Participações e Empreendimentos Ltda., regarding the multiproduct retailers' market, which will be addressed further on[3]). Other than that, the cases analyzed by CADE have not yet pushed the Brazilian authorities to enter a broader discussion concerning the relationship and the different definitions concerning buyer power, monopsony power, oligopsony power, bargaining power and countervailing power, although it seems fairly clear that there is a concrete distinction between all these concepts.

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1 DOBSON P., WATERSON M., CHU A. *The Welfare Consequences of the Exercise of Buyer Power*. Research paper prepared for the Office of Fair Trading.1998; WERDEN, G. J., *Monopsony and the Sherman Act: Consumer Welfare in a New Light*. U.S. Department of Justice - Antitrust Division. 2007. Available at http://ssrn.com/abstract=975992, accessed in May 2nd, 2008.

2 OECD. *Buying Power: the exercise of market power by dominant buyers*. Report of the Committee of Experts on Restrictive Business Practices, Paris, 1981. See also: OECD. *Buying Power of multiproduct retailers*. Roundtable of the Committee on Competition Law and Policy, Paris, 1998, which, similarly to the previous report, globally defines buyer power as "*the ability of a buyer to influence the terms and conditions on which it purchases goods*".

3 AC 08012.006976/2001-58, Reporting Commissioner: Cleveland Prates Teixeira.

3. Buyer power in the Brazilian legislation

Although the Brazilian competition legislation does not have any specific approach to buyer power, there is no doubt that, in general terms, the law condemns the negative exercise of this type of market power.

In accordance with Article 20 of Law 8884/1994, any acts that may (i) limit or restrain competition or free enterprise; (ii) lead to market control[4]; (iii) arbitrarily increase profits; or (iv) imply abuse of market control by a given firm, are to be reprehended by the antitrust authority. Thus, if the exercise of buyer power by a company produces any of these effects, such practice will be deemed a violation of the economic order.

More specifically, Article 21 provides examples of conducts that, when producing the effects listed on Article 20, are considered to be violations of the economic order. Some of these conducts clearly refer to buyer power practices, for instance: (i) posing difficulties for the establishment, operation or development of a supplier (subsection V); and (ii) discriminating suppliers of a certain product or service by establishing price differentials or discriminatory operating conditions (subsection XII).

Therefore, the reprehension of buyer power, when harmful for the competition, is undoubtedly present in the Brazilian antitrust law. However, the discussion on how to determine buyer power, on what extent buyer power is actually harmful and in which cases it should be reprehended is more controversial. The next section will address concrete cases analyzed by CADE and will attempt to outline the main issues concerning buyer power raised by the Brazilian authorities.

4. Buyer power case analysis by CADE

4.1 Multiproduct retailers

Buyer power of multiproduct retailers has been an important issue throughout the world, mainly because of increasing levels of concentration observed on these markets over the last years. In order to study this phenomenon and the economic aspects involved, OECD organized a Roundtable on *Buyer Power of Multiproduct Retailers* in 1998[5].

Brazil's experience is similar to other countries' when it comes to strong acquisition tendencies on the multiproduct retail market. More specifically, CADE, in 2003, analyzed a merger involving *BR Participações e Empreendimentos S.A. ("BR"), G. Barbosa e Cia. Ltda. ("G. Barbosa") and Serigy Participações e Empreendimentos Ltda. ("Serigy")*[6]. In short, *BR* purchased assets of property of *G. Barbosa* and Serigy, gathering supermarkets of all these companies ("*Bompreço*" supermarkets) and causing a horizontal concentration on the multiproduct retail market in the Northeast region of Brazil. This is probably the case in which CADE provided the largest amount of analysis material regarding its views towards buyer power.

The operation led to very high market concentration levels, above 70%, which represented significant market power in the hands of the multiproduct retailers. Considering that the contracts signed with the

4 In accordance with Article 20, Paragraph 1, the achievement of market control as a result of economic efficiency is nor deemed a violation.

5 OECD. *Buying Power of multiproduct retailers*. Roundtable of the Committee on Competition Law and Policy, Paris, 1998.

6 AC 08012.006976/2001-58, Reporting Commissioner Cleveland Prates Teixeira, 2003.

retailers imposed several obligations and restrains towards the suppliers, CADE's understanding was that it was possible that the operation could excessively reinforce negotiation power of the participants towards its suppliers (mainly the smaller ones).

Entering one of the main issues regarding buyer power, CADE was concerned about the effects that the increase of the companies' buyer power would have on the consumers. As outlined on the decision, "*under the strictly economic point of view, it is important to remark that, when analyzing monopsony power, one should not divert focus from the consumer*" (free translation).

Similarly to the opinion rendered on the matter by the Brazilian Secretariat of Economic Law, CADE stated that it would be unlikely that the income benefits acquired by the large multiproduct retailers over its suppliers would be passed along to the consumers:

> "o*btaining better prices from the suppliers, contrarily of what common sense may indicate, does not necessarily imply that these gains will be extended to consumers. Actually, the retailer behaviour will be determined by the market structure regarding its relationship with the clients. Thus, if a supermarket group is the only one in its working area (monopolist), the consumers obviously will not have other options to acquire goods, and very unlikely the low prices obtained from the negotiations with the suppliers will be passed along*" (free translation).

Regarding the effects of the operation on the suppliers and the possible consequences to consumers due to these effects, the Brazilian antitrust authorities concluded that buyer power concentration can be more harmful if suppliers are atomized and dependent on multiproduct retailers. In such an industry structure, buyers with monopsony power, in order to decrease input costs, have incentives to buy (and produce) less than would otherwise be bought in a competitive environment. As a consequence, prices to final consumers tend to be higher, inasmuch as there will be less products available to them.

Using previous analysis provided by the Office of Fair Trade-UK, CADE outlined that as a possible long term consequence of price reduction to suppliers, investment and research capacity of these firms could decrease as well, lessening the quality of the products. Additionally, at the sign of profit reduction, new supplying firms would be discouraged to enter the market.

Another potential problem would be the fact that in certain situations a retailer with significant buying power, enjoying lower wholesale prices, could temporarily grant discounts to consumers not as a sign of economic efficiency obtained due to its buyer power, but as a form of predatory pricing, with the intention of eliminating its rivals.

On the other hand, although buyer power by multiproduct retailers can be harmful to suppliers, CADE also recognized that large multiproduct retailers not necessarily with buyer power can be helpful on the development of small suppliers, propitiating the distribution of their products on a national basis and providing scale economies, reducing production costs.

Also, CADE did not ignore the fact that many of the industrial sectors which supply goods for multiproduct retailers are very concentrated as well, thus being able to countervail retailer's buyer power.

The main ambiguity which arises when analyzing buyer power is therefore present in CADE's decision as well. On one hand, buyer power can be favourable, as it constitutes countervailing power against strongly concentrated suppliers, preventing abuses by the latter and extending the benefits to consumers. It may also help small suppliers to develop and to better distribute their products. On the other hand, buyer power may reduce output, suppliers' investments, as well as preventing the entry of new firms.

Furthermore, the benefits obtained by the retailers from this practice are not likely to be extended to consumers.

Due to this ambiguity, CADE was not able to reach a solid conclusion on the effects that the merger participants' buyer power would have on the consumers in that particular case. However, due to the elevated market power detained by the retailers participating on the merger, the type of contracts imposed to the suppliers and the understanding that the benefits obtained by the retailers because of its buying power were not likely to be passed along to consumers, the Brazilian authorities concluded that the participants buyer power could be harmful for competition.

Because of that, CADE determined the opening of a proceeding by the Secretariat of Economic Law in order to investigate the impact of exclusive dealing contracts on multiproduct retailers in markets in the Northeast of Brazil. Moreover, the decision demanded a study on the effects of the recent concentration process in the multiproduct retailers market to be addressed by the Secretariat for Economic Monitoring. Finally, because of the heavy concentration caused by the merger, entry barriers and the absence of effective rivals, CADE determined disinvestment of some the assets involved in the operation.

On the overall, although CADE's decision on the matter has raised more questions regarding buyer power than it has provided answers, a few aspects concerning Brazil's views towards buyer power can already be verified.

First of all, when analyzing buyer power, CADE's focus was clearly kept on the consumers. It is important to verify, therefore, if the exercise of buyer power generates negative effects not only on the suppliers but on the consumers as well. Nonetheless, CADE recognizes that, on the long term, excessive pressure by the buyer power holder over its suppliers can reduce investment and research capacity of these firms and generate negative outcomes to the consumers, such as the lessening of the products' quality. The advantages obtained from the suppliers can also be used by the buyer power holder to carry exclusionary conducts against its competitors, making possible the exercise of monopoly power against the consumers later on.

The Brazilian competition authorities were very skeptical about the fact that lower prices obtained from the suppliers through buyer power could be extended to consumers. In CADE's view, if the downstream market structure is not competitive, a company will have no incentive to pass along to consumers the benefits obtained due to its buyer power in the upstream market. This view very much weakens arguments defending that buyer power is benefit to consumers downstream in any situation, as well as the indiscriminate defence of countervailing power. The increase of a buyers' power towards a strong supplier can be positive (or at least it will not be as harmful), but the eventual benefits will not necessarily be extended to consumers.

4.2 B2B Electronic Marketplaces

Two of the cases regarding buyer power analyzed by CADE involved B2B (business-to-business) electronic marketplaces, which are basically on-line portals operated jointly by competitors to facilitate the purchase of common supplies.

Both operations constituted joint ventures among buyers of particular products. The first one involved General Motors Corporation, Ford Motor Company, Renault S/A, Nissan Motor Co. Ltd., Oracle do Brasil Sistemas Ltda., DaimlerChrysler AG and Commerce One, Inc.[7], and it was created to allow a "more efficient" purchase of equipments, components and services related to the automobile industry. The second

[7] AC 08012.00001/2001-16, Reporting Commissioner Cleveland Prates Teixeira, 2004.

joint venture involved Sadia S/A, Cargill Agrícola S/A and Danone S/A[8] (companies of the food industry), and was designed to allow the purchase of maintenance, repair and operation materials by the companies (such as office supplies, computer equipments, transportation services, cleaning material and others) through a B2B portal.

The relation between buyer power and corporate arrangements such as joint ventures, cooperatives and other kinds of associations has been common in the analysis made by antitrust authorities throughout the world[9]. More specifically, electronic marketplaces and its relation with buyer power have also been studied by competition agencies. Such studies were useful to CADE, which quoted three of them when analyzing the above mentioned B2B cases. Two of the studies resulted from workshop reports elaborated by the Federal Trade Commission: "*Entering the 21st Century: Competition Policy in the World of B2B Electronic Marketplaces: A Report by Federal Trade Commission Staff*" (2000); and "*Emerging Issues for Competition Policy in the World of E-Commerce*". The third one resulted from an European Commission report named "*E-marketplaces: new challenges for enterprise policy, competition and standardisation*" (2001).

The 2000 FTC report, used in CADE's decisions more extensively, states that B2B portals can generate efficiencies due to its cooperative nature. Nonetheless, this cooperation can also give place to anticompetitive behaviours. Within the market of products commercialized through the portal, competition could be affected by: (i) the more evident possibility of collusion or coordination between the competitors sharing the portal; (ii) the implementation of exclusionary practices by raising rivals costs; and (iii) the possibility that the joint purchase leads to **monopsony power**. Regarding the present analysis, this last possibility is of our particular interest.

When it comes to electronic marketplaces designed for the purchase of supplies, the relevant market definition, as stated by CADE, "*must not take into account the Participants' activities as producers, but the segment where they act as consumers*" (free translation). Obviously, such B2B portals intend to facilitate the purchase of supplies by the companies and not the selling of their final products. Thus, "*any possibility of exercising market power would be held upon suppliers, and not upon the costumers*" (free translation).

Based on the Federal Trade Commission report, CADE emphasized that B2Bs might facilitate the exercise of buyer power by allowing participants with reasonable market power to coordinate their purchases in order to force a reduction in the prices of supplies. Once again, CADE doubted that this reduction would be extended to consumers downstream and stated that the prices upstream could simply "*be reduced to levels below competitive prices, leading to a decrease of the supplies*", not necessarily generating benefits to costumers downstream[10].

In order to cause anticompetitive effects, however, buyer power holders must detain a significant market share towards suppliers. The greater the market share of B2B participants, the greater the possibility of anticompetitive effects. Acknowledging that, CADE quoted examples of practices listed by the FTC that should be observed by companies (and competition authorities) when designing (or analyzing) B2B on-line marketplaces, such as: (i) restricting the exchange of information between competitors participating on the portal; (ii) applying confidentiality agreements; (iii) providing antitrust training to employees; (iv) protecting sensitive information through firewalls; (v) avoiding exclusivity

8 AC 08012.003632/2001-97, Reporting Commissioner Ricardo Villas Bôas Cueva, 2004.

9 GOLDBERG, Daniel. *Poder de compra e política antitruste*. São Paulo: Editora Singular, 2006, p. 153.

10 This view is particularly present in the decision rendered on AC 08012.002950/02-11, involving Sadia, Cargill and Danone.

agreements; and (vi) avoiding the inclusion of new participants in the B2B marketplace once the concentration level reaches a 30% market share.

When analyzing the general Motors, Ford, Renault, Nissan, DaimlerChrysler B2B joint venture, the Brazilian authorities found that these companies' market share regarding its purchases of automobile services and equipments was approximately 38% (this number was overestimated, since it did not take into account the equipments bought by smaller shops for resale).

Although such market share probably exceeded the 30% threshold recommended by the FTC, CADE's understanding was that other automobile companies working in the Brazilian market, which detained at least a 57% market share, represented effective competition to the captioned B2B participants and that such companies would be able to prevent an eventual buyer power abuse by the B2B marketplace owners. Furthermore, the competition authorities concluded that the rules established for the portal did not allow the participants to make joint purchases, but only constituted means to facilitate transactions. Due to these factors, CADE decided to approve the operation, stating, however, that future anticompetitive conducts eventually carried out through the B2B marketplace would cause the re-appreciation of the matter by the competition authorities.

Regarding the B2B joint venture involving Sadia, Cargill and Danone, CADE verified that the on-line marketplace designed by the participants would not be used to buy inputs these companies' core business, but only to the purchase of simple maintenance and operation materials. Since the companies' approximate market share regarding this segment was extremely low, CADE concluded that the exercise of buyer power by these firms was not likely and therefore approved the operation. Nonetheless, CADE emphasized that the eventual entry of new firms in the captioned joint venture should be submitted to the competition authorities for analysis.

4.3 Agriculture (orange juice)

Buyer power in agricultural markets – where a processer or a group of processors with significant market power uses its monopsony power to decrease the prices of supplies or to impose more favourable conditions – has been common in antitrust analysis throughout the globe[11]. Brazilian competition authorities had to face such situations as well, although the development of the cases did not allow CADE to enter deeper discussions regarding buyer power in agricultural markets.

The most notorious case concerning this theme in Brazil was related to an alleged buyers' cartel in the frozen concentrated orange juice industry[12]. In 1994, orange growers' associations accused several orange juice processers, to whom they supplied fruits, of cartelization. Through the cartel, the processers would impose prices and payment conditions to the suppliers, as well as coordinated standard-contracts which would prevent free negotiation between the parties.

In 1995, CADE and the defendants agreed to celebrate a Cease-and-Desist Commitment, in which the orange juice processers agreed to cease any conducts that supposedly have been harmful to competition. Among other obligations, the companies committed to: (i) engage on individual negotiations with the orange producers, agreeing on prices and other purchase conditions separately; (ii) formalize the transactions in individual contracts, established according to the specific conditions negotiated between

11 DOBSON P., WATERSON M., CHU A. *The Welfare Consequences of the Exercise of Buyer Power*. Research paper prepared for the Office of Fair Trading, 1998; WERDEN, G. J., *Monopsony and the Sherman Act: Consumer Welfare in a New Light*. U.S. Department of Justice - Antitrust Division, 2007. Available at http://ssrn.com/abstract=975992, accessed in May 2nd, 2008.

12 PA 0800.012720/94-74, Reporting Commissioner Neide Teresinha Malard, 1995.

each party; (iii) not to adopt uniform conducts, common prices and payment conditions between rival processors; (iv) not to promote or to participate on meetings between competitors that might aim to adopt uniform commercial conducts; (v) not to divide or regulate the orange purchase market between competitors; (vi) not to impose standard-contracts to orange producers; (vii) to submit to CADE detailed reports about the companies' activities every three months for the period of three years, as well as a final report.

The signing of the Cease-and-Desist Commitment prevented CADE from rendering a decision that could discuss broader theoretical aspects concerning buyer power, especially regarding agricultural markets. Nonetheless, this was an example of an important case involving buyer power, in particular a case of monopsony achieved by means of cartelization.

Regardless of the fact that, at the end, CADE did not formally recognized that the orange juice processors had committed infractions and regardless of the effects that the captioned practice might have had on the consumers (due to the settlement, CADE did not deeply analyze such effects), the Brazilian authorities clearly signalized that monopsony power against agricultural suppliers, imposing prices and other conditions, might be an antitrust offence. More specifically, buyer power obtained through possible cartel associations was particularly concerning to the antitrust authorities, who indicated that this type of conduct should be reprehended.

4.4 Slaughterhouses' cartel

In 2007, CADE analyzed, this time more deeply, a buyer's cartel in the slaughterhouses market[13], which rendered further views of the Brazilian antitrust authorities on buyer power, in particular through the use of cartel associations.

The case was originated from a representation to the Secretariat of Economic Law denouncing that several slaughterhouses would be exercising its dominant position as cattle buyers/processers and adopting uniform conducts in order to influence cattle prices and purchase conditions obtained from its suppliers.

After evaluating the evidences produced, such as meetings between slaughterhouse owners and others, CADE concluded that, indeed, the slaughterhouses were adopting uniform conducts regarding the relative prices for different qualities of cattle carcasses.

Furthermore, the authorities verified that the slaughterhouses' market share was significant, over 48% in some cases, sufficient to presume market power. Once more, the market share was calculated observing the companies buyer power and not simply its position as producers.

The analysis revealed two distinct conducts practiced by the slaughterhouses: (i) coordination between the firms in order to establish classification criteria for the cattle carcasses; and (ii) deliberated adoption of uniform discounts[14] regarding the prices paid for the cattle carcasses, according to its characteristics.

The first conduct was not considered a violation. On the contrary, the establishment of criteria for the classification of the different kinds of carcasses was considered to be benefit for the market, since it

13 PA 08012.002493/2005-16, Reporting Commissioner Luis Fernando Schuartz.

14 The reference prices of the cattle are negotiated between cattle-raisers and slaughter-houses. However, the actual price paid by the latter depends on characteristics observed only after the slaughtering, such as fatness, sanitary conditions and others. Thus, the reference price is adjusted through discounts given by the slaughter-houses after the observation of the carcasses.

clarified quality standards and other factors. The adoption of uniform discounts, however, led to price collusion and homogenization of buying conditions, and was considered to be harmful for the competition.

It is interesting to remark that in both analyses involving buyers' cartels mentioned in the present paper – the slaughterhouses cartel and the alleged orange juice cartel – CADE did not devote a substantial part of its arguments to analyze whether the conducts could generate effects directly upon consumers or not. The cartelization by dominant agents itself, despite being conducted by buyers and not sellers, was considered to be potentially harmful to competition and to society and was reprehended.

As demonstrated in this paper, CADE's experience endorses that view that there are both positive and negative effects of buyer power depending on several conditions. The exercise of buyer power through cartelization, however, was specially worrying to the Brazilian authorities. In cartel cases such as the slaughterhouse's, there was a presumption that, once proved the cartelization and the dominant position of the participants, there could be negative effects not only to suppliers, but to collectivity and competition in general.

4.5 Private health insurance and medical services

According to the Brazilian National Private Health Agency (ANS), at least 38 million people in Brazil are beneficiaries of private health insurance plans[15] offered by different types of firms, from traditional insurance companies to medical associations or cooperatives.

Although there are several firms offering this kind of service, there is a high level of market concentration in some regions. In the majority of cities throughout Brazil, there are only few insurance firms in operation. [16]

Such market power has generated one of the most usual cases analyzed by the Brazilian competition authorities, which directly involves the exercise of buyer power, in particular by health insurance plans.

In most cities, a significant part of the population acquires medical services through health insurance cooperatives and associations. Also, as already mentioned, in some of these cities such firms detain very expressive market shares or even monopolist positions regarding the health insurance market. Such position gives theses associations not only a very significant market power towards final consumers but also a significant buyer power towards the physicians who attend these consumers through health insurance plans. In other words, since health insurance beneficiaries represent a significant amount of the cities' total population, the doctors must join these health insurance cooperatives and associations in order to get patients. Such picture is aggravated by considerable entry barriers in the health insurance market, due to scale economies, regulatory requirements and other factors. That gives the existing firms extremely relevant buyer power towards medical services.

Cooperatives and associations often impose very restrictive contract clauses to the associated physicians. The most common of these clauses was one which prohibited physicians to offer medical services to other health insurance firms (exclusive dealing). Over the past years, the Brazilian competition authorities consistently condemned such conducts. Up until now, CADE has condemned more than 20 health insurance cooperatives and associations for such practices of collusive behaviour. The sanctions applied involve: (i) the imposition of fines; (ii) the suppressing of exclusivity clauses from the contracts signed between medical service suppliers and insurance firms; (iii) the publication of CADE's decision in

15 AGÊNCIA NACIONAL DE SAÚDE COMPLEMENTAR (ANS). *Relatório de Gestão 2000-2003*. Ministério da Saúde, Rio de Janeiro, 2004, p. 67.

16 GOLDBERG, Daniel. *Poder de compra e política antitruste*. São Paulo: Editora Singular, 2006, p. 256.

newspapers and in the firms' websites; and (iv) the firms' obligation to inform its medical service suppliers of CADE's decision.

Although these conduct cases are mainly grounded on the analysis of collusive behaviour, buyer power is often used as a defence argument. In order to obtain a better bargaining position towards health insurance firms, physicians often join in cooperatives and associations, through which they negotiate with the insurance companies.

On the one hand, such forms of physicians associations may play the role of countervailing power against health insurance companies' buyer power. However, it can also generate harmful effects, such as the exercise of uniform conducts by the medical service suppliers, including price agreements.

Such as other cases involving buyer power discussed in this paper, the one just described has also been dealt with by other jurisdictions. The FTC and the DOJ, for instance, have already established guidelines to orient medical service suppliers about which agreements are considered to be a *per se* violation and which are not. In short, these agencies allow doctors' agreements only in the absence of significant market power and when observed a certain level of clinical integration, with distributed business risks between the participating doctors. In the United States, therefore, the joint negotiation of medical service suppliers with health insurance firms has been severely restricted by the antitrust authorities.[17]

In Brazil, such cases have already been analyzed by CADE a few times. The most common complaint against physicians's associations is the imposition or "recommendation" of minimum prices that medical service suppliers should charge from beneficiaries of health insurance plans. Similarly to other jurisdictions, the Brazilian authorities have been condemning such practices in most cases.[18]

Although CADE has recognized that physicians' collaborative behaviours are mainly a response against the exercise of buyer power by health insurance firms, the majority of decisions still consider this type of coordinated conduct as an antitrust offence. As outlined in one of CADE's decisions:

> *"The firms that operate in this segment [health insurance] impose values to the [medical] services and sometimes intervene in the work of physicians, hospitals and laboratories, restricting medical autonomy. Medical service price lists, such as de AMB's [Brazilian Medical Association] arose as a reaction against this. (...)*
>
> *However, the elaboration of such lists as a way of reacting against the behaviour of health insurance firms is extremely dangerous, for it exceeds the relationship between doctors and companies, reflecting directly on the market and harming the principle of free competition*"(free translation).[19]

As a result, CADE, in general, has been reprehending the imposition (or even the recommendation) of uniform prices by physician's associations, considering that such conducts represent cartelization with naked anticompetitive effects, regardless of the fact that it also represents countervailing power against health insurance companies' buyer power.

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17 GAYNOR, M., VOGT, W. B., *Antitrust and Competition in Health Care Markets*. In: Anthony J. Curlyer and Joseph P. Newhouse, (Editors). *Handbook of Health Economics*., Amsterdam: North-Holland, 1999.

18 For example: PAs 0800.007201/97-09, 0800.021976/1997-51, 08000.011517/94-35, 08000.027395/95-80, 53/92 and others.

19 PA 0800.007201/97-09, Reporting Commissioner Thompson Andrade, 2001.

Although this seems to be the dominant position within the Council, the Brazilian authorities have sometimes granted more credit to the physician's associations countervailing power against health insurance companies' buyer power. For instance, in a Proceeding filed against the *Cooperativa de Anestesiologistas do Ceará ("COOPANEST-CE")*, this medical cooperative was also accused of "recommending" minimum prices to be charged by the physicians. Differently of other similar cases previously judged, however, CADE decided not to condemn the cooperative. The Counsel's decision, which was not unanimous, stated that:

> *"The medical services market is one with many participants and the doctors do not have, individually, any negotiation power towards health insurance firms. In the present configuration of the medical services market, the health insurance firms are the main, if not the only buyers of these services, since they mediate doctors and clients. Thus, they detain a large negotiation power over the doctors and act in order to lessen the wages of these professionals. So being, I understand that the constitution of cooperatives such as the COOPANEST-CE is legitimate, so that doctors' wages can be better negotiated"* (free translation).[20]

It is important to remark that, in the above mentioned case, the authorities understood that the cooperative's influence on the physicians was not binding and that the associates were not obliged to follow the price recommendations. Nevertheless, one cannot ignore that this line of argumentation differs from other positions adopted by CADE on the matter, which can indicate that such type of cases have not yet been given a permanent conclusion by the commission.

For sure, CADE has not indiscriminately considered as a positive outcome the fact that physician's associations may balance health insurance firms's buyer power. On the contrary, the authorities have demonstrated to be extremely worried about the anticompetitive effects caused by this collaboration among doctors. Nonetheless, cases such as the one just mentioned show that the Council does not ignore the possible positive effects that this sort of countervailing power against health insurance companies' buyer power may represent. The discussion still seems to be open.

5. Conclusions

The cases analyzed in the present paper shortly presented the main discussions involving buyer power in CADE's decisions. It is interesting to remark that the economic segments in which these cases took place are very similar to the segments in which other jurisdictions throughout the world also found necessary to analyze buyer power effects. Among these segments are the multiproduct retail market, B2B electronic marketplaces (specially involving joint ventures and other kinds of buyers' associations), agricultural markets and the medical services/private health insurance market.

The analysis of buyer power cases by CADE also shows that the Brazilian authorities have been paying attention to international discussions regarding the theme and that the knowledge produced by other jurisdictions such as the FTC and the European Commission have been of great use in CADE's decisions.

It is certainly too early to say that Brazil's approach towards buyer power is consolidated or even in an advanced stage. One of the reasons for that is probably the fact that the few cases analyzed so far did not demand greater theoretical discussions concerning the subject. However, the relative "unimportance" given to monopsony power when compared to monopoly power (which is a common feature not only in Brazil, but in other jurisdictions as well) may also indicate that perhaps the competition authorities' eyes

[20] PA 08012.003664/2001-92. This quotation was extracted from Commissioner Prado's Vote, which favored the denounced cooperative and was followed by the majority of the Counsel.

are not yet focused enough on the damages caused by the exercise of buyer power. Nonetheless, a few tendencies regarding CADE's view towards buyer power can already be verified.

When determining buyer power and its extent, the Brazilian analysis did not differ much from the usual market power analysis. Great attention was given to the buyer's market share, in particular with regard to the share of products purchased from the suppliers. When observing buyer power, it is particularly important to measure the company's power as a consumer and not as a producer. Nevertheless, its seller power was also taken into account by the authorities, mainly because it is important to access the effects on final consumers. Asides from market share calculations, other factors were observed to determine a firm's buyer power, such as contract clauses imposed to suppliers.

CADE's focus when analyzing buyer power was mostly kept on the possible effects generated upon consumers, and not on the companies which supply products to buyer power holders. One might think, therefore, that buyer power exercise is indiscriminately seen as benefit by the Brazilian authorities, since consumers downstream would be positively affected by lower prices obtained upstream. Such presumption, however, is incorrect.

CADE was very sceptical about the fact that lower prices obtained from the suppliers through buyer power would be extended to consumers downstream. In CADE's view, the determinant factor whether consumers will or will not be granted advantages is the downstream market structure. If the market is not competitive, a company will have no incentive to pass along to consumers eventual benefits acquired from suppliers upstream. Moreover, in order to decrease input costs, the monopsony has incentives to buy less than would otherwise be bought in a competitive environment. As a consequence, prices to final consumers tend to be higher.

Furthermore, buyer power abuse against suppliers can implicate extremely negative effects to competition and, ultimately, to consumers as well. CADE recognized that, on the long term, the abuse of a buyer power holder over its suppliers could simply reduce supply levels, avoid the entry of new supplying firms and reduce investment and research capacity of these companies, generating negative outcomes to consumers, such as the lessening of the products' quality. The advantages obtained from the suppliers can also be used by the buyer power holder to carry exclusionary conducts, preventing the entry of rivals in the market or posing difficulties to existing competitors.

Despite of that, the Brazilian competition authorities did not deny that buyer power can generate positive outcomes as well, such as the fact that in certain cases, larger retailers can help small suppliers to better distribute their products and to reach scale economies. Also, buyer power can balance the market power exercised by a concentrated group of suppliers, which may represent benefits to consumers downstream (depending on the market conditions). The benefits of countervailing power exercised by buyer power holders, therefore, are not ignored by CADE, although they are not indiscriminately recognized in any situation.

Similarly, countervailing power exercised by suppliers against a strong monopsonist is also under CADE's scrutiny. The agency, in general, has been worried about this issue, especially when such countervailing power is obtained through some sort of association. Nonetheless, possible benefits of this balance between suppliers' and monopsonits' power are not ignored by CADE either.

Lastly, CADE's analyses draw attention to the exercise of monopoly power through cartel associations, which can be an effective and, at the same time, very negative way of practicing buyer power. There was an assumption that such collusions were harmful to competition and society, regardless of the fact that it was a buyers' cartel and not a producers' cartel.

The handling of the mentioned cases, although not comprehensive, shows some tendencies in the way Brazilian Competition Policy System treats buyer power. The subject raises some controversial questions that has been tackled by Brazilian competition authorities without yet a quite consensual understanding, Nevertheless, the major trade-offs regarding the effects of buyer power has been consistently addressed in each decision of the commission.

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INDONESIA

1. Development of Indonesian retail market

Issues on buyer power known as a major issue felt in Indonesian retailing market. The phenomenon involved with the rapid growth of Indonesian retail market, specifically on modern retailer with huge capital and financial ability. However, even though contribution by modern retailer on Indonesian retail growth significant to the consumer, modern retailer also put into discussion further problems in the existence of pressure to small retailer by modern retailer with huge capital ability. Lately, retail industry developed in line with changes in society. The increase of society income had caused segmented consumer that want changes in retail industry management. Taken into account the history of Indonesian retail market, the availability of goods is the main indicator of a retail industry (especially traditional market) to be visited by the consumer. Currently this indicator cannot be beneficial without additional facilities, such as cleanliness, conformability, security, and company image that being implant into consumer's sight (cheap price, good image, and other). The trend is inevitable in Indonesian retail market.

Number of traditional and modern store in Indonesia

Store format	Year 2007	Year 2006	Year 2005
Hypermarket	121	105	83
Wholesale	26	26	24
Supermarket	1,379	1,311	1,141
Small (mini) market	8,889	7,356	6,465
Convenience store	148	120	115
Traditional store	1,900,332	1,846,752	1,787,897

With strategic position and facilities that able to satisfy consumer, modern retail development has become a large market power and affect distribution side, especially middle and small supplier. Supplier becomes dependable to them. Considering the development of intense competition between suppliers, thus big retailers are blessed with ability to abuse its dominant position. They began to implement several specifications that lead to certain trading term. Even in its development, the trading term has become part of income for the modern retailer.

Indonesian competition authority traced within Carrefour Indonesia's case showed that this retailer in year 2004 had reached other income until Rp 40.19 billion. Income from listing fee is the biggest, up until Rp 25.68 billion. Minus margin was placed second with amount of Rp 1.98 billion, while the rest are Rp 12.53 billion came from other trading terms.

2. Carrefour case

The only case handled by Indonesian competition agency on buyer power was the Carrefour case. This case occurred due to the implementation of minus margin by Carrefour that was intended to create a condition in which the selling price of Carrefour's competitor would not be lower than that of Carrefour. This minus margin term has indirectly resulted in the blockage of consumer access to buy product with competitive price in the relevant market. Some dealers were discontinuing their supplies to Carrefour's competitor selling product in lower price than that of Carrefour, because afraid of being sanctioned on minus margin term.

Based on investigation, this behaviour has caused significant impacts, in which competitor was unable to sell the same product. Stock product of competitor is getting lessen; hence reduce the consumers option in buying a product. Based on aforementioned, it can be concluded that Carrefour act of implementing the minus margin term has potential of preventing its competitor from doing business in the relevant market. The minus margin term implemented by Carrefour constitute Carrefour's act in burdening the dealer for loss competition risk, namely when selling price of the competitor is lower than that of Carrefour. Hence, the minus margin term which was implemented by Carrefour to the dealer given that the competitor sold a product in lower price than that of sold by Carrefour, constituted an unfair act since the Carrefour has troubled the dealer with something beyond its authority. The minus margin term has disturbed business relation between the dealer and the Carrefour's competitor. The minus margin term also has indirectly intended to maintain the selling price of product in vendors of the competitor, so that the selling price would not be lower than that of sold in vendors of Carrefour.

Therefore in its decision, Indonesian competition agency stipulated that Carrefour's behaviour violated Article 19 of Indonesian competition law (Law No. 5/1999). This article stated that "business actor shall be prohibited from engaging in one or more activities, either individually or jointly with other business actor, which may result in monopolistic practices and or unfair business competition, in the following form: (a) reject and or impede certain other business actors from conducting the same business activities in the relevant market". In this circumstance, Indonesian competition agency analyzed that the impact of Carrefour's market power had created an abuse of bargaining position. However due to the lack of specific regulation on bargaining position, then this behaviour also involved with abuse of dominant position banned by Law No. 5/1999.

3. Buyer power in Indonesia

Buyer power can be defined as ability possess in buying transaction. The monopsony in the Law No. 5/1999 is defined according to article 18 of the Law, which is the limitation to control supply or become a single buyer on certain good or service in relevant market that can create monopolistic practices and unfair business competition. So does the oligopoly power regulated in article 13 of the Law No. 5/1999 that specified on agreement with other business actor jointly to control purchase or supply and thus will control price of goods and or services in relevant market which will caused monopolistic practices and unfair business competition.

Based on aforementioned stipulation, it can be concluded that the main focus of buyer power in Indonesia is their ability to create market power and thus will potentially create monopolistic practices and unfair business competition.

Business actor in the position to exercise its monopsony power (as well as monopsony power) if the respective business actor equipped with market power that can be explain through their sales shares, entry barrier, number of outlet, number of selling space, strategic location, the availability of sales good or supply, and its buying power from consumer and supplier side.

What intended as relevant market in identifying strength of monopsony is identification of market based on from substitution and geographic side. For measurement of relevant market geographically for grocery is by specifying location, supermarket size, and shopping pattern in the area. And is required calculation how consumer to make a movement between shops to fulfil requirement of its household. It is also considered average travel distance average when she/he forms definition of geographic market for weekly shopping at one particular area.

Impact of abuse of monopsony power can analyzed at the price and other effect. At case which has been handled by KPPU, this impact showed that with strength bargains power owned by retailer

(Carrefour) can make is stipulation causing supplier cannot supply the same goods with lower price to Carrefour's competitor, thus as a result, circulation of goods became limited and only can be met in Carrefour. This take affect at consumer level where consumer only can buy the product at Carrefour's price.

Supplier's position in this case incapable of making choice and only focused at distribution to Carrefour with thin margin value. As a result, the price made static with price in Carrefour, though it is not impossible with high number of purchase or any trade strategy differ from Carrefour's competitor to Carrefour's supplier causes price can make a move dynamic.

In supplier perspective, retailer is key distribution to win competition. To leave them is much the same to exit from market. Binding sanction and limited margin given by Carrefour had caused supplier did not get incentives to do innovation and also value addition at its product. Even now every corner in the retailer's place can provide potency for earnings. So today, some retailer is not only focus at selling goods to consumer, but also focus at selling their business spaces to supplier. At the same time, in fact, consumer is not guaranteed enjoy efficiency by producers/suppliers because some portion of it has been transferred to retailer's profit.

One thing needs to be observed and become attention from competition policy is, if in relation between supplier and retailer, there are:

- Retailers become dominant and lead to cartel and or oligopoly by burdening cost on the supplier.
- Dominant retailer is able to depress supplier causing tight space for price movement and narrowed choice for consumer in the future.
- Vertical restraint that force supplier not to distribute its goods to the competitor.
- Horizontal merger where market power is bigger and causes obstacles in (for example of merger between Carrefour and Alpha Retailindo, another Indonesia's retailer).

These conditions are stressed in law enforcement on buyer power.

In merger Issue between Carrefour and Alpha Retailindo, position of Carrefour hypermarket has identified with the biggest market share, does merger with Alfa Retailindo having hypermarket and supermarket format with composition of market share as follows:

	2004	**2005**	**2006**	**2007**
Carrefour	14.22%	16.72%	17.66%	19.63%
Matahari	5.03%	7.03%	8.99%	9.47%
Hero	12.21%	11.79%	11.11%	10.73%
Mutiara	1.71%	0.66%	0.22%	
Alfa	10.82%	9.30%	8.51%	7.22%
Makro	6.72%	6.31%	5.84%	5.45%
Goro	0.37%	0.33%	0.29%	0.25%
Inti	3.62%	3.26%	2.93%	2.72%
Lion	5.05%	3.24%	3.02%	3.07%
Macan Yaohan	0.86%	0.88%	0.88%	0.86%
Mitra	0.45%	0.35%	0.31%	0.25%

	2004	2005	2006	2007
Metro	0.08%	0.03%	0.03%	0.03%
Others (75 outlet)	38.88%	40.11%	40.21%	40.11%

Alfa Retailindo has 29 supermarkets in all Indonesia, and Carrefour has number of outlet 37 hypermarket nationally. With the existence of merger, Carrefour gain strength and had impact at position of supplier. At this case, KPPU focus its investigation on the impact of this merger.

ROMANIA

The Romanian competition regulations provide the framework for the assessment of buyer power, both in merger cases as well as in vertical or horizontal agreements. The issue of buyer power may arise predominantly in merger cases, either as 'countervailing' power when assessing upstream mergers among suppliers, or else as anticipatory concern when considering downstream mergers among buyers. However, this concept may be used and applied as well under art. 5 and 6 of the Law (analogous to Articles 81 and 82 of the EC Treaty) and buyer cooperatives and upstream collusive activity are of course examined under art. 5(1) of the Romanian Competition Law.

Far from touching all the aspects that the topic of monopsony and buyer power involve, this contribution rather focuses on the presentation of several retailer practices which are conducive to buyer power and on the provisional findings of a sector inquiry where Romanian Competition Council (hereinafter called RCC) currently evaluates the extent to which some supermarket practices may be the result of buyer power or excessive bargaining power of retailers vis-à-vis suppliers.

It becomes apparent that much focus has been placed recently at both European and international level on the alleged growth of market power of supermarkets and other big-box retailers. The consolidation in the Romanian food retailing follows the general trend across EU countries. However, national statistics show that in Romania, the level of concentration of the modern retail formats at the expense of traditional formats is increasing slightly but it is still low compared to other European Countries. Thus, the first 10 retailers only stand for about 19% of the total Romanian retail market. In addition, more than 130 super/hypermarket chains are present, through 954 shops opened in 142 municipalities.

Moreover, the Romanian Competition Council takes into account the notion of buying power when applying EC and national Competition Law provisions, but it is not authorised to stop abuses made by non-dominant undertakings.

Against this background, at the beginning of current year, a series of Trade Associations lodged a complaint to RCC claiming the violation of the provisions of articles 5 and 6 of the Competition Law (through the "abuse of dominant position and the anti-competitive concerted practices") by the Romanian supermarkets.

The complaint was based on the assumption that the Romanian modern commerce represents about 80% of the total consumer goods market. According to the current information available, the modern commerce currently owns a share of about 35% of the total market.

Nevertheless, based on this complaint and also on the novelty of these issues for our competition authority, the Competition Council decided to open a sector inquiry[1] in order to analyze the competition mechanisms of the food retail sector.

[1] Note should be made that the inquiry is still under course, therefore only partial results of this investigation can be made available.

The complaint raised RCC's concerns that increasing concentration may facilitate the ability of large retailing groups to exercise market power, as both buyers and sellers

In the absence of off-setting efficiency benefits, seller power exercised by retailers could conceivably result in higher prices for consumers and reduced choice than in the case of normal competition. This could be detrimental to the economic welfare.

In contrast, the economic welfare effects arising from the exploitation of buyer power are less certain as suppliers could suffer if the prices they obtain for their goods are reduced while consumers might gain if lower intermediate prices result in retailers setting lower final prices.

However, more often it might be that the buying power of retailers goes hand in hand with their increased selling power, where one power reinforces the other and thus their combined influence has adverse effects on economic welfare.

In retailing, the buyer power is viewed as arising from the ability of retailers to obtain from suppliers more favourable terms than those available to other buyers or would otherwise be expected under normal competitive conditions.

Since the terms of supply contracts vary widely, retailer practices that could be cited as evidence of buyer power range from listing charges (where buyers require payment of a fee before goods are purchased from the listed supplier), anniversary fees, expansion fees, slotting allowances (where fees are charged for store shelf-space allocation), retroactive discounts on goods already sold, to the most favoured nation (MFN) clauses (with contractual obligations for the supplier to treat a buyer the same way it treats its best client), unjustified high contribution to retailer promotional expenses, and insistence on exclusive supply.

Such buyer-induced vertical restraints can have both pro- and anticompetitive effects. For instance, the MFN (most-favoured customer) clause or the anti-discrimination clause represents a promise of one party, e.g. a supplier, to treat a buyer the same way it treats its best client. If the supplier lowers the prices charged to one of its customers, then the prices of the client that benefits from this clause will be lowered accordingly.

Usually, a big retailer uses relatively small margins when selling the products and when it observes the same product being sold cheaper by a competitor, the big retailer may put a pressure on the supplier to obtain a lower price that would allow him to sell the good at a competitive price.

However, a clause such as this one is not incriminated "per se" in the competition law and its effects and the context of application therefore should be thoroughly analysed. Generally, the more concentrated the market and the higher the barriers to entry, the stronger effects might an MFN clause have. Actually, this type of clause represents a vertical restraint on competition, the contract's signatories being active at different levels of the production-distribution chain. The MFN can also have horizontal effects and can lead to restraining competition on the market through the coordination of competing undertakings' behaviour on the market, but also by forming an unusually high price level (e.g. for a dominant producer that includes such a clause in its contracts with the big retailers, the immediate effect would be a reduced competition at the retail level).

Slotting allowances have also their pros and cons. Shelf space creates the opportunity for promotional sales. In other words, a product allocated premium eye-level shelf space, an end-cap, or an increased quantity of shelf space may result in additional sales. This is in large part because consumers do not always know what products or what particular brand they will purchase before they enter the supermarket.

While their use may be beneficial both for the retailers as a financial source for covering some of their costs (as the margins for selling the products are very small) and for the suppliers as they can get a better shelf space for their products and therefore increased sales, slotting allowance may rise as well competitive concerns for antitrust authorities. It may become a mechanism by which suppliers with market power can "overbuy" shelf space in order to exclude rivals. However, slotting allowances generally only bind supermarkets to provide premium shelf space for a short period of time. Under these conditions, it is highly unlikely that a competitor will be disadvantaged and unable to compete on a level playing field for promotional shelf space.

The study conducted by RCC in the food retail sector aims therefore at determining if, and to what extent, the increasing concentration of the retailers could lead to a greater negotiating power in relation to their suppliers, possibly permitting behaviour that is incompatible with competition legislation.

The analysis is focused both on the upstream market (purchasing market – national level) and downstream market (retail market – local level) and it observes the horizontal issues, as well as the vertical relationships between the undertakings in the sector.

On the upstream market, i.e. that of procurement, we can find several economic entities, such as convenience stores, specialized shops, wholesalers, cash & carry shops, super/hypermarkets, HoReCa (hotel, restaurant, catering). These undertakings buy from different producers or wholesalers. Depending on the product involved, the imports represent a real alternative for the purchasing of goods, whereas exports to the EU are as well a pertinent alternative for the producers.

On the downstream market, i.e. that of selling the consumer goods to the final customer, the percentage of modern commerce in the total national commerce with consumer goods, although rising (from 27% in 2005 to 33% in 2006), is now situated at approximately 38%, according to 2007 statistical data. The most spectacular is the accrual of hypermarkets, from 8% in 2006 to 14% in the first three quarters of 2007. At the same time, the supermarkets gained 2% compared to 2006, reaching a 17% market share. The discounters also evolved with 1%, reaching 5% in 2007 while Cash & carry shops lost 1%, reaching 5% in 2007.

Therefore, the balance of commerce with consumer goods is still inclined towards to traditional commerce, i.e. small neighbourhood shops such as proximity shops or the kiosks (more than 65% of the population's income intended to the acquisition of consumer goods is spent through this kind of stores).

The current investigation on retail comprises as well several questions for the producers concerning the cost structure of their products for the past three years. From their answers we hope to gather information regarding the evolution of prices of raw materials, consumables, energy and transportation costs. The retailers have also been asked to provide the acquisition prices for the past three years and the evolution in the prices of the marketing services provided. This will enable us to see where the increase in the final price to the consumers is originating, from the increases in the prices charged for raw materials, energy and fuel, logistics, or from the increased profit margins of producers/retailers.

The partial results of the investigation point out that there are a few markets (e.g. edible oils, milk, carbonated soft drinks) where the concentration at the producers' level is much higher than the one of the buyers (only a few players on the market of supply sell up to 70-80% of the total market).

As far as local markets are concerned, where actually the retailers compete one with each other, the retail investigation targets the analysis of market share of modern commerce in some of the biggest Romanian cities. Provisional data shows that, in Bucharest, modern commerce ranges between 60-70% of the total retail market, whereas in some other cities, it represents about 40% of it.

As we mentioned already, the current investigation is focused on both horizontal and vertical issues and if upon its completion, any competition distortions would be found, the Competition Council will act towards re-establishing a normal competitive environment.

It is important to add that at the proposal of RCC and then under the supervision of the Ministry of Agriculture, a Code of Good Practices for the Food Commerce was agreed upon by all stakeholders involved at the beginning of July. By its general formulation, the Code did not contain any provisions that would violate the competition law and therefore Romanian competition authority offered a favorable point of view over the document.

The Code serves now as guidelines for a fair trade and contains provisions regarding the payment terms, delivery arrangements, promotions, quality specifications etc. Nevertheless, if applying the Code would lead to anti-competitive agreements or practices, the RCC reserves its right to intervene in the matter.

Conclusions

The provisional findings of the current inquiry point out that the great retail chains appear to have a superior negotiating power, mostly over the small and medium-sized producers. The retailers can ask all sort of compensation for the marketing services rendered, that often vary in appellation, ranging from bonuses, catalogue fees, slotting allowances, expansion, anniversary marketing to centralized buying services. Anyway, as a general principle, we believe that such contractual provisions may affect the proper functioning of the competition mechanisms thus requiring the intervention of RCC only when dominance can be found on the buyer-side.

In the absence of such a dominant position, the market power gained by a company on its merits may certainly confer to that company certain negotiation advantages over other companies but this should not be regulated in terms of competition, as long as these advantages are the result of natural functioning of the market economy mechanisms, mechanisms that enhance the benefits of the final consumer.

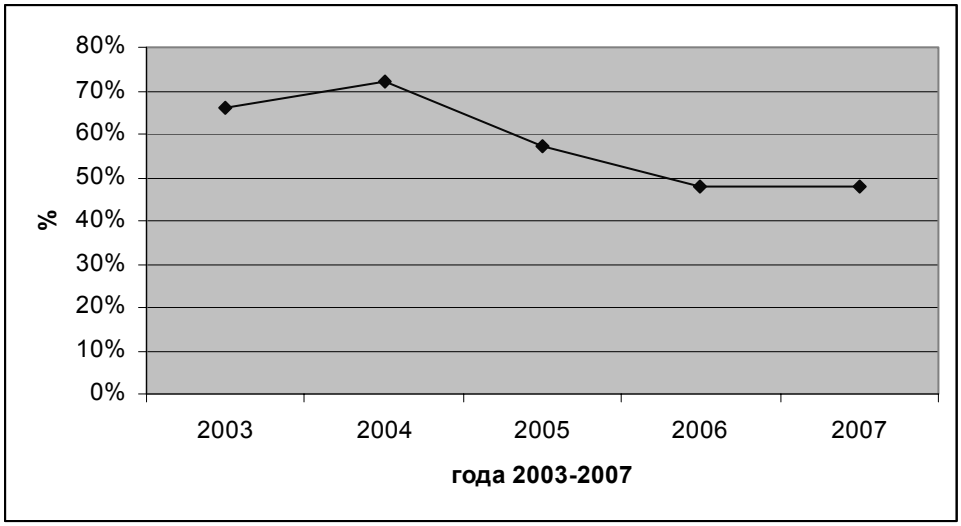
To conclude, an intervention by a competition authority in a situation where a company owns a greater negotiation power, but does not hold a dominant position in the market, would only put into danger the objective of the competition law, i.e. that of protecting competition, with the final aim of promoting consumer interests.

RUSSIAN FEDERATION

In Russia there act more than 100 food retail networks.

The growth rate of the food sales volume in the Russian Federation for 2003-2006 made 28%, and for 2006-2007 – 13%.

At the same time the growth rate of sales volume of TOP-10 retail networks in Russia for 2003-2007 was exceeding 50% and there is no trend for decrease.



The retail networks now face an objective of further increase of their scope to use more fully the scale effect.

Currently on the Russian market act almost all largest global leaders, except for WAL-MART that is planning to entry the market in 2008 by purchasing one of the Russian networks. Due to this the national retail networks, not to lose their market share, purchase small retail networks and try to entry market of other regions of Russia.

The largest Russian operators diversified their formats of trade and started using different methods of consolidation. The important event in this sphere was acquisition in April, 2008 of the "Karusel" retail network to retail network group X5 ("Perekrestok", "Pyatorochka", "Mercado") leading to creation of hyper network occupying the first place in the number of outlets, and in commercial intercourse and including the outlets of different format (discounters, supermarket, hyper markets) thus allowing to cover the maximum number of consumers of different categories.

As a result of consideration of X5 Retail Group N.V. pre-merger notification the FAS Russia satisfied the notification and issued an instruction on prohibition of execution of actions on the territory of Saint-Petersburg that may lead to restriction of competition and on ensuring competition it food retail service market.

Moreover in 2008 the Ashaun-Russia group purchased the "Ramstor" network, thus not only increasing the number of outlets, but also taking over the direct rival in the sphere of hypermarkets.

The retail networks start accumulating considerable capitals that gives them a chance to dictate terms of cooperation to the food producers.

The fast growth of the largest retail networks on the regional food retail markets has lead to natural and known from the international experience consequences – displacement of market power balance from producers to retailers and with regard to this more difficult situation for suppliers.

The global experience shows that requirements of retail networks in respect of suppliers are not always justified and don't equally reflect interests of suppliers and retail networks.

There are no such requirements to suppliers that cannot ensure gaining by suppliers of appropriate share of additional proceeds resulting from certain events in the goods allocation system, and, therefore, can negatively influence their activity effectiveness. This can relate to such business practice as discriminatory bonus policy, free goods supply to the retail networks, participation in advertising actions, auctions to get the right to conclude the supply agreements, etc.

Retail networks exercising severe product line policy trying to limit their list by the method of selection. This leads to "washing-out" from the list of suppliers of small and medium enterprises. The hypermarket networks place orders for the less number of suppliers, limit them by those undertakings with whom they have long-term and trusted economic ties.

This is exactly what we see on the Russian markets.

Assessment of retail networks on Saint-Petersburg market shows that none of the retail networks can be determined as dominant according to competition law.

Peculiarity of relations in this sphere is that despite small share of economic entities (retail networks) on food sale and (or) supply market and taking into account low concentration of such markets and deficit of trading spot, these economic entities get an ability to impact on the arising legal relations and competition on the relevant commodity markets, in particular on existing contract legal relations with goods suppliers.

As a result of inspections the following conduct of retail networks in respect of suppliers was revealed:

- guarantee of the minimum trade extra charge (margin gains), i.e. supplier supplies the product to all retail networks on the same price. Every retail network individually sets retail prices. If an extra charge in the certain retail network, with which a guarantee of the minimum trade extra charge is concluded, is low than the one stated in the agreement compared to the minimum price in the city (i.e. "on the shelve" of another retail network), the supplier is obliged to reimburse the lacking extra charge. Thus in competition between retail networks the burden of responsibility is laid on the supplier despite his identical work with all the retail networks and his inability to influence the their internal price policy;

- the sequence of product purchase price is changing. Every retail network requires that its prices change no later than they had been changed by the rivals. The proof is price change on the rivals' shelves. Thus it's a vicious circle and it's impossible to increase the price. The agreements envisage an opportunity to change price with prior notice (2-3 months before that), but the retail

network can decline such change (the agreement says that "in any case, the price of the product cannot be changed by the supplier unilaterally), but the agreement does not say anything about what happens when the retail network does not accept the price change and the supplier is obliged to continue supplies on the old prices endlessly or during at least 2-3 months with the further withdrawal of the product from the network product range;

- the right of the retail networks to withdraw the product from the network product range without any period for notification of supplier. The supplier is obliged to maintain the product store for regular supplies to the retail network and in case of the product withdrawal without notice the supplier is left with the excess number of goods. Moreover, bonus for introduction of the good to the product range is not returned and not recounted. The agreements usually don't contain such provision, but the majority of retail networks use this practice;

- when supplier provides "special prices" for other retail networks for a certain period, the price for Consumer for the same period cannot be higher than that. This is applicable to advertising actions held in the competitive retail networks. The schedule for holding actions in different retail networks is agreed with the marketing plan. The time of holding actions in different retail networks does not coincide. This requirement means that the supplier when holding advertising actions in one retail network is obliged to hold such actions in all the rest retail networks or to compensate them the given discount in price. Otherwise considerable fines are envisaged;

- payment for introducing of new product positions, payment for opening of new trade slots, payment for rotation (changing of product range). In the majority of cases the retail operators shift on the suppliers the burden of costs on their gaining of entrepreneurs profit under implementation of retail purchase/sale agreement. In particular all terms relating to payment for introduction to the product range, change of product range, opening of new outlets and stores, fact of conclusion of an agreement, theft, etc. don't relate to the relations between supplier and customer within the frameworks of the purchase/sale (supply) agreement, and are merely an attempt to compensate part of their own costs;

- payment for presence of the supplier's product in the retail network ("bonus of presence"). The FAS Russia received an information that retail network "Perekrestok" told its suppliers in Moscow on sharp reduction of product range from January, 2008, due to this it suggested to conclude additional agreement to the main supply agreement on guaranteed presence of not less than 85% of the current product range for the I quarter of 2008. The "bonus of presence" required by the retail network for one quarter made about 30% of annual turnover of the product supplier.

Sometimes the sum of such bonuses exceeds the amount of supply. Application by the retail networks of such bonuses influence on retail pricing by suppliers. Since the suppliers have to include these costs to the product price, the retail prices for consumers also increase and inflation rises. For instance, the French antimonopoly body directly ties increase of such costs with the rise of inflation of consumer prices.

The above information indicates the high influence of retail networks with a market share of less than 35% on legal relations arising under sale of products. Presently the relations between economic entities are settled mainly in general terms without taking into consideration of peculiarities of relations in trade by the regulations of the Civil Code of the Russian Federation, despite the biggest number of violations of right and legal interest of economic entities happening in this sphere.

Currently there have been elaborated a draft law "On fundamental basis of state regulation of trade activity of the Russian Federation" that contains principles of competition regulation of trade aimed at

competition development in trade, protection of interests of retail networks and suppliers and ensuring of balance of interest of the trade participants.

SOUTH AFRICA

1. Introduction

There have been very few cases of buyer power in South Africa, and these have generally been with regard to coordination between competitors in setting purchase prices, falling foul of the *per se* price fixing prohibition. The two main examples are of: private healthcare funders (medical aid scheme administrators) collectively agreeing through the Board of Healthcare Funders (BHF) on prices to pay for various private healthcare services; and, glass manufacturers agreeing prices to purchase recycled glass cullet. Although the *per se* nature of the contraventions meant that the evaluations did not have to address the anti-competitive effects, the penalties sought does reflect the analysis of Competition Commission of South Africa (CCSA) in this regard.

In the case of the BHF a consent order was reached including a very low fine. In this case it is also relevant that the healthcare service providers had also been collectively agreeing on prices through various associations such as the Hospitals Association of South Africa and as such the BHF was a countervailing arrangement on the part of buyers. There is also evidence that buyer pressure to limit prices for tariff items had been associated with higher price increases being put through by healthcare providers on non-tariff items and that ultimate consumers, being the medical aid members (purchasers of healthcare insurance), had not seen lower prices as a result. In the glass cullet case, being referred now to the Competition Tribunal of South Africa (CTSA), the arrangement had been associated with efforts to increase glass recycling.

Issues of monopsony and buyer power have figured in the focus of the CCSA on food and agriculture in the past two years. These issues include the high levels of concentration of supermarkets, and the implications of coordination and unilateral market power on the part of dairy processors with respect to dairy farmers. This note discusses issues relating to these areas, specifically drawing on the learning from the CCSA's investigation of a merger in food retail and on the wide-ranging investigation into the alleged anti-competitive conduct by dairy processors, referred by the CCSA for adjudication to the CTSA.[1]

The primary line of inquiry in the CCSA's food study is whether anti-competitive conduct is a factor behind high staple food prices. However, a subsidiary concern is the health of the agricultural sector more broadly and in this regard farming groups have raised many questions about the power of buyers of their produce given that the processing of agricultural products in South Africa is very concentrated. The South African Competition Act's total welfare orientation rather than an over-riding focus on consumer welfare allows for such concerns, and includes as an objective the participation of small and medium enterprises alongside ensuring competitive prices for consumers.

2. The retailing landscape in South Africa

In South Africa, there are a few large supermarket groups that share the formal retail market, providing a bundle of products and one-stop shopping. There are also many small corner stores (called

[1] This case is still to be heard in the Tribunal, although the Commission has filed its papers referring the case.

corner cafés in South Africa) and informal 'spaza shops'[2]. In addition, there are several 'cash and carry' type stores selling in large volumes.

There are in effect three major national supermarket groups (Pick 'n Pay Stores Ltd, the Spar Group Ltd, and Shoprite Holdings Ltd) aimed at the mass market and a further group (Woolworths) aimed at higher income consumers. The industry has become increasingly concentrated due to the consolidation that has taken place over the past decade.[3]

2.1 Proposed merger of Pick 'n Pay and Fruit and Veg City

In 2006, Pick 'n Pay sought to acquire Fruit and Veg City (FVC), a relatively recent entry into grocery retail and an aggressive competitor that was progressively broadening its offering. The CCSA recommended the transaction be prohibited, and the merger was withdrawn by the parties. The competition concerns related to the effects of both seller and buyer power due to the removal of an effective competitor. FVC had built its business model on cut price produce to the benefit of consumers. However, its business model was also based on procuring produce in season from local fresh produce markets while the established supermarkets had been increasingly by-passing these markets and making demanding requirements on the farmers seeking to supply to them. FVC thus provided an outlet for farmers who were not part of the supermarkets' supply chains. There were therefore concerns about the removal of such a firm from a buyer concentration perspective, although ultimately the CCSA's analysis emphasized the negative impact on consumer prices.[4]

2.2 Concerns in retail of dairy products

The issue of buyer power by the supermarkets exerted to the detriment of producer groups has been raised in the course of CCSA's ongoing study into the food sector. In addition, the CCSA received a complaint in 2005 from the Milk Producers Organisation (MPO), a voluntary organisation representing the great majority of milk producers in South Africa, against the major retail chains, specifically Pick 'n Pay, Shoprite and Spar. According to the MPO, the respondents held buying power as dominant players in this market, which enabled them to suppress wholesale prices from suppliers, and in turn resulting in downward pricing pressures being exerted by the milk processors on to the members of the MPO.

The respondents' dominant position together with the downward pricing pressure that they exerted allegedly resulted in smaller and medium-sized marketing and distribution channels not being able to compete with the respondents and inhibited the development of small and medium dairy processors through various measures and requirements imposed by the supermarkets. These concerns are still being investigated.

3. Concerns with buyer power on the part of dairy processors

We start by mapping out the dairy value chain and then outline the legacy of regulation before describing the competition concerns relating to buyer power which are part of a wide ranging investigation

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2 Typically family owned stores retailing from homes in townships.

3 For example, the Shoprite Group acquired OK Bazaars in 1990, Checkers in 1991, RMG (Sentra/Megasave) in 1996. In 1991, Score and Fairways were amalgamated. In 1994, the Pick 'n Pay Group acquired a 50% interest in Score Stores and an additional 25% interest in 1996. In 1997, they acquired a further 10% interest in Score Stores, which in turn acquired Superliner.

4 According to the Commission's assessment the post merger national market share of the parties in the retail of fresh fruit and veg (in the identified product market) would have been 58% while it would have been significantly higher (up to 91%) in a number of local markets.

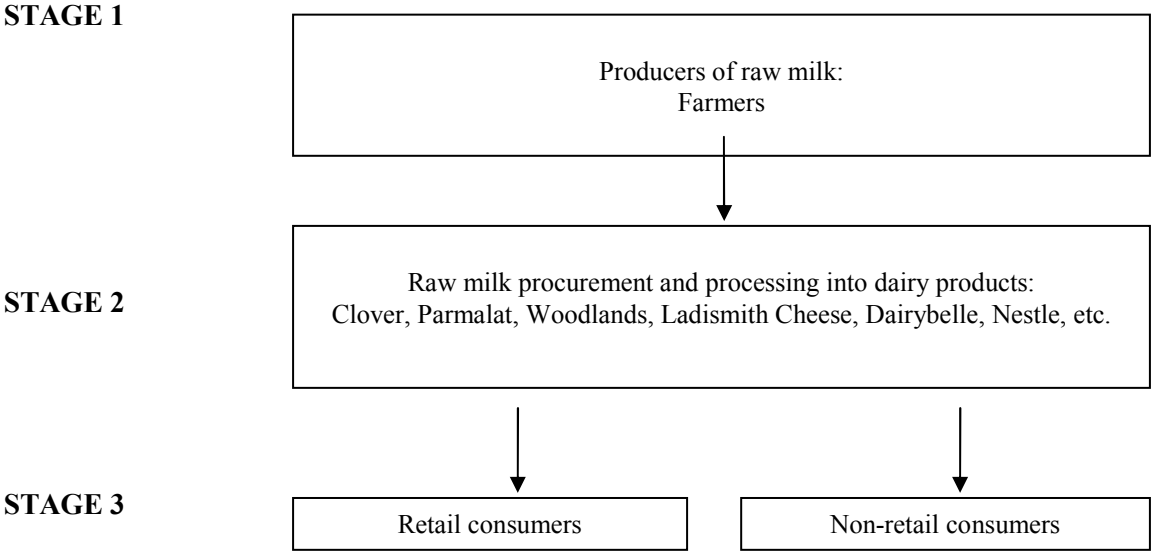
by the CCSA into anti-competitive conduct, both unilateral and coordinated, on the part of dairy processors. This case has been referred to the CTSA for adjudication.

3.1 The dairy value chain

The dairy value chain can be divided into three stages of activity: (1) the farmers produce raw milk; (2) processors procure raw milk from farmers on a local/regional basis and process it into pasteurised milk, UHT milk, milk powders, butter, cheese, butter milk, milk powders, whey powder, and casein variations (the latter 7 products are known as 'ingredients'); (3) the processors on-sell the pasteurised milk, UHT milk and 'ingredients' either to retailers or in bulk (Figure 1).

The downstream market for the retail of dairy products is well developed. This market offers a wide variety of processed dairy products in various sizes. The main distribution channel is through the retail chains.

Figure 1: Dairy value chain



There are very high levels of concentration in raw milk procurement by region within South Africa. And, in the majority of South Africa' nine provinces there is a single player with a 50% or more market share, measured in terms of procurement of raw milk.

3.2 Regulation in the industry

The milk industry has historically been highly regulated. Through the establishment of various milk and dairy control boards, minimum price regulation for specified products was in force from the 1930s. However, in 1998 this system was abolished resulting in a significant impact on the industry. Flowing from deregulation, dairy farming (as with other farming) became much larger scale as farms were merged and the number commercial dairy farmers declined dramatically. By 2006 there were 4184 milk producers dispersed throughout the country.

However, as discussed further below, it appears as if immediately following the abolition of the control boards and other regulations the processors took on the role of regulator through alleged coordinated practices including 'surplus removal' to prevent higher levels of production having a downward effect on wholesale prices, and information exchange in respect of procurement to depress the

price to farmers. Not surprisingly, this underpinned better margins at the processing level of the value chain, while margins appear to have worsened for farmers.

3.3 Competition concerns at the processing level

The initiation of the CTSA's investigation into processors was prompted in 2004 by a letter from a small milk producer referring to possible anti-competitive factors affecting milk producers in the industry. At the same time, numerous articles and letters appeared in the media about the alleged high prices of various food products, including milk. Also contributing to the debate was the increasing gap between farm gate prices and shelf prices of dairy products. As a result of the above concerns the CCSA contacted various players in the milk industry and found indications of substantial anti-competitive conduct in the industry. Subsequently, on 10 February 2005, the CCSA initiated a complaint and commenced an investigation of alleged restrictive vertical practices, restrictive horizontal practices including price fixing, market division, and the alleged abuse of a dominant position by some of the major milk processors.

The CCSA's investigation revealed that within the market for the procurement of raw milk and processed dairy products some or all of the respondents had contravened the Competition Act 89 of 1998, as amended ("the Act" or "the Competition Act") by:

- price fixing through information exchanges between milk processors;
- limiting competition through the use of milk exchanges and supply agreements between milk processors;
- use of exclusive supply agreements with the milk producers to lessen competition;
- fixing of retail prices and market allocation;
- agreeing on trading conditions by artificially manipulating the market through arrangements regarding price signals and volumes in the retail and raw milk markets; and
- milk processors as competitors fixing the selling price and/or trading conditions of milk and processed products at an artificially high level by agreeing on co-ordinated control of volumes in the market.

The CCSA's view was that the conduct by the processors was detrimental to consumers, producers and retailers. The CCSA received a leniency application from Clover in respect of some of the allegations and referred its findings to the CTSA for adjudication. The matter is currently before the CTSA.

Alleged anti-competitive behaviour on the part of processors uncovered by the CCSA in these markets has thus included price fixing, market allocation and 'surplus removal'. Farmers also complained that these anticompetitive actions led to a margin squeeze, forcing out the marginal farmers and encouraging other farmers to change to other land use, thus negatively impacting on agricultural production in South Africa.

The alleged contraventions as they relate to buyer power exerted on farmers are due to both coordination and unilateral market power. The horizontal agreements include market allocation, entrenching specific processors in defined regions. In addition, price fixing by processors for procuring raw milk was facilitated by information exchange. The many competing farmers in a given region and the dominance of one or two processors appears to have enabled individual processors to enforce exclusive contracts on farmers with provisions setting much lower prices for production in excess of a specified

quantity, while farmers are also prohibited from selling such surplus to other buyers (such as potential entrants into processing). According to the processors this was to prevent over-supply and to ensure stability.

The buyer power considered here is not bargaining power in a countervailing sense to offset the market power of sellers. In this case the sellers (farmers) lack market power given the large number of competitors. In addition, the sellers (farmers) of raw milk have incurred significant sunk costs and require arrangements to ensure off-take of the raw milk. The concentration on the buyer side means that this can be exploited to suppress prices below what would be expected under competitive pricing.

Such conduct can have a distortionary impact in that farmers facing alternative uses for their land are able over time to move out of dairy farming, or they may simply not invest to maintain the value of their capital stock meaning supply reductions and skewed land use. This is indeed what has occurred in recent years, with milk shortages in 2007. The reduction in supply of raw milk reduces the costs of coordination as it reduces the amount of 'surplus extraction' that has to be undertaken to maintain selling prices. However, where this leads to actual shortages, the dairy processors risk farmers being able to increase raw milk prices.

The buyer power also has an exclusionary effect in raising barriers to the entry of new processors by tying farmers to exclusive contracts. The anti-competitive harm in this case involves buyer power together with harm from a lessening of competition in the selling markets and thus does not pose the more difficult question of whether to address unilateral buying power where there is no linked anti-competitive effect to the detriment of consumers.

CHINESE TAIPEI

1. Introduction

The regulations governing the behaviour of enterprises with market power under the Fair Trade Act do not differ between buyers and sellers. The regulations regarding monopsony and buyer power are to be found in Articles 10, 19, and 24 of the Fair Trade Act and are dependent on the degree of market power. The possible restraints on competition or unfair competition acts in which a buyer may engage can be distinguished as either being price-related or non price-related issues. This report will address the identification of buyer power and illustrate buyer power and buyer behaviour by taking the domestic retail market as an example.

2. Identifying Buyer Power

The measurement of market power has conventionally involved using market share as the key indicator. The same status is also applied to identify buyer market power. The act of abusing market power engaged in by monopolistic enterprises is prohibited by Article 10 of the Fair Trade Act. Market power is determined by taking into consideration the market share enjoyed by enterprises as well as the relevant market structure, enterprises' behaviour and operational performance of the enterprises.

Subparagraphs 1, 2 and 6 under Article 19 of the Fair Trade Act regulate non-price vertical restraints on competition. In its relevant part, Article 19 provides as follows:

> "No enterprise shall have any of the following acts which are likely to lessen competition or to impede fair competition:
>
> 1. cause another enterprise to discontinue supply, purchase or other business transactions with a particular enterprise for the purpose of injuring such particular enterprise (boycott);
>
> 2. treat another enterprise discriminatively without justification;
>
> ……
>
> 6. limit its trading counterparts' business activity improperly by means of the requirements of business engagement."

"Restrictions" as used in Subparagraph 6, Article 19 of the Act refer to circumstances under which an enterprise engages in restrictive activity by means of tie-ins, exclusive dealing, territorial or customers restraints, or otherwise.

The provisions above use the "rule of reason" as a basis to determine illegality. Illegal vertical restraints on competition are found if the following requirements are met. First, the vertical restraints must have existed and second, the conduct must have been likely to have lessened competition or impeded fair competition. Vertical restraints can reduce intra-brand competition (competition between distributors) and induce collusive behaviour but for them to impact market competition, a degree of market power is required on the part of the participants. In practice, Chinese Taipei employs a 10% market share threshold

and the existence of dependence to determine the existence of "likely to impede competition" (i.e., product producers may be dependent on distributors with strong market power).

The Fair Trade Commission (the FTC) takes into consideration whether:

1. competition is substantially reduced in the relevant markets (i.e. whether there is sufficient inter-brand competition in the relevant market);

2. potential competition is hindered (i.e. whether there are entry barriers to new competitors); and

3. improper means of competition are used.

An enterprise with a market share of less than 10% could also have an advantageous market position in the relevant market and engage in unfair competition behaviour in relation to the related industries or its upstream or downstream enterprises that is disruptive to the market competition order. (Article 24 of the Fair Trade Act governs such conduct.)

3. Buyer Power and Conduct

The domestic disputes regarding buyer power and conduct can be found mostly within the distribution enterprises including hypermarkets, convenience stores, supermarkets and department stores. Consequently, the FTC has developed a number of guidelines specifically for the distribution industry including Policy Statements on Distribution Industry, Guidelines on Additional Fees Charged by Distribution Enterprises and Guidelines on Trade Practices between Department Stores and Branded Product Suppliers.

In the retailing sector there have been numerous incidents triggering anti-trust concerns related to additional fees (known as slotting allowances or shelf allowances of listing fees) or unfavorable trade terms levied by the large-scale distribution enterprises. These concerns arise from large-scale distribution enterprises using their buyer power (abusing market power) to either:

- require their suppliers to sustain additional fees as a means to securing distribution channels and excluding competitors, or

- engage in suspected collusive behaviour on the part of large-scale retailers or a group of retailers to charge slotting allowances that lead to monopoly power.

4. Case 1: Additional Fees Charged by Distribution Enterprises

It is reported that domestic suppliers need to first enter into a "Nation-wide Contract" if they would like to initiate supply transactions with Carrefour. Suppliers can only begin to distribute their products through Carrefour hypermarkets after all additional trade-related conditions and all sponsorship items have been negotiated. After investigations, the FTC found that following the signing of the nation-wide agreement, Carrefour did not attempt to reach an agreement with suppliers regarding the contents and terms of annual promotion activities. Instead, it unilaterally charged a "National Sales Promotion Fee" and additional fees to suppliers for its "Opening Promotional Gift Offering" and "Remodeling Opening Promotional Gift Offering". Further, it also charged additional fees for the "Opening Special Clause" and "Storefront Remodeling Opening Special Clause" already covered by the "Nation-wide Contract".

The FTC is of the opinion that the additional fees levied by distribution enterprises on suppliers should meet two principles including (a) advanced disclosure of the additional charges and (b) that the charges are appropriate in all the circumstances while being compliant with reasonable commercial terms

of trade. Otherwise, the improper additional fees imposed by distribution enterprises on suppliers will place additional cost burdens on the suppliers that will eventually be passed down to the retail prices of the products which will in turn impact adversely on consumer benefits and overall social welfare.

According to the "Nation-wide Contract" reported to the FTC, the minimum annual revenues Carrefour required its suppliers to generate for the year 2000 were 2.23 times the complainant's actual revenues for the previous year. In addition, the minimum amount of its "National Sales Promotion Fee" amounted to as much as 13.38% of the complainant's actual revenues in 1999. This clearly exceeded the benefits directly obtained by the complainant from promotions. In addition, Carrefour had unilaterally stipulated that the suppliers must participate in the "Opening Promotional Gift Offering" and "Remodeling Opening Promotional Gift Offering" to induce more customers to visit during opening or remodeling events. However, these promotional activities and related surcharges essentially served the same purposes as the additional fees charged for the "Opening Special Clause" and "Storefront Remodeling Opening Special Clause" that were already provided for in the "Nation-wide Contract". Moreover, instead of participating with flower baskets or promotional gifts as suggested by the "Opening Promotional Gift Offering" and "Remodeling Opening Promotional Gift Offering", the complainant was required to participate in these promotional activities by paying a surrogate fee and this was contrary to normal trading practices.

The FTC made a decision in 2001 that Carrefour had charged its suppliers improper additional fees that imposed additional operational cost burdens on its trade counterparts and prevented them from enjoying normal operating profits. Carrefour essentially exerted pressure on its suppliers to secure continued business relationships and forced additional charges on them. This impaired the competitive nature of the market and was reprehensible in terms of the commercial competition ethics associated with its behavior. Carrefour's behavior in charging improper additional fees improperly suppressed its trading counterparts and forced them to accept unfair terms of trade. Therefore, there was an adverse impact on the order of the distribution market. The FTC imposed an administrative fine of NTD $5 million on Carrefour for its violation of Article 24 of the Fair Trade Act.

5. Case 2: Restricting the Business Area of Trading Counterparts

To cite another example, Pacific Sogo Department Stores Co., Ltd. (hereinafter Pacific Sogo) prepared an agreement that unilaterally imposed limitations on the operating territories of vendors of its goods and services. The FTC found that department stores in Chinese Taipei were primarily located in five main urban areas, (Taipei, Taoyuan and Hsinchu, Taichung, Tainan, and Kaohsiung), and that cross-area competition in retail sales services was extremely difficult.

In its renewed contracts with the vendors of goods or services, Pacific Sogo stipulated that, without its consent, the vendors could not sell the same or similar goods or services in any other commercial district "within a radius of two kilometers of Pacific Sogo's business location." Pacific Sogo also reserved the right to terminate contracts with, and seek compensation from, vendors. As this provision was added as a contract amendment shortly after the grand opening of the Breeze Center, the contracted vendors complained to the FTC. They alleged that Pacific Sogo had intentionally amended the contracts to impose constraints on the contracted vendors' operating territories in order to secure its own market dominance at the expense of creating entry barriers and unfair competition.

This territorial restriction clause was intended to restrict those vendors in terms of their choices of outlet location. At the same time this was deemed detrimental to Pacific Sogo's competitors that operated in the same commercial district because they were prevented from selecting their vendors. It was evident that Pacific Sogo, by creating an entry barrier, intended to prevent potential competitors from entering the market and thus violated Subparagraph 6, Article 19 of the Fair Trade Act.

SUMMARY OF DISCUSSION

The Chairman began by observing that the implications of buyer power for competition policy are controversial. He first invited a guest speaker, Professor Roman Inderst (University of Frankfurt and Imperial College London), to provide an introduction to the issues.

1. Overview of Buyer Power by Professor Inderst

Professor Inderst addressed the following four topics: (i) sources of buyer power; (ii) consequences of buyer power; (iii) metrics and the role of consumer welfare; and (iv) buyer power as a "defence" in merger cases.

1.1 Sources of Buyer Power

Professor Inderst distinguished between two paradigms of buyer power: monopsonistic power, which is exercised by buyers withholding demand and results in market wide price decreases, and bargaining power, which is exercised in bilateral negotiations and results in preferable terms of trade. Professor Inderst confined his remarks to bargaining power, which he noted seemed to be more appropriate when there are relatively few firms on either side of the market, products are differentiated, there are bilateral negotiations, and there are large differences in individual contracts.

In the bargaining framework, the source of buyer and seller power has mainly to do with the outside options of the parties in the event that trade between them breaks down. Buyer size is often viewed as an important determinant of both the outside option of the buyer and the outside option of a buyer's suppliers. Professor Inderst noted, however, that in any particular instance, size might be a disadvantage and that there may be many other sources of buyer power. For instance, a buyer may control the access to specific, local markets or there might be other reasons why they have a captive clientele that allows them to switch more easily between different suppliers without substantial losses in their own sales.

1.2 Consequences of Buyer Power

Professor Inderst remarked that the extent to which consumers in the downstream market benefit from the exercise of bargaining power depends on the extent of pass-through. The extent of pass-through will depend on the prevailing degree of competition in the downstream market and the nature of any preferential terms that are negotiated. Typically, there must be discounts at the margin for there to be pass-through benefits to downstream consumers.

For the exercise of bargaining power to result in harm to competition and consumers, it must adversely affect rival retailers (buyers). It can do this by leading to the exclusion of rival retailers in the long run if they cannot operate profitably. Consumer detriment may also occur without a change in downstream market structure if there is a waterbed effect. A waterbed effect occurs when preferential treatment of one retailer leads to a deterioration of the terms of trade for other retailers. However, if other retailers are equally strong and powerful, then a discount given to one retailer may, instead, lead to similar discounts being given to all retailers (buyers). A waterbed effect can also arise if the exercise of buyer power leads to a consolidation among suppliers. While the strong retailer may be shielded from the subsequent exercise of supplier market power, this may not be the case for smaller retailers.

Finally, the exercise of buyer power may affect dynamic efficiency by affecting retailers' and suppliers' incentives to invest and innovate. Regarding suppliers, the prevailing view is that the exercise of buyer power undermines their incentives. It is argued that a stronger buyer is more likely to "hold up" the

supplier, extracting a larger fraction of the additional profits that the suppliers' up-front investment generates. However, the presence of fewer and stronger buyers may make such a hold-up problem less likely. For instance, larger buyers may find it in their own interest to engage with the supplier early on and to co-finance some of the required investment. Moreover, powerful buyers may be necessary to discipline suppliers: A large buyer may be more willing to substitute away from a given supplier if the supplier's product falls short of expectations, or it may more readily integrate back into functions up the supply chain if suppliers perform poorly.

If bargaining power is related to size, then it can create powerful incentives to invest and innovate for the retailer. This follows because growth pays a "double dividend": First, holding all else constant, it creates additional profits; second, these gains are amplified by winning additional discounts as the buyer grows.

1.3 Metrics and Consumer Welfare

Professor Inderst remarked on two difficult issues. The first is identifying threshold levels of buyer power that signals potential for concern. Since there is no presumption that buyer power leads to inefficiencies or loss of consumer welfare, avoiding Type I errors suggests significant thresholds. On the other hand, it has been noted that significant buyer power can exist even for relatively small buyers when suppliers are financially dependent or require national coverage.

The second difficult issue is the role of the welfare of final consumers. If the policy focus is only on the welfare of final consumers, then bargaining power should not raise concerns if downstream markets are competitive. However, such a focus ignores the potential for upstream anticompetitive harm, especially when high transportation costs mean there are only a few buyers.

1.4 Buyer Power and Mergers

Professor Inderst remarked that buyer power has played a role in evaluating mergers of suppliers. He noted two issues. The first is whether buyer power protects all buyers post-merger, or just powerful buyers. The second is whether, even if buyer power is an adequate substitute for upstream *price* competition, it might not be an adequate substitute for *non-price* competition.

2. Definitions and Identification

The Chairman noted that it is important to distinguish between bargaining power and monopsony power both in theory and in practice. He invited Canada to define monopsony power and bargaining power, to explain how the Competition Bureau distinguishes between the two in practice, and to discuss whether and why as a matter of enforcement policy the distinction is important.

A delegate from Canada responded that the successful exercise of buyer power, whether monopsony or bargaining power, results in lower prices. The key distinction is that the exercise of monopsony power results in prices being depressed below competitive levels, whereas the exercise of bargaining power countervails seller market power. The delegate noted that this distinction is critical, since the welfare effects of the two types of buyer power differ. The exercise of monopsony power is a cause for concern since it results in allocative inefficiency. The exercise of bargaining power is much more problematic since it is not clear that it has similar negative welfare effects. Indeed, the direct effects often are positive—lower prices for consumers downstream. Negative welfare effects from bargaining power must be indirect and arise by affecting competitors in some adverse way such that their effectiveness is impaired and consequently there is a negative effect on competition in the market. Because very different economic forces and effects underlie monopsony power and bargaining power, it is important to distinguish them and use different analyses to understand them.

The delegate continued, noting that in assessing the potential for buyer power, the Bureau first defines the upstream market from the perspective of the sellers by considering their outside options. If the buyer of interest has high market share and there are significant barriers to entry into purchasing, then buyer power is potentially an issue. The Bureau then attempts to ascertain whether a large market share for a buyer means monopsony power or bargaining power by considering the competitiveness of the upstream market, the shape of the upstream supply curve, whether demand would actually be withheld by the buyer, and if in response to the exercise of buyer power, suppliers will reduce their supply or exit.

The Chairman then invited Hungary to identify factors used by the Hungarian competition authority to assess buyer power and to comment on the role of a downstream market power screen. A delegate from Hungary responded that the three factors considered were the market share of the buyer, the extent to which suppliers could substitute to other buyers, and whether the suppliers can substitute by producing other products for other buyers. The Hungarian delegate also noted that if the downstream market is competitive, then the exercise of bargaining power would not raise concerns since under these circumstances it is difficult to determine how its exercise would harm final consumers.

3. Welfare Effects of Buyer Power

The Chairman remarked that the country submissions contain a wide range of views on whether and when the exercise of buyer power has positive or negative effects and also some discussion as to whether competition law is the appropriate tool to address cases in which the exercise of bargaining power is thought to be harmful. The Chairman invited the UK to comment on how the welfare effects of bargaining power are assessed in the UK.

A delegate from the UK responded with the following observations. First, when assessing bargaining power's welfare effects, buyer power is not the mirror image of seller power. While suppliers are harmed by lower prices, in general consumers benefit from lower prices and a normal part of the competitive process is that retailers pass on competition to upstream firms by trying to reduce the prices of inputs. This is a critical link between consumer welfare and productivity growth in the economy. This means that is important to recognize that what is alleged to be the effect of bargaining power is often actually competition and the effects are beneficial. For instance, it was alleged that when BA reduced the commissions it paid to travel agents, it was abusing its buyer power in the marketplace. But it was later determined that the reduction in commissions was a pro-competitive reduction in prices in an upstream market associated with consumers buying an increasing number of tickets on the internet. The lower prices led to increases in consumer welfare downstream, not reductions in consumer welfare.

Second, in cases of allegations of buyer power a consumer harm test is employed as a threshold screen. This threshold for intervention is intended to be high. It follows from the view that reductions in prices upstream are usually pro-competitive and it is difficult to distinguish instances when buyer power has negative effects from instances when it has positive effects. Therefore, balancing Type I and Type II errors suggests a high threshold to avoid chilling competitive behaviour.

The Chairman observed that the submission from the Slovak Republic suggests that antitrust instruments are ill-suited to address the exercise of buyer power. He invited the delegation to explain that view.

A delegate from the Slovak Republic replied that the exercise of buyer power (bargaining power) was prevalent even if the buyers were not acting as a cartel or were not abusing a dominant position. Intervening when buyer power is exercised would be to regulate bilateral supplier-buyer business relations and that is not consistent with the goals of antitrust, which is the protection of competition not competitors (in this case, suppliers).

Moreover, the delegate noted that the question as to whether a competition authority should deal with the exercise of buyer power at all is debatable because of its potential to benefit consumers. The benefits from the exercise of bargaining power for downstream consumers depend on the extent of competition in the downstream market. Hence it is of higher importance to ensure effective competition on the downstream market than to deal with the exercise of buyer power.

The Chairman noted that the submission from the Netherlands discusses the practice of health care insurers making "take it or leave it" offers to providers of health care services. He invited the Netherlands' delegation to explain the nature of the controversy about when and whether take it or leave it offers amount to abuse of dominance and whether part of the difficulty is related to the distinction between the exercise of buyer power and conduct that creates, maintains, or enhances buyer power.

A delegate from the Netherlands responded that their concern was not with the exercise of buyer power by insurance companies, but rather the creation, maintenance or enhancement of market power. Whether the use of "take it or leave it" contracts involves the exercise of market power is not problematic. What would be problematic is contractual terms that lead to the exclusion of competitors of the insurance companies by preventing health care providers from entering into contracts with them or if the terms would lead to higher costs for those competitors. It could be the case that standardized contracts are leading to lower costs for the insurance companies, that those lower costs are working their way through into lower insurance policy premiums, and so they benefit consumers. The mere fact that no negotiation takes place may indicate the presence of competition and the incentives it creates to lower costs.

The Chairman noted that Brazil's submission was sceptical about whether lower prices obtained from suppliers through the exercise of buyer power would be passed on unless the downstream market was competitive. He asked invited Brazil to explain why there would be pass-through only in a competitive market.

A delegate from Brazil noted that if there is competition downstream, then the exercise of monopsony power, not bargaining power, is unlikely to harm downstream consumers, since the downstream price is given for final consumers. Increases in monopsony power harm downstream consumers if the buyer also has market power downstream. As a result, if the market downstream is competitive, then concerns regarding the exercise of monopsony power are not material. On the other hand, the exercise of bargaining power results in either redistribution alone or, if it increases upstream output, it has a positive welfare effect on downstream consumers.

The Chairman next turned to the submission from Finland, which states that because of competition in the retail grocery sector in that country, the exercise of bargaining power has led to discounts being passed onto consumers. Nevertheless, the submission raised other concerns about the exercise of bargaining power by large grocers. The Chairman invited Finland to comment on these other concerns.

A delegate from Finland noted that there were two specific concerns. First, bargaining power might be used not only to negotiate discounts, but also to impose exclusive supply requirements. Second, there is evidence that suppliers subject to bargaining power were responding by lowering their costs either by reducing quality or violating environmental regulations.

The Chairman then turned to the EC's submission, noting that it appeared to be more sceptical about the possibility of harm from the exercise of buyer power. The submission observes that buyer power is associated with problems faced by small suppliers but those problems are not really an issue for competition law. The focus of competition law is on consumer welfare and that means the concern is usually with seller market power. The submission also notes that one competitive problem associated with increased buyer power from a merger is the potential for foreclosure. In discussing the foreclosure, effect

the EC states that the effect of lower prices from the exercise of buyer power might lead to the exit of rivals in the downstream market. The Chairman invited the EC to comment on why it seems sceptical of the potential for buyer power to lead to negative effects on consumers. He also asked the EC to comment on the evidence that could be used to assess the potential for buyer power created from a merger to result in the exit of a rival and whether there might be anticompetitive effects even if rivals do not exit, but instead have higher costs than they would otherwise.

A delegate from the EC responded that buyer power typically does not exist in isolation from seller power in the downstream market. The EC's experience has been that in mergers were there are buyer market power concerns there are also market power concerns raised by the transaction in the downstream market and that remedies to address the concerns in the downstream market have also addressed concerns regarding buyer power. Moreover, where the downstream market is competitive, the EC's view is that there are not negative effects from buyer power.

The Chairman then turned to the US submission, which states that "recent scholarship doesn't indicate that competitive concerns relating to buyer power and distribution warrant either broad limitations on the purchasing practices of larger retailers or any sort of presumption that a particular practice by a large retailer is anticompetitive. In addition there may not be a sound basis for reliably concluding in a particular case that the waterbed effect has occurred. Yet there is ample reason to believe that errors in imposing liability or in formulating remedies could undermine price competition". The Chairman asked the US delegation to explain the basis for its assessment and discuss circumstances where it would intervene.

A delegate from the US said that logically consistent theories of waterbed effects and other theories that demonstrate the potential for harm from the exercise of market power do not, in and of themselves, establish the prevalence of negative effects. Indeed, there is no presumption or suggestion of a presumption that buyer power or certain practices associated with the exercise of buyer power are anticompetitive. Moreover, there is no reliable basis for predicting that a waterbed effect is likely in a particular circumstance and identifying actual waterbed effects after the fact is also unlikely to be easy. It will be difficult to determine that a price increase to one customer can be found with reasonable certainty to be the result of a price discount to another customer. Finally, even if such a link could be established, it is not enough because there it must still be shown that there is a significant anticompetitive effect in the downstream market. The standard for finding an anticompetitive effect should be high to avoid false positives, which could result in remedies that limit discounting and thereby result in higher prices and immediate harm to consumers.

The delegate continued, noting that the USDOJ does act to prevent and restrain exercises of monopsony power on the basis of its direct effects, but not indirect effects that might arise, for example, from waterbed effects. There has been some controversy in the US over whether the only consumers whose welfare counts are those in the downstream market. The DOJ is firmly opposed to that; the welfare of all consumers all of the time counts. From 1997 to 2007 the Department has prosecuted 70 buyer cartel cases and did not worry about whether there was any downstream consumer harm. On occasion, the DOJ challenges a merger on the basis of anticompetitive effects on the buying side of the market.

In response to an inquiry by a delegate from Brazil regarding the evidence used in the US to identify merger cases that raise concerns about enhanced monopsony power, the US delegate said that the approach taken was similar to the one used when assessing transactions that raise seller concentration in downstream markets. The framework for determining whether there might be a competitive problem due to an increase in buyer power involves market definition, examination of pre-transaction market shares and the effect of the transaction on concentration on the buying side of the market. The delegate stated that in the last 20 years there had been relatively few such cases and that they typically arose in situations where the upstream markets were geographically small in comparison to the downstream market. The narrow

upstream geographic markets arise because of immobile resources in the supply chain and give rise to pockets of buyer power. The US enforcement agencies tend to be sceptical about monopsony issues in merger cases and require evidence that the anticompetitive effect is real before they bring a case.

The Chairman then turned to Chinese Taipei's submission, which notes that a frequent source of complaints in Chinese Taipei involve large scale distributors using their buyer power to require that suppliers pay additional fees as a mean of securing distribution channels. The FTC believes that this behaviour is in itself an abuse that should be controlled. It states "improper additional fees imposed by distribution enterprises and suppliers will place additional cost burdens on the suppliers that will eventually be passed on to the retail prices of the product which will in turn impact adversely on consumer benefits and overall social welfare". The Chairman invited Chinese Taipei to elaborate on how it determines what a proper fee is.

A delegate from Chinese Taipei responded that the apparent enthusiasm for intervention in instances where buyer power is exercised arises because the relevant legislation is concerned with fair trade, not typical antitrust violations. As a result, the FTC has the discretion to deemphasize market power and focus more on the nature of the fees. The FTC applies the principles of relevance, proportionality and transparency in assessing whether fees are improper. The delegate emphasized that the relevant legislation is controversial and the FTC has refrained from broadening its application.

The Chairman then turned to Germany's contribution, which takes the position that agreements between buyers on maximum prices and agreements between sellers on minimum prices should be treated symmetrically. The German perspective is that this view is not shared by the EC in that the EC would require proof of adverse effect on consumers downstream. The Chairman asked Germany to elaborate on the nature of this difference between it and the EC.

A delegate from Germany explained that there is a fundamental difference with respect to the goals of competition policy. German enforcement is guided by the goal of protecting the process of competition, while the EC puts more emphasis on consumer welfare. The delegate was not sure if this difference would translate into differences in practice and divergence in enforcement, pointing to the similarity of concerns in merger enforcement and the EC's acknowledgement of the importance of a longer term perspective that incorporates changes in product choice and quality for consumers. The delegate outlined an example involving the formation of buyer groups among health insurance companies that were exercising buyer power against suppliers of pharmaceuticals. The effect of this exercise in Germany has been consolidation and exit of pharmaceutical suppliers. The delegate speculated that while in the short run the effect of the buyer groups is lower prices, this might not be the case in the long run. In the long run, after restructuring on the supply side, the effect of the buyer groups might be higher prices, lower service, and lower quality. While these groups are not subject to either EC or German competition law, the delegate suggested that this case might be an example of when it would be easier to find a violation under the German goal of freedom of process rather than under EC enforcement with its focus on consumer harm.

4. Enforcement Experience and Policy

The Chairman remarked that the US enforcement agencies are sceptical that countervailing power can offset an increase in market power from an otherwise anticompetitive merger, a position that does not appear to be shared by other enforcement agencies. The Chairman invited the US to explain why it has come to that conclusion, whether there have been cases in the US where countervailing power was considered a possibility and what elements led to the conclusion that countervailing power was not sufficient in those cases.

A delegate from the US noted that the DOJ and FTC Commentary on the Horizontal Merger Guidelines, released in 2006, addressed the experience in the US: "Large buyers rarely can negate the likelihood that an otherwise anticompetitive merger between sellers would harm at least some buyers; most markets with large buyers also have other buyers against which market power can be exercised even if some large buyers could protect themselves". The commentary adds: "Moreover, even very large buyers may be unable to thwart the exercise of market power". The reason is that the increase in concentration among sellers is likely to reduce the ability of large buyers to play off sellers against each other to obtain price reductions. In addition, part of the harm that may occur from mergers is discriminatory price increases, and the fact that some buyers are not affected directly doesn't mean that other buyers might not be discriminated against.

The delegate noted that there have not been many merger decisions featuring countervailing power. A few decisions have cited buyer power as one of several factors supporting the rejection of a merger challenge, while others have noted that the presence of powerful buyers is apt to affect only the pattern of anticompetitive price increases following a merger.

Next, the Chairman observed that the contribution from Spain discusses several cases in the food sector where the competition authority considered countervailing power. He invited Spain to comment on whether and why countervailing power was considered to be sufficient to allow any of these mergers to go through or whether it was insufficient.

A delegate from Spain noted that in one merger case involving rum fabricants, buyer power was found to be sufficient, given other factors, to counteract the transaction's likely anticompetitive effects. The delegate noted that while there had been entry, it was more significant that large food retailers had strong bargaining power vis-à-vis the rum fabricants. The sales of both fabricants were very concentrated, the major clients of the two being big retailers with very high market shares in the relevant downstream market. Furthermore, sales of the two fabricants amounted to just 10% of these retailers' total sales of the relevant product lines while a very significant percentage of the rum fabricants' total sales went to these large retailers. While it seemed that retailers had outside options available to them, in the form of their other own brands and the brands of other suppliers, it also appeared that the fabricants, because of their lack of alternatives, had more to lose should their relations with the big retailers come to an end.

The Chairman then turned to Turkey's contribution, which discusses a case in which a central purchasing system was created by independent gasoline filling stations. The submission expressly characterizes this as an example of small retailers instituting counter-strategies to create "equalizing" buyer power so as to protect themselves from discrimination in input markets. The Chairman invited Turkey to explain why this arrangement was not anticompetitive.

A delegate from Turkey answered that the investigation of the central purchasing system at issue found that the system would provide independent fuel retailers with buyer power similar to that of large retail chains, leading to lower prices for consumers. At the same time, there was little risk of an anticompetitive effect from the enhanced coordination because of the extent of competition in gasoline retailing from large retailers.

The Chairman turned to the contribution of Chile, which notes that further mergers by supermarket chains "may have negative effects for competition only in situations where such strategy has a non-transitory effect on the aggregate supply, be it through the reduction of total output, the increase in prices or the reduction of investments in innovation and development of new products." The Chairman invited Chile to comment on the evidence regarding the negative effects of enhanced buyer power from mergers and the details of the settlement agreements reached with the supermarket chains.

A delegate from Chile observed that the trend in Chile had been to emphasize the effects on competition from the exercise of buyer power and to reduce the emphasis on economic dependency. The delegate noted that there was not any significant evidence on the negative effects of buyer power. Instead, the Competition Tribunal identified the relevant types of negative effects and imposed a requirement of mandatory notification prior to any further acquisitions by the two large chains. In addition, a settlement was reached with the two chains implementing a code of conduct to govern their transactions with small and medium suppliers.

The Chairman moved on to the UK submission, which states that buyer power does not raise an issue unless it has detrimental effects on consumers and that since it typically leads to lower input prices, it usually has positive effects on consumer welfare. However, the submission identifies three circumstances under which bargaining power can harm consumers: (i) when there is monopsony or oligopsony; (ii) when bargaining power results in foreclosure, waterbed effects, or harms supplier incentives to invest and innovate upstream; (iii) when buyer power facilitates collusion downstream. The Chairman invited the UK to discuss its analysis and findings regarding waterbed effects and the effect of buyer power on the incentives for suppliers in the context of its recently completed grocery inquiry.

A delegate from the UK began by noting that there was evidence of buyer power in the grocery sector, but not of a market share shifting waterbed effect. On the other hand, there was evidence that buyer power was being used to transfer too much risk to suppliers.

With regard to buyer power, the Competition Commission found evidence of price dispersion: larger purchasers on average paid lower prices than their smaller competitors. However, there was evidence that through the use of either wholesalers or symbol groups (buyer groups) some small retailers were able to match the prices paid by their larger competitors. Moreover, size was by no means the only explanatory factor for the pattern of prices paid by retailers. In particular, other determinants of outside options mattered and there was evidence that it was perhaps easier to switch smaller volumes than larger volumes.

The delegate further explained that the finding that the exercise of buyer power was not consistent with a waterbed effect was based on (i) survey evidence indicating that only seven percent of suppliers strongly agreed that when large customers negotiated lower prices, one effect was to increase the price paid by smaller customers; and (ii) the lack of clear evidence that there had been a decline in the number of smaller retailers, in particular convenience stores.

With respect to suppliers' incentive to invest and innovate, the Competition Commission's work focused not on the level of investment per se at any stage of the vertical chain, but rather on the implications of the combination of buyer power, contractual incompleteness, the presence of ex post hold up and in some instances the role of badly aligned incentives within the vertical chain. In terms of contractual incompleteness, many contracts consisted of little more than a one-page letter between suppliers and retailers and there was a considerable amount of renegotiating and changing of terms, some even taking place after delivery of the goods. Some ex post renegotiations may not be a problem but there were examples of suppliers who had made investments on the basis of contractually agreed prices who were pushed to retrospectively and adversely adjust their terms. Moreover, there was evidence consistent with misalignment of incentives in the vertical chain. In particular, some manufacturers or suppliers were paying for losses due to shrinkage or breakage within the store, as well as theft within the store, all of which are more easily controlled by the retailer. The Competition Commission interpreted this as evidence of ex post hold up: retailers were using their buyer power to charge suppliers for things that were happening in their stores but had nothing to do with the suppliers.

France's submission is less categorical, the Chairman noted. It asserts that the effect of buyer power on upstream incentives is theoretically ambiguous and that there is little empirical evidence to resolve the

ambiguity. The Chairman invited France to identify the conditions under which it would expect buyer power to reduce investment upstream and the appropriate remedies when that is the case.

A delegate from France said that the incentives for investment upstream might be linked to the market structure up and downstream. If competition is limited upstream but it is strong downstream, then buyer power is unlikely to reduce investment. If anything, it is likely to stimulate competition and investment upstream. The upstream suppliers' margins will be large, providing them with incentives and the financial capability to innovate. If upstream competition is strong and downstream competition is limited, buyer power can be detrimental. In this case, producer margins can be limited and an additional reduction of these margins can reduce the investment capability and incentives of upstream suppliers. Furthermore, if downstream competition is limited, distributors will have reduced incentives to provide new products.

The delegate concluded by noting that it might be prudent to ensure that the market structure is appropriate up and downstream so that the positive effects of buyer power on investments exceed its negative effects. This means taking or allowing preventive measures that promote competition in the downstream market, while in certain markets in which producers are small, competition is extensive, and the financing capabilities of suppliers are limited, encouraging supplier groups or other types of appropriate coordination by the suppliers.

Next, the Chairman invited Poland to comment on a case in its submission involving the contracting practices of the National Health Fund in the procurement of dental services.

A delegate from Poland noted that the National Health Fund was, by statute, a monopoly supplier and is an unavoidable trading partner for most health care providers. The prices imposed by the NHF were well below the average costs of providing dental services and in fact the NHF did not consider the costs of service provision in determining its reimbursement rates. The enforcement agency's view was that the exercise of buyer power not only harmed the providers of dental services, but in the long run prices below costs would harm consumers as service providers withdrew from the market.

The Chairman then turned to the submission from Korea, noting that it discusses a case involving three large department stores with aggregate market shares of almost 80 percent. The Chairman invited the Korean delegation to comment on how buyer power was established and how consumers were harmed.

A delegate from Korea explained that the department stores required suppliers to provide details of their electronic access information to the purchasing systems of rival department stores. There was not any direct evidence on consumer harm, but there was evidence that access to this information permitted department stores to monitor suppliers and punish those that supplied rivals, and full information about price and sales volume at competing department stores could easily facilitate collusion.

The submission from Indonesia discusses the Carrefour case, which involved a "minus margin" policy. The Chairman invited Indonesia to explain the nature of the minus margin strategy, how it amounted to abuse of dominance, how dominance was determined, and the effect of the minus margin strategy on competition and consumers.

The delegate from Indonesia explained that the minus margins were demanded in a contract clause that prohibited suppliers from selling their products to the buyer's competitors (in this case, Carrefour's competitors) at a price below the one sold to the buyer. Failure to abide by the clause resulted in a fine on the supplier. The delegate explained that the effect of the minus margin had been to exclude competing retailers from the market.

The Chairman then invited South Africa to comment on a case, discussed in its submission, involving horizontal and vertical restrictions in dairy products.

A delegate from South Africa remarked that the case involved both horizontal and vertical practices by dairy processors, and that the practices appeared to enhance and maintain the processors' monopsony power. The practices included market allocation and exclusive supply contracts, as well as information exchange, all apparently intended to create regional geographic markets and maintain monopsony power for diary processors in each region. The effect of the exercise of monopsony power has been exit by farmers, resulting in land being diverted to less productive uses, and a reduction in the supply of fluid milk.

5. Closing Discussion

The Chairman invited Professors Inderst and Church to comment on the discussion.

Professor Inderst identified a number of issues that arise frequently and warrant further deliberation. He noted that there was more confidence about the harm from the exercise of monopsony power and that there was partial support for the notion that countervailing power should play a role in merger analysis. His view is that whether countervailing power was always a good substitute for a lack of upstream competition was very much an open question.

With respect to bargaining power, the difficulties with identifying anticompetitive harm from its exercise suggest the relevance of Type I errors in fashioning enforcement policy. Professor Inderst noted, however, that the extent to which different countries were concerned about false positives and chilling price discounting were a function of their different experiences and differences in domestic markets. He noted that the relevant welfare standard could make a large difference for enforcement policy. A consumer welfare standard misses allocative inefficiencies in upstream markets, when high transportation costs create local markets and pockets of buyer power. In Inderst's view, the merits of relaxing standards or taking more seriously a wider range of anticompetitive theories depend on the weights assigned to different types of errors and ultimately on assumptions about the potential for the market to overcome impediments to efficiency in a particular industry in a particular country.

Professor Church posed a hypothetical question based on the facts of the *Weyerhaeuser* case, but instead of having predatory bidding as in *Weyerhaeuser* he asked the delegates to suppose that the only two sawmills in a particular geographic region have proposed a merger. The downstream market is competitive and the concern is the potential for the transaction to increase the exercise of monopsony power in the market for saw logs. He asked the UK to confirm that they would not take the case because of the absence of downstream consumer harm and the US to confirm that they would, based on allocative inefficiency in the upstream market.

A delegate from the UK responded that they might have some enthusiasm for enforcement if there was the possibility of a hold up problem that reduced incentives for investment and harmed consumers in the long run. This might be the case given the length of time between tree planting and harvest. However, they would have a reasonably high threshold for intervention.

A delegate from the US responded that this is exactly the sort of case they would be inclined to bring. The key is the allocative harm upstream that results from the immobility of resources in this market, not the speed of tree growth. The economics of the tree growing makes the case a little bit more interesting and complicated, but these complications wouldn't be determinative.

Professor Church reiterated that the US would be concerned even if there is no downstream harm because there is potential harm to the input suppliers. He asked if it was clear that there was in fact no downstream harm since a greater exercise of monopsony power is equivalent to an increase in marginal cost of the merged firm in the downstream market, which would shift the supply curve even if the firm was

a price taker. Furthermore, if it was a significant enough supplier, that would have a price impact on the downstream market, harming downstream consumers.

Moreover, Church stated, even if there was perfectly elastic supply downstream from other regions, then even though the nominal price downstream does not change, consumers are going to be harmed, since the exercise of monopsony power will involve the reallocation of resources. Very productive resources will be taken out of the production of logs in the region in which monopsony power is exercised and less productive resources will be put into the production of logs in other regions, so the real price does change downstream. Church contended that it is a fiction that monopsony power can be exercised upstream with no effect on customers downstream.

The delegate from the US responded that in the view of the US, log suppliers count as consumers and if they are harmed that is enough. It is not required to pin down exactly which consumers in which market are harmed.

A delegate from the UK responded that the difficulty with not identifying which consumers are harmed and the extent of harm is that it will result in over-enforcement and does not appropriately balance Type 1 and Type II errors. For every such case that is missed because of the inability to identify downstream harm, there are likely lots of cases which will benefit downstream consumers. As a result, vigorous enforcement of cases in which downstream markets are competitive and hence the harm from buyer power is small risks doing enormous harm to the competitive process from dampening competitive incentives in other markets by having too low an intervention threshold. Moreover, even if there is some small probability of harm, intervention is not optimal because no enforcement agency has the resources to intervene in every case. Interventions need to be limited to those cases where the competitive harm is greatest.

The Chairman closed the proceedings by noting that recent theoretical developments identifying the potential harm from the exercise of bargaining power were important and interesting. However, what was needed was empirical evidence on the prevalence of when the exercise of bargaining power would adversely affect consumers. Without systematic evidence on the frequency of negative effects, it is difficult to develop informed priors, presumptions, and enforcement standards.

COMPTE RENDU DE LA TABLE RONDE

Le Président ouvre la table ronde en faisant remarquer que les implications du pouvoir de l'acheteur pour la politique de la concurrence sont sujettes à controverse. Il convie tout d'abord un orateur invité, le professeur Roman Inderst, qui enseigne à l'Université de Francfort et à l'Imperial College de Londres, à présenter les thèmes abordés.

1. Présentation du concept de pouvoir de l'acheteur par le professeur Inderst

L'exposé du professeur Inderst porte sur les quatre thèmes suivants : i) les sources de pouvoir de l'acheteur ; ii) les conséquences de l'exercice du pouvoir de l'acheteur ; iii) la mesure et le rôle du bien-être du consommateur ; iv) le pouvoir de l'acheteur comme moyen de défense dans les cas de fusion.

1.1 Sources de pouvoir de l'acheteur

Le professeur Inderst distingue deux types de pouvoir de l'acheteur : le pouvoir de monopsone, qu'exercent les acheteurs en limitant la demande, ce qui entraîne des baisses de prix à l'échelle du marché, et le pouvoir de négociation, qui s'exerce dans les négociations bilatérales et se traduit par de meilleurs termes de l'échange. Le professeur Inderst s'en tient dans ses remarques au pouvoir de négociation, qui lui semble plus approprié lorsque les entreprises sont relativement peu nombreuses tant du côté de l'offre que de celui de la demande, les produits sont différenciés, les négociations sont bilatérales, et les contrats sont très diversifiés.

Dans le cadre de la négociation, les options extérieures qui se présentent aux parties en cas d'échec de leur transaction constituent la principale source de pouvoir pour l'acheteur et pour le vendeur. La taille de l'acheteur est souvent considérée comme un déterminant important en ce qui concerne les options extérieures qu'ont l'acheteur et ses fournisseurs, respectivement. Le professeur Inderst note toutefois que, dans tous les cas, la taille peut être un inconvénient et qu'il peut y avoir beaucoup d'autres sources de pouvoir de l'acheteur. Ainsi, un acheteur peut contrôler l'accès à certains marchés locaux, ou il peut y avoir d'autres raisons pour lesquelles l'acheteur dispose d'une clientèle captive lui permettant de changer plus facilement de fournisseur sans diminution significative de son propre chiffre d'affaires.

1.2 Conséquences de l'exercice du pouvoir de l'acheteur

Le professeur Inderst fait observer que l'ampleur des effets positifs de l'exercice du pouvoir de négociation sur les consommateurs du marché en aval dépend de l'ampleur de la répercussion, qui variera elle-même selon le degré de concurrence sur le marché en aval et la nature des éventuelles conditions préférentielles négociées. En règle générale, des rabais à la marge sont nécessaires pour que les effets positifs soient répercutés sur les consommateurs en aval.

L'exercice du pouvoir de négociation ne porte préjudice à la concurrence et aux consommateurs que s'il nuit à des distributeurs rivaux (acheteurs), ce qui peut se produire lorsque le pouvoir de négociation conduit à l'exclusion à long terme de distributeurs concurrents incapables de rentabiliser leurs activités. Les consommateurs peuvent aussi être lésés, malgré l'absence de modification de la structure du marché en aval, en cas d'effet de vases communicants. Un tel effet se produit lorsque l'octroi d'un traitement de faveur à un distributeur entraîne une dégradation des termes de l'échange pour d'autres distributeurs. En revanche, si des distributeurs sont de puissance égale, l'octroi d'un rabais à l'un d'entre eux peut, au contraire, se traduire par l'octroi d'un rabais identique à tous les distributeurs (acheteurs). Un effet de vases communicants peut aussi se produire lorsque l'exercice du pouvoir de l'acheteur entraîne un regroupement de fournisseurs. Si le distributeur en position de force peut être protégé contre l'exercice ultérieur de leur

pouvoir de marché par les fournisseurs, il n'en va pas nécessairement de même pour les distributeurs plus petits.

Enfin, l'exercice du pouvoir de l'acheteur peut avoir un effet sur l'efficience dynamique en influant sur l'incitation des distributeurs et des fournisseurs à investir et innover. En ce qui concerne les fournisseurs, on estime le plus généralement que l'exercice du pouvoir de l'acheteur compromet les incitations dont ils bénéficient. La probabilité serait plus grande qu'un acheteur en position de force « prenne en otage » le fournisseur, s'appropriant une part plus importante des bénéfices supplémentaires issus de l'investissement initial réalisé par les fournisseurs. Toutefois, la présence d'acheteurs moins nombreux et plus puissants peut réduire la probabilité de ce problème de hold-up. Par exemple, les grands acheteurs peuvent juger qu'il est dans leur propre intérêt de s'impliquer à un stade précoce auprès des fournisseurs et de cofinancer une partie de l'investissement requis. En outre, des acheteurs puissants peuvent être nécessaires pour discipliner les fournisseurs : un grand acheteur risque d'être plus enclin à remplacer un fournisseur donné si son produit ne répond pas aux attentes, ou il peut plus facilement réintégrer des fonctions situées en amont dans la chaîne d'approvisionnement si les fournisseurs offrent des prestations médiocres.

Si le pouvoir de négociation dépend de la taille, alors il peut faire naître de fortes incitations à l'investissement et à l'innovation pour les distributeurs. En effet, la croissance se traduit par un « double dividende » : d'une part, toutes choses étant égales par ailleurs, elle est source de bénéfices supplémentaires ; d'autre part, ces bénéfices sont gonflés par l'obtention de rabais supplémentaires au fur et à mesure que l'acheteur se développe.

1.3 Mesure et rôle du bien-être du consommateur

Le professeur Inderst fait des remarques sur deux points délicats. Le premier est la détermination des seuils de pouvoir de l'acheteur au-delà desquels des problèmes pourraient se poser. Comme il n'existe aucune présomption selon laquelle le pouvoir de l'acheteur entraînerait des pertes d'efficience ou une diminution du bien-être du consommateur, éviter les erreurs de type I suppose des seuils élevés. Par ailleurs, comme on l'a fait observer, les acheteurs, même relativement petits, peuvent jouir d'un grand pouvoir lorsque les fournisseurs sont dépendants sur le plan financier ou ont besoin d'une présence nationale.

Le second point délicat est le rôle du bien-être des consommateurs finals. Si la politique est uniquement axée sur ce bien-être, le pouvoir de négociation ne devrait pas susciter d'inquiétude dans la mesure où les marchés en aval sont concurrentiels. Cependant, cette orientation ne tient pas compte de l'éventuel préjudice anticoncurrentiel causé sur le marché en amont, en particulier lorsque les coûts de transport élevés se traduisent par l'existence de quelques acheteurs seulement.

1.4 Pouvoir de l'acheteur et fusions

Le professeur Inderst fait observer que le pouvoir de l'acheteur joue un rôle dans l'évaluation des fusions de fournisseurs. Deux questions se posent. La première consiste à savoir si le pouvoir de l'acheteur protège tous les acheteurs après la fusion, ou seulement les plus puissants. Quant à la seconde, il s'agit de savoir si le pouvoir de l'acheteur, bien qu'il soit un bon substitut à la concurrence *par les prix* sur le marché en amont, ne pourrait pas se substituer de manière satisfaisante à la concurrence *hors prix*.

2. Définitions et distinction

Le Président note qu'il importe de faire la distinction entre pouvoir de négociation et pouvoir de monopsone tant du point de vue théorique que pratique. Il invite le Canada à définir le pouvoir de monopsone et le pouvoir de négociation, à expliquer comment le Bureau de la concurrence fait

concrètement la distinction entre les deux, et à voir dans quelle mesure et pourquoi cette distinction est importante au regard des mesures d'application.

Un délégué du Canada répond que le bon exercice du pouvoir de l'acheteur, qu'il s'agisse du pouvoir de monopsone ou du pouvoir de négociation, se traduit par une baisse des prix. La distinction fondamentale est la suivante : l'exercice du pouvoir de monopsone fait baisser les prix à un niveau infraconcurrentiel, alors que l'exercice du pouvoir de négociation compense celui du pouvoir de marché par les vendeurs. Le délégué note le caractère primordial de cette distinction, compte tenu des différences entre les effets sur le bien-être des deux types de pouvoir de l'acheteur. Si l'exercice du pouvoir de monopsone est préoccupant, étant donné qu'il est source d'inefficacité dans la répartition des ressources, l'exercice du pouvoir de négociation est plus problématique car il n'est pas clairement établi qu'il ait des effets négatifs semblables sur le bien-être. En réalité, les effets directs sont souvent positifs (baisse des prix pour les consommateurs en aval). Les effets négatifs du pouvoir de négociation sur le bien-être doivent être indirects et se manifester en portant préjudice à l'efficacité des concurrents, d'où un effet négatif sur la concurrence sur le marché. Comme des forces économiques et des effets très différents sous-tendent les pouvoirs de monopsone et de négociation, il importe de les distinguer et de recourir à différentes analyses pour les comprendre.

Le délégué poursuit en faisant observer que lors de l'évaluation du pouvoir susceptible d'être exercé par l'acheteur, le Bureau de la concurrence commence par définir le marché en amont du point de vue des vendeurs en tenant compte de leurs options extérieures. Si l'acheteur considéré bénéficie d'une part de marché importante et si des obstacles de taille rendent les achats difficiles, le pouvoir de l'acheteur peut poser problème. Le Bureau tente alors de déterminer si la part de marché importante que détient un acheteur est due à l'exercice du pouvoir de monopsone ou à celui du pouvoir de négociation en examinant la capacité concurrentielle du marché en amont, la forme de la courbe de l'offre en amont, la question de savoir si l'acheteur limiterait véritablement la demande, et la question de savoir si l'exercice du pouvoir de l'acheteur conduira les fournisseurs à réduire leur offre ou provoquera leur éviction.

Le Président invite ensuite la Hongrie à définir les facteurs retenus par l'autorité de la concurrence hongroise pour évaluer le pouvoir de l'acheteur, et à commenter le rôle d'un examen du pouvoir de marché en aval. Un délégué de la Hongrie répond que les trois facteurs retenus sont la part de marché de l'acheteur, la mesure dans laquelle les fournisseurs pourraient se tourner vers d'autres acheteurs, et la question de savoir si les fournisseurs peuvent passer à la production d'autres produits à l'intention d'autres acheteurs. Le délégué hongrois note également que si le marché en aval est concurrentiel, l'exercice du pouvoir de négociation ne sera pas préoccupant car, dans ces circonstances, il est difficile de voir comment l'exercice de ce pouvoir porterait préjudice aux consommateurs finals.

3. Effets du pouvoir de l'acheteur sur le bien-être

Le Président constate que les documents soumis par les pays offrent un large éventail de réponses à la question de savoir si, et à quel moment, l'exercice du pouvoir de l'acheteur a des effets positifs ou négatifs, ainsi qu'une réflexion visant à déterminer si le droit de la concurrence est l'instrument adéquat pour traiter les affaires dans lesquelles on estime que l'exercice du pouvoir de négociation est préjudiciable. Le Président invite le Royaume-Uni à commenter la façon dont les effets du pouvoir de l'acheteur sur le bien-être sont évalués dans le pays.

Un délégué du Royaume-Uni fait les observations suivantes. Tout d'abord, lors de l'évaluation des effets du pouvoir de négociation sur le bien-être, le pouvoir de l'acheteur n'est pas symétrique du pouvoir du vendeur. Si les fournisseurs sont lésés par la baisse des prix, celle-ci profite en général aux consommateurs et, dans le cadre du processus concurrentiel, les distributeurs mettent normalement en concurrence, à leur tour, les sociétés situées en amont en essayant de réduire le prix des produits

intermédiaires. Il s'agit d'un lien essentiel entre le bien-être du consommateur et les gains de productivité dans l'économie. En d'autres termes, il importe de savoir que ce qu'on assimile à une conséquence du pouvoir de négociation est souvent, en réalité, une manifestation de la concurrence, dont les effets sont positifs. Par exemple, on a prétendu qu'en abaissant le montant des commissions versées aux agents de voyage, British Airways (BA) avait recouru abusivement à son pouvoir d'acheteur sur le marché. Or, on a déterminé par la suite que l'abaissement du montant des commissions s'était traduit par une réduction des prix favorable à la concurrence sur un marché en amont affecté par la tendance croissante des consommateurs à acheter leurs billets sur Internet. L'abaissement des prix a entraîné une amélioration, et non une dégradation, du bien-être des consommateurs en aval.

Ensuite, en cas d'allégations d'exercice du pouvoir de l'acheteur, on fait appel à un test de préjudice causé aux consommateurs pour déterminer le seuil d'intervention, qui est censé être élevé. Cette procédure découle de l'idée que les baisses de prix en amont favorisent généralement la concurrence et qu'il est difficile de distinguer les cas dans lesquels le pouvoir de l'acheteur a des effets négatifs des cas dans lesquels ses effets sont positifs. Par conséquent, compte tenu des erreurs de type I et II, un seuil élevé serait nécessaire afin de ne pas freiner les comportements concurrentiels.

Le Président constate que la République slovaque, dans le document qu'elle a soumis, laisse entendre que les instruments antitrust sont inadaptés pour traiter la question de l'exercice du pouvoir de l'acheteur. Il invite la délégation à expliquer ce point de vue.

Un délégué de la République slovaque répond que le pouvoir de l'acheteur (pouvoir de négociation) s'exerce de façon omniprésente, même si les acheteurs n'agissent pas dans le cadre d'une entente ou n'abusent pas d'une position dominante. Intervenir lorsque s'exerce le pouvoir de l'acheteur reviendrait à réglementer les relations commerciales bilatérales entre fournisseurs et acheteurs, ce qui n'est pas conforme aux objectifs de la lutte contre les pratiques anticoncurrentielles, à savoir la protection de la concurrence et non des concurrents (en l'occurrence, les fournisseurs).

En outre, le délégué fait remarquer que la question de savoir si une autorité de la concurrence devrait effectivement s'attaquer à l'exercice du pouvoir de l'acheteur est discutable, étant donné que ce pouvoir est susceptible de profiter aux consommateurs. Les avantages que retirent les consommateurs en aval de l'exercice du pouvoir de négociation dépendent de l'intensité de la concurrence sur le marché en aval. Aussi est-il plus important de veiller à l'efficacité de la concurrence sur ce marché que de s'attaquer à l'exercice du pouvoir de l'acheteur.

Le Président constate que le document soumis par les Pays-Bas traite de la pratique des compagnies d'assurance-maladie consistant à formuler des offres « à prendre ou à laisser » à l'intention des prestataires de services de santé. Il invite la délégation des Pays-Bas à expliquer la nature de la polémique sur la question de savoir dans quels cas ces offres constituent ou non un abus de position dominante et si une partie du problème est liée à la distinction entre l'exercice du pouvoir de l'acheteur et les comportements qui confèrent un pouvoir à l'acheteur, entretiennent ce pouvoir ou le renforcent.

Un délégué des Pays-Bas répond que ce n'est pas l'exercice du pouvoir de l'acheteur par les compagnies d'assurance qui inquiète son pays, mais la création d'un pouvoir de marché, la conservation de ce pouvoir ou son renforcement. Le problème n'est pas de savoir si le recours à des contrats « à prendre ou à laisser » suppose l'exercice d'un pouvoir de marché, mais s'il existe des clauses contractuelles qui se traduisent par l'exclusion des concurrents des compagnies d'assurance en empêchant les prestataires de soins de santé de signer des contrats avec eux, ou par des coûts plus élevés pour ces concurrents. L'uniformisation des contrats est susceptible d'entraîner une baisse des coûts pour les compagnies d'assurance, baisse qui pourrait se répercuter sur les primes d'assurance, et donc profiter aux

consommateurs. Le simple fait qu'aucune négociation n'ait lieu signale peut-être l'existence d'une concurrence et de l'incitation qui en découle à réduire les coûts.

Le Président note que le Brésil, dans le document qu'il a soumis, doute qu'une baisse des prix concédée par les fournisseurs sous l'effet du pouvoir de l'acheteur se répercute en aval, à moins que le marché y soit concurrentiel. Il demande au Brésil, pays invité, d'expliquer pourquoi une telle baisse ne se répercuterait que dans un marché concurrentiel.

Un délégué du Brésil fait observer que si le marché en aval est concurrentiel, il est peu probable que l'exercice du pouvoir de monopsone, et non de négociation, porte préjudice aux consommateurs de ce marché, le prix en aval étant donné pour les consommateurs finals. Le renforcement du pouvoir de monopsone nuit aux consommateurs en aval si l'acheteur dispose également d'un pouvoir de marché en aval. Par conséquent, si le marché en aval est concurrentiel, il n'y a pas lieu de s'inquiéter quant à l'exercice du pouvoir de monopsone. En revanche, l'exercice du pouvoir de négociation se traduit soit par une simple redistribution soit, s'il entraîne une augmentation de la production en amont, par un effet positif sur le bien-être des consommateurs en aval.

Le Président passe ensuite au document soumis par la Finlande, où il est indiqué qu'en raison de la concurrence que connaît ce pays dans le secteur de l'alimentation de détail, l'exercice du pouvoir de négociation a entraîné des rabais qui sont répercutés sur les consommateurs. Néanmoins, ce document fait état de certaines inquiétudes concernant l'exercice du pouvoir de négociation par les grands distributeurs. Le Président invite la Finlande à s'exprimer sur ces autres inquiétudes.

Un délégué de la Finlande fait observer qu'il y a deux préoccupations distinctes : d'une part, le pouvoir de négociation pourrait être exercé non seulement pour négocier des ristournes, mais aussi pour imposer des conditions d'exclusivité en matière d'offre ; d'autre part, on constate que les fournisseurs soumis à un pouvoir de négociation réagissent en abaissant leurs coûts par le biais d'une diminution de la qualité ou du non-respect des réglementations environnementales.

Le Président évoque ensuite le document soumis par la Commission européenne (CE), en notant qu'elle semble plus sceptique quant à la possibilité d'un préjudice découlant de l'exercice du pouvoir de l'acheteur. Dans son document, la CE fait observer que le pouvoir de l'acheteur est lié aux problèmes rencontrés par les petits fournisseurs, mais que ces problèmes n'en sont pas véritablement en ce qui concerne le droit de la concurrence. Celui-ci vise principalement le bien-être du consommateur ; autrement dit, c'est généralement le pouvoir de marché du vendeur qui pose problème. La CE note aussi dans son document qu'un problème de concurrence lié au renforcement du pouvoir de l'acheteur à la suite d'une fusion réside dans la possibilité de verrouillage du marché. Examinant cette possibilité, la CE indique que la baisse des prix due à l'exercice du pouvoir de l'acheteur pourrait entraîner l'éviction des concurrents sur le marché en aval. Le Président invite la CE à préciser pourquoi elle semble douter de la possibilité que le pouvoir de l'acheteur ait des effets négatifs sur les consommateurs. Il demande également à la CE de s'exprimer sur les éléments de preuve qui pourraient être utilisés pour évaluer le risque que le pouvoir de l'acheteur issu d'une fusion conduise à l'éviction d'un concurrent, et sur la question de savoir si des effets anticoncurrentiels pourraient se produire au cas où les concurrents ne seraient pas évincés, mais leurs coûts deviendraient supérieurs à la normale.

Un délégué de la CE répond qu'en règle générale, le pouvoir de l'acheteur est indissociable du pouvoir du vendeur sur le marché en aval. D'après l'expérience de la CE, lorsque le pouvoir de marché d'un acheteur suscite des inquiétudes dans le cadre d'une fusion, celle-ci fait également naître en aval des craintes liées au pouvoir de marché, et les mesures adoptées pour répondre aux inquiétudes sur le marché en aval agissent aussi sur les craintes concernant le pouvoir de l'acheteur. De plus, lorsque le marché en aval est concurrentiel, la CE estime que le pouvoir de l'acheteur n'engendre pas d'effets négatifs.

Le Président poursuit avec le document soumis par les États-Unis, où il est indiqué qu'aucune étude récente ne montre que les problèmes de concurrence liés au pouvoir et à la répartition des acheteurs justifient d'amples restrictions sur les pratiques d'achat des grands distributeurs ou une quelconque présomption de violation des règles de concurrence pour une pratique donnée d'un grand distributeur. En outre, il se peut qu'aucun élément sérieux ne permette de conclure avec fiabilité, dans un cas précis, qu'un effet de vases communicants s'est produit. Cependant, il y a tout lieu de croire que des erreurs dans l'imputation des responsabilités ou la formulation de solutions pourraient compromettre la concurrence par les prix. Le Président demande à la délégation des États-Unis d'expliquer les fondements de son évaluation et d'exposer les circonstances dans lesquelles celle-ci interviendrait.

Un délégué des États-Unis indique que les théories cohérentes reposant sur les effets de vases communicants et d'autres théories démontrant le préjudice éventuel résultant de l'exercice du pouvoir de marché ne confirment pas, ipso facto, la prédominance d'effets négatifs. En fait, on ne peut présumer, à quelque degré que ce soit, que le pouvoir de l'acheteur ou certaines pratiques liées à l'exercice de ce pouvoir sont anticoncurrentiels. En outre, aucun élément fiable ne permet de dire à l'avance qu'un effet de vases communicants est susceptible de se produire dans telles circonstances, et le repérage a posteriori d'un véritable effet de vases communicants risque par ailleurs d'être ardu. Il sera difficile d'établir avec une quasi-certitude qu'une augmentation de prix imposée à un client découle d'un rabais concédé à un autre client. Enfin, même si un tel lien peut être établi, il n'est pas suffisant dans la mesure où il faut encore démontrer qu'un effet anticoncurrentiel non négligeable est ressenti sur le marché en aval. Les seuils de détermination de l'existence d'un effet anticoncurrentiel devraient être élevés afin d'éviter les faux positifs, qui pourraient entraîner l'adoption de mesures limitant l'octroi de ristournes et, de ce fait, engendrant pour les consommateurs une hausse des prix et un préjudice immédiat.

Le délégué poursuit en faisant observer que le Département de la justice américain agit pour prévenir et limiter l'exercice du pouvoir de monopsone eu égard à ses effets directs, mais non aux effets indirects qui pourraient découler, par exemple, du phénomène de vases communicants. Les États-Unis ont connu une polémique sur le point de savoir si les seuls consommateurs dont le bien-être avait de l'importance étaient ceux du marché en aval. Le Département de la justice est fermement opposé à cette idée : ce qui compte, c'est le bien-être permanent de tous les consommateurs. De 1997 à 2007, le Département a traduit en justice les parties à 70 affaires d'entente d'acheteurs, laissant de côté la question de savoir si les consommateurs en aval avaient subi un quelconque préjudice. Parfois, le Département de la justice conteste une fusion au motif d'effets anticoncurrentiels du côté de la demande.

En réponse à une question d'un délégué du Brésil concernant les éléments de preuve utilisés aux États-Unis pour repérer les cas de fusion qui posent des problèmes de renforcement du pouvoir de monopsone, le délégué des États-Unis fait savoir que l'approche adoptée est semblable à celle qui est utilisée lors de l'évaluation des opérations à l'origine d'une concentration de vendeurs sur les marchés en aval. Le cadre permettant de déterminer l'éventualité d'un problème de concurrence dû à un renforcement du pouvoir de l'acheteur fait intervenir la définition du marché, l'examen des parts de marché préalablement à l'opération et l'effet de celle-ci sur la concentration des acheteurs. Le délégué indique qu'au cours des 20 dernières années, les cas de ce type ont été relativement peu nombreux et se sont généralement produits dans des situations où les marchés en amont étaient géographiquement confinés par rapport au marché en aval. Ces marchés en amont géographiquement confinés sont le résultat de l'immobilité des ressources de la chaîne d'approvisionnement et donnent naissance à des îlots de pouvoir de l'acheteur. Les autorités américaines de la concurrence ont tendance à être sceptiques à propos des problèmes de monopsone associés aux fusions et exigent des preuves de la réalité de l'effet anticoncurrentiel pour intervenir.

Le Président s'intéresse ensuite au document soumis par le Taipei chinois, qui y fait remarquer que le recours à leur pouvoir d'acheteur par les grands distributeurs pour imposer aux fournisseurs le paiement de

commissions supplémentaires comme moyen de s'assurer des canaux de distribution est une source fréquente de plaintes dans le Taipei chinois. La Commission d'État de la concurrence estime que ce comportement constitue en soi un abus auquel il faut remédier. Selon elle, l'instauration inappropriée de commissions supplémentaires par les entreprises de distribution fait peser des coûts supplémentaires sur les fournisseurs, lesquels seront finalement répercutés sur les prix de détail des produits, ce qui, par voie de conséquence, nuira aux consommateurs et au bien-être social dans son ensemble. Le Président invite le Taipei chinois à commenter la façon dont il juge ce qu'est un niveau de commissions adéquat.

Un délégué du Taipei chinois répond que l'enthousiasme évident pour les interventions dans les cas où s'exerce le pouvoir de l'acheteur tient au fait que la législation applicable a pour objet la loyauté de la concurrence, et pas les violations classiques de la législation antitrust. C'est pourquoi l'autorité de la concurrence peut décider de faire une moindre place au pouvoir de marché de façon à s'intéresser davantage à la nature des commissions. Elle applique les principes de pertinence, de proportionnalité et de transparence pour déterminer si les commissions sont adéquates. Le délégué souligne que la législation en question est controversée et que l'autorité de la concurrence s'est abstenue d'élargir son application.

Le Président évoque ensuite la contribution de l'Allemagne, qui adopte le point de vue selon lequel les ententes entre acheteurs sur les prix maximums et les ententes entre vendeurs sur les prix minimums devraient être traitées de façon symétrique. Selon l'Allemagne, ce point de vue n'est pas partagé par la CE étant donné que celle-ci exigerait la preuve d'un effet négatif sur les consommateurs en aval. Le Président demande à l'Allemagne de préciser la nature de cette divergence entre elle et la CE.

Un délégué de l'Allemagne explique qu'il existe une différence fondamentale en matière d'objectifs de la politique de la concurrence. Les autorités allemandes sont guidées par l'objectif de protection du processus concurrentiel, alors que la CE met davantage l'accent sur le bien-être du consommateur. Le délégué n'est pas certain que cette différence se traduirait par des différences concrètes et une divergence en termes de mise en œuvre, signalant les similitudes quant aux préoccupations relatives à la mise en œuvre des fusions et la prise de conscience par la CE de l'importance d'une perspective à long terme tenant compte des modifications concernant le choix et la qualité des produits pour les consommateurs. Le délégué donne l'exemple de la constitution de groupements d'achat parmi les compagnies d'assurance-maladie, lesquelles ont exercé leur pouvoir d'acheteur face aux fournisseurs de produits pharmaceutiques. L'exercice de ce pouvoir en Allemagne a entraîné le regroupement et l'éviction de fournisseurs de produits pharmaceutiques. Le délégué émet l'hypothèse que la constitution de groupements d'achat peut avoir pour effet, à court terme, d'abaisser les prix, mais que ce n'est pas nécessairement le cas à long terme où, après restructuration du côté de l'offre, la constitution de groupements d'achat peut se traduire par une hausse des prix, une diminution du service et une dégradation de la qualité. Ces groupements ne relèvent ni du droit de la concurrence de l'UE ni de celui de l'Allemagne, mais le délégué suggère que ce cas pourrait être un exemple de situation dans laquelle il serait plus simple de conclure à une violation au titre de la disposition allemande de libre concurrence que de la législation communautaire, qui privilégie le préjudice causé aux consommateurs.

4. Expérience et politique des autorités

Le Président fait remarquer que les autorités américaines de la concurrence doutent qu'un contre-pouvoir puisse compenser les effets d'un renforcement du pouvoir de marché dû à une fusion au demeurant anticoncurrentielle, avis que ne semblent par partager leurs homologues étrangers. Le Président invite les États-Unis à expliquer pourquoi ils sont parvenus à cette conclusion, et à indiquer s'il y a eu dans le pays des cas où un contre-pouvoir a été considéré comme une possibilité et quels éléments ont conduit à la conclusion qu'un contre-pouvoir n'était pas suffisant dans les cas en question.

Un délégué des États-Unis note que dans leurs commentaires sur les Directives concernant les fusions horizontales, publiées en 2006, le Département de la justice et la Federal Trade Commission (FTC) indiquaient qu'aux États-Unis, les grands acheteurs pouvaient rarement nier la probabilité qu'une fusion au demeurant anticoncurrentielle entre des vendeurs porte préjudice au moins à certains acheteurs ; la plupart des marchés sur lesquels évoluent des acheteurs de grande taille comptent aussi d'autres acheteurs contre lesquels un pouvoir de marché peut être exercé, quand bien même certains grands acheteurs seraient à même de se prémunir. Il est ajouté dans le commentaire que même de très grands acheteurs peuvent être incapables de faire obstacle à l'exercice d'un pouvoir de marché, car il est probable que la concentration accrue des vendeurs réduise la capacité des grands acheteurs à faire jouer la concurrence entre les vendeurs pour obtenir des rabais. En outre, une partie du préjudice susceptible de découler des fusions réside dans l'augmentation discriminatoire du prix, et ce n'est pas parce que certains acheteurs ne sont pas directement touchés que d'autres acheteurs ne risquent pas de subir une discrimination.

Le délégué fait observer que peu de décisions de fusion mettent en scène un contre-pouvoir. Dans quelques cas, le pouvoir de l'acheteur a été cité parmi plusieurs facteurs motivant le rejet d'une fusion, alors que dans d'autres, la présence de puissants acheteurs est de nature à modifier seulement la tendance générale des augmentations de prix anticoncurrentielles qui font suite à une fusion.

Ensuite, le Président constate que la contribution de l'Espagne traite de plusieurs cas dans le secteur de l'alimentation où l'autorité de la concurrence a pris en compte un contre-pouvoir. Il invite l'Espagne à s'exprimer sur le fait de savoir si et pourquoi le contre-pouvoir a été jugé suffisant ou non pour autoriser la fusion.

Un délégué de l'Espagne fait remarquer que dans un cas de fusion impliquant des fabricants de rhum, le pouvoir de l'acheteur a été considéré comme suffisant, compte tenu des autres facteurs, pour compenser les effets vraisemblablement anticoncurrentiels de l'opération. Le délégué mentionne qu'il y avait des entrées sur le marché, mais que surtout, les grands distributeurs alimentaires avaient un fort pouvoir de négociation vis-à-vis des fabricants de rhum. Les ventes des deux fabricants étaient très concentrées, les principaux clients étant de grands distributeurs qui détenaient de parts de marché très importantes sur le marché correspondant en aval. De plus, le chiffre d'affaires des deux fabricants ne représentait que 10 % du chiffre d'affaires total de ces distributeurs concernant les gammes de produits correspondantes, tandis qu'un pourcentage très élevé des ventes totales des fabricants de rhum était destiné à ces grands distributeurs. Il semble que les distributeurs disposaient d'options extérieures, en l'occurrence la vente sous leurs propres marques ou celles d'autres fournisseurs, mais il semble aussi que les fabricants, en raison de l'insuffisance des options, avaient plus à perdre au cas où leurs relations avec les grands distributeurs seraient rompues.

Le Président évoque ensuite la contribution de la Turquie, dans laquelle celle-ci examine le cas d'une centrale d'achat créée par des stations d'essence indépendantes. Pour la Turquie, il s'agit expressément d'un exemple de petits distributeurs mettant en œuvre des stratégies de résistance pour se doter d'un pouvoir d'acheteur « compensateur » et se prémunir ainsi contre la discrimination sur les marchés de produits intermédiaires. Le Président invite la Turquie à expliquer pourquoi ce groupement d'achat n'était pas anticoncurrentiel.

Un délégué de la Turquie répond que l'enquête sur la centrale d'achat en question a montré que celle-ci conférerait aux distributeurs de carburant indépendants un pouvoir d'acheteur semblable à celui des grandes chaînes de distribution, d'où une baisse des prix au bénéfice des consommateurs. Parallèlement, le risque était faible que le renforcement de la coordination ait un effet anticoncurrentiel, étant donné l'intensité de la concurrence entre les grands distributeurs dans le domaine de la distribution d'essence.

Le Président en vient à la contribution du Chili, qui note que des nouvelles fusions de chaînes de supermarchés risquent d'influer négativement sur la concurrence seulement dans les cas où cette stratégie a un effet permanent sur l'offre globale, du fait de la baisse de la production totale, de la hausse des prix ou de la réduction des investissements dans l'innovation et le développement de nouveaux produits. Le Président invite le Chili à commenter les éléments démontrant les effets négatifs du renforcement du pouvoir de l'acheteur engendrés par les fusions et les modalités de la solution transactionnelle mise en place avec les chaînes de supermarchés.

Un délégué du Chili fait observer que la tendance dans le pays a été de mettre l'accent sur les effets concurrentiels dus à l'exercice du pouvoir de l'acheteur et de moins insister sur la dépendance économique. Le délégué note qu'il n'y avait aucune preuve significative des effets négatifs du pouvoir de l'acheteur. Le Tribunal de la concurrence a préféré recenser les types d'effets négatifs correspondants et imposer aux deux grandes chaînes une obligation de notification préalable à toute nouvelle acquisition. Par ailleurs, un accord se traduisant par la mise en place d'un code de conduite destiné à régir les transactions avec les fournisseurs de taille modeste ou moyenne a été obtenu avec les deux chaînes.

Le Président passe au document soumis par le Royaume-Uni, où il est indiqué que le pouvoir de l'acheteur ne pose pas de problème, à moins de léser les consommateurs. Or, comme l'exercice de ce pouvoir entraîne d'ordinaire une baisse du prix des produits intermédiaires, il influe généralement de façon positive sur le bien-être des consommateurs. Toutefois, le Royaume-Uni recense trois situations dans lesquelles le pouvoir de négociation peut porter préjudice aux consommateurs : i) existence d'un monopsone ou d'un oligopsone ; ii) l'exercice du pouvoir de négociation conduit à un verrouillage du marché, produit des effets de vases communicants ou porte atteinte à l'incitation des fournisseurs en amont à investir et innover ; iii) le pouvoir de l'acheteur favorise la collusion en aval. Le Président invite le Royaume-Uni à présenter son analyse et ses conclusions concernant les effets de vases communicants et l'influence du pouvoir de l'acheteur sur les incitations des fournisseurs à la lumière de l'enquête qu'il vient de réaliser sur le secteur de l'alimentation.

Un délégué du Royaume-Uni fait d'abord observer qu'on se trouvait en présence d'un pouvoir de l'acheteur dans le secteur de l'alimentation, mais pas d'un effet de vases communicants modifiant les parts de marché. En revanche, tout portait à croire que le pouvoir de l'acheteur était mis en œuvre pour transférer des risques excessifs sur les fournisseurs.

En ce qui concerne le pouvoir de l'acheteur, la Commission de la concurrence a constaté une certaine dispersion des prix : en moyenne, les grands acheteurs payaient des prix moins élevés que leurs concurrents plus petits. Toutefois, on constatait que le recours à des grossistes ou à des groupes franchisés (groupements d'achat) permettait à certains petits distributeurs de s'aligner sur les prix de leurs concurrents de plus grande taille. Par ailleurs, la taille n'était en aucun cas le seul facteur explicatif de la structure des prix payés par les distributeurs. En particulier, d'autres facteurs déterminants des options extérieures devaient être pris en compte et on constatait qu'il était peut-être plus facile de changer de fournisseur en cas de faibles volumes que de volumes importants.

Le délégué explique ensuite que la conclusion selon laquelle l'exercice du pouvoir de l'acheteur n'était pas compatible avec l'existence d'un effet de vases communicants reposait sur : i) les réponses obtenues à des questionnaires montrant que seulement 7 % des fournisseurs étaient tout à fait d'accord avec le fait que la négociation de ristournes par les grands clients entraînait notamment une hausse des prix payés par les clients de taille modeste ; ii) l'absence de preuves manifestes d'une diminution du nombre des petits distributeurs, en particulier des commerces de proximité.

En ce qui concerne l'incitation des fournisseurs à investir et à innover, les travaux de la Commission de la concurrence portent non pas sur le niveau d'investissement en soi aux différents stades de la chaîne

verticale, mais plutôt sur les effets conjugués de l'exercice du pouvoir de l'acheteur, du caractère incomplet des contrats, d'un hold-up a posteriori et, dans certains cas, d'une mauvaise harmonisation des incitations dans la chaîne verticale. Pour ce qui est du caractère incomplet des contrats, nombre d'entre eux se résument à une lettre d'une page à peine entre fournisseurs et distributeurs, et les clauses font l'objet de renégociations et de modifications dans des proportions considérables, parfois même après la livraison des marchandises. Certaines renégociations a posteriori peuvent ne pas poser problème, mais on a des exemples de fournisseurs qui, ayant réalisé des investissements compte tenu de prix convenus par contrat, sont contraints rétrospectivement de revoir à la baisse leurs conditions. En outre, on constate une mauvaise harmonisation des incitations dans la chaîne verticale. En particulier, certains fabricants ou fournisseurs paient pour les pertes dues à la freinte ou aux dégradations subies en magasin, ainsi qu'aux vols in situ, le distributeur étant mieux à même de maîtriser tous ces problèmes. La Commission de la concurrence y voit la preuve d'un hold-up a posteriori : les distributeurs usent de leur pouvoir d'acheteur pour faire payer aux fournisseurs ce type de pertes qui ne leur sont absolument pas imputables.

Le Président note que le document soumis par la France est moins catégorique. Ce pays indique que l'effet du pouvoir de l'acheteur sur les incitations en amont est théoriquement ambigu et qu'il existe peu d'éléments empiriques pour résoudre cette ambiguïté. Le Président invite la France à définir les conditions dans lesquelles elle estime que le pouvoir de l'acheteur réduirait les investissements en amont, ainsi que les solutions à adopter lorsque c'est le cas.

Un délégué de la France déclare que les incitations à l'investissement en amont peuvent être liées à la structure du marché en amont et en aval. Si la concurrence est limitée en amont mais forte en aval, il est peu probable que le pouvoir de l'acheteur réduise l'investissement. Et même, il stimule probablement la concurrence et l'investissement en amont. Les marges des fournisseurs en amont seront fortes, ce qui incitera les fournisseurs à innover et leur donnera les moyens financiers de le faire. Si la concurrence est forte en amont et faible en aval, le pouvoir de l'acheteur peut être préjudiciable. Dans ce cas, les marges des producteurs peuvent être limitées et une contraction supplémentaire de ces marges peut se traduire par une réduction de la capacité d'investissement et de l'incitation concernant des fournisseurs en amont à investir. De plus, si la concurrence en aval est limitée, les distributeurs seront moins enclins à fournir de nouveaux produits.

Le délégué conclut en faisant remarquer qu'il pourrait être judicieux de veiller à ce que la structure du marché soit correcte en amont et en aval de façon que le pouvoir de l'acheteur ait plus d'effets positifs que d'effets négatifs sur les investissements. Par conséquent, il convient de prendre ou d'autoriser des mesures préventives qui favorisent la concurrence sur le marché en aval, tout en encourageant la constitution de groupements de fournisseurs ou d'autres formes adéquates de coordination entre les fournisseurs sur certains marchés où les producteurs sont de petite taille, la concurrence joue largement et les fournisseurs disposent de moyens financiers limités.

Le Président invite ensuite la Pologne à s'exprimer sur les pratiques contractuelles de la Caisse nationale d'assurance maladie, évoquées dans le document soumis par le pays, en ce qui concerne les marchés de services dentaires.

Un délégué de la Pologne fait observer que la Caisse nationale d'assurance maladie détient en vertu de la loi le monopole en matière de fourniture et constitue un partenaire commercial incontournable pour la plupart des prestataires de soins de santé. Les tarifs imposés par la Caisse sont bien inférieurs aux tarifs moyens des services dentaires, et d'ailleurs, la Caisse n'a pas intégré les coûts de la prestation de ces services dans le calcul des taux de remboursement. Selon l'autorité de la concurrence, l'exercice du pouvoir de l'acheteur non seulement nuit aux prestataires de services dentaires mais, à long terme, des prix inférieurs aux coûts porteront préjudice aux consommateurs dans la mesure où certains prestataires se retireront du marché.

Le Président s'intéresse ensuite au document soumis par la Corée, en notant qu'elle s'y penche sur le cas de trois grands magasins se partageant près de 80 % des parts de marché. Il invite la délégation coréenne à commenter les modalités de l'exercice du pouvoir de l'acheteur et le préjudice subi par les consommateurs.

Un délégué de la Corée explique que les grands magasins obligeaient leurs fournisseurs à communiquer des informations détaillées sur l'accès électronique aux systèmes d'achat des grands magasins concurrents. Rien ne prouvait directement qu'il y ait eu préjudice pour les consommateurs, mais on pouvait penser que l'accès à ces informations permettait aux grands magasins de surveiller leurs fournisseurs et d'engager des représailles contre ceux qui approvisionnaient leurs rivaux, des renseignements complets sur les prix pratiqués et les volumes vendus dans les grands magasins concurrents pouvant aisément favoriser la collusion.

Le document soumis par l'Indonésie traite du cas de Carrefour, dans lequel il est question d'une politique de « marge minimale ». Le Président invite l'Indonésie à expliquer quelle est la nature de la stratégie de marge minimale, en quoi elle constitue un abus de position dominante, comment la position dominante est établie et de quelle façon la stratégie de marge minimale influe sur la concurrence et les consommateurs.

Le délégué de l'Indonésie explique que les marges minimales sont imposées par une clause contractuelle qui interdit aux fournisseurs de vendre leurs produits aux concurrents de l'acheteur (ici, les concurrents de Carrefour) à un prix inférieur au prix appliqué à l'acheteur. En cas de non-respect de cette clause, les fournisseurs subissent une pénalité. Le délégué explique que l'instauration d'une marge minimale a eu pour effet d'exclure des distributeurs concurrents du marché.

Le Président convie ensuite l'Afrique du Sud à commenter une affaire, évoquée dans le document qu'elle a soumis, concernant des restrictions horizontales et verticales dans le domaine des produits laitiers.

Un délégué de l'Afrique du Sud fait remarquer qu'on se trouvait en présence de pratiques horizontales et verticales de la part d'entreprises de transformation de produits laitiers, ces pratiques semblant renforcer et maintenir le pouvoir de monopsone des transformateurs. Elles consistaient notamment en un partage des marchés et en contrats d'approvisionnement exclusif, se doublant d'un échange de renseignements, toutes ces pratiques visant semble-t-il à créer des marchés géographiquement confinés au plan régional et à préserver le pouvoir de monopsone des entreprises de transformation de produits laitiers dans les différentes régions. L'exercice du pouvoir de monopsone a conduit à l'éviction d'exploitants agricoles ; d'où une réaffectation de la terre à des usages moins productifs et une réduction de l'offre de lait liquide.

5. Débat de clôture

Le Président invite les professeurs Inderst et Church à formuler des observations sur la table ronde.

Le professeur Inderst met en évidence plusieurs problèmes qui se posent fréquemment et méritent un examen plus approfondi. Il note un renforcement de la conviction que l'exercice du pouvoir de monopsone est préjudiciable, ainsi qu'un soutien partiel en faveur de l'idée selon laquelle un pouvoir compensateur devrait jouer un rôle dans l'analyse des fusions. Il estime que la question de savoir si un pouvoir compensateur constitue toujours un bon substitut à un manque de concurrence en amont est très ouverte.

En ce qui concerne le pouvoir de négociation, les difficultés rencontrées pour déterminer le préjudice anticoncurrentiel dû à l'exercice de ce pouvoir tendent à démontrer la pertinence des erreurs de type I dans l'élaboration de mesures d'application. Le professeur Inderst fait néanmoins remarquer que les pays sont plus ou moins préoccupés par les faux positifs et le gel des ristournes selon leur expérience et leurs différences en termes de marché intérieur. Il note que le choix du critère de bien-être peut largement se

répercuter sur les mesures d'application. Aucun critère de bien-être du consommateur ne tient compte de l'inefficacité de la répartition des ressources sur les marchés en amont, lorsque les coûts de transport élevés donnent naissance à des marchés locaux et à des îlots de pouvoir de l'acheteur. Selon le professeur Inderst, les avantages qu'offrent un assouplissement des critères ou une meilleure prise en compte d'un large éventail de théories des pratiques anticoncurrentielles dépendent de la pondération affectée aux différents types d'erreurs et, finalement, des hypothèses concernant la capacité du marché de surmonter les obstacles à l'efficience dans un secteur particulier d'un pays donné.

Le professeur Church s'interroge sur l'issue d'un scénario hypothétique basé sur les faits de l'affaire *Weyerhaeuser*, mais au lieu des offres prédatrices pratiquées par *Weyerhaeuser*, il demande aux délégués de supposer que les deux seules scieries d'une région particulière ont proposé de fusionner. Le marché en aval est concurrentiel et le problème est que l'opération pourrait renforcer l'exercice du pouvoir de monopsone sur le marché des grumes de sciage. Il demande au Royaume-Uni de confirmer qu'il n'agirait pas en raison de l'absence de préjudice pour les consommateurs en aval et aux États-Unis de confirmer qu'ils le feraient, eu égard à l'inefficience allocative sur le marché en amont.

Un délégué du Royaume-Uni répond qu'il pourrait être enclin à agir en cas de problème de hold-up amenuisant les incitations à l'investissement et portant préjudice aux consommateurs à long terme, ce qui pourrait être le cas étant donné le délai entre la plantation et l'abattage des arbres. Toutefois, le Royaume-Uni appliquerait un seuil d'intervention relativement élevé.

Un délégué des États-Unis répond qu'il s'agit exactement du genre d'affaire dans laquelle son pays serait enclin à agir. L'élément fondamental est le préjudice allocatif en amont résultant de l'immobilité des ressources sur ce marché, et non la vitesse de croissance des arbres. L'économie de l'arboriculture rend l'affaire un tout petit peu plus intéressante et complexe, mais ces complications ne joueraient pas un rôle déterminant.

Le professeur Church répète que les États-Unis seraient préoccupés même en l'absence de préjudice en aval car il existe une possibilité de préjudice à l'égard des fournisseurs de produits intermédiaires. Il demande s'il est évident qu'aucun préjudice n'est subi en aval, concrètement, étant donné qu'un renforcement de l'exercice du pouvoir de monopsone équivaut à une augmentation du coût marginal de l'entreprise issue de la fusion sur le marché en aval, ce qui infléchirait la courbe de l'offre même si l'entreprise était preneuse de prix. En outre, s'il s'agit d'un fournisseur suffisamment important, les prix sur le marché en aval en subiront les effets, d'où un préjudice pour les consommateurs en aval.

Par ailleurs, le professeur Church indique que même si l'offre en aval est parfaitement élastique de la part d'autres régions, les consommateurs vont subir un préjudice, quand bien même le prix nominal en aval ne changerait pas, étant donné que l'exercice du pouvoir de monopsone impliquera la réaffectation de ressources. Des ressources très productives seront écartées de la production de grumes dans la région où s'exerce le pouvoir de monopsone et des ressources moins productives seront affectées à la production de grumes dans d'autres régions, de sorte que le prix réel change en aval. Le professeur Church affirme qu'il est inconcevable que le pouvoir de monopsone puisse s'exercer en amont sans influer sur les clients en aval.

Le délégué des États-Unis répond que de l'avis de son pays, les fournisseurs de grumes sont considérés comme des consommateurs et le fait qu'ils subissent un préjudice est suffisant. Il n'est pas nécessaire de déterminer exactement quels consommateurs sur quel marché subissent un préjudice.

Un délégué du Royaume-Uni répond que la difficulté liée à la non-détermination des consommateurs qui subissent un préjudice et de l'ampleur de celui-ci tient à ce qu'elle se traduira par une intervention excessive et un déséquilibre entre erreurs de type I et de type II. Pour chaque cas qui n'est pas pris en

compte en raison de l'incapacité à déterminer le préjudice en aval, il existe probablement de nombreux cas dont les consommateurs en aval tireront parti. Par conséquent, une attitude rigoriste dans les cas où les marchés en aval sont concurrentiels et, partant, les préjudices imputables au pouvoir de l'acheteur sont faibles, risque de nuire énormément au processus concurrentiel parce qu'on atténuera les incitations à la concurrence sur d'autres marchés en ayant un seuil d'intervention trop bas. De plus, même s'il y a une faible probabilité de préjudice, l'intervention n'est pas optimale dans la mesure où aucune autorité de la concurrence n'a les moyens d'intervenir dans chaque cas. Les interventions doivent être limitées aux cas où le préjudice concurrentiel est le plus important.

Le Président clôt le débat en notant que les récents éléments théoriques permettant de déterminer le préjudice potentiel découlant de l'exercice du pouvoir de négociation sont importants et intéressants. Toutefois, il faut pouvoir disposer d'éléments empiriques systématiques sur la fréquence des cas dans lesquels l'exercice du pouvoir de négociation nuirait aux consommateurs, faute de quoi il sera difficile d'établir des précédents, des présomptions et des critères d'application bien étayés.