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# Ex Post Assessment of European Competition Policy: Buyer power in concentration cases

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NHH



# Our paper

- Focus on the analysis of three landmark buyer power concentration cases from the late 90s and early 2000s
  - Two supermarkets
    - Kesko/Tuko – declared incompatible with the market
    - Carrefour/Promodès – compatible despite concerns
  - One cardboard and classic countervailing buyer power case
    - Enso/Stora
- We try to show how and why buyer power is assessed in mergers
  - Through these examples
  - Less than to dissect the decisions

# Buyer power in 2 mins...

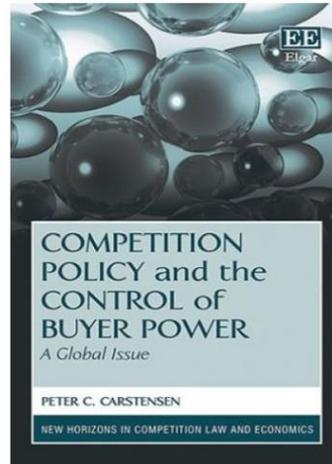
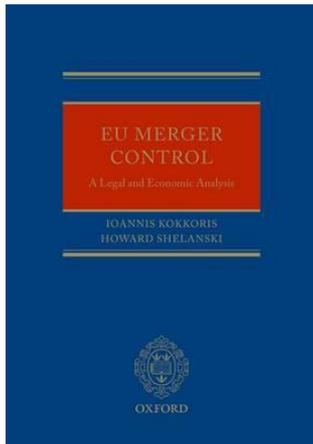
- Position of the purchaser with respect to the supplier of goods and services
  - Regarding terms of contract
  - Different factors influence
- It is a different form/side of market power
- Monopsony model
  - Sole purchaser faces an upstream market with perfect competition among suppliers
  - Implies a withholding effect
  - Mirror of monopoly
- Bargaining power
  - Jack will call it countervailing power
  - Agreement depends on characteristics of both parties
  - Supplier and the purchaser have an incentive to reach an agreement
    - To split surplus

# Buyer power issues in mergers

- Two ways
  - Theory of harm
    - Reduction of volume (withholding)
    - Reduction of choice
    - Foreclosure
      - Upstream and downstream
  - Countervailing power
    - As a defence
    - Prevents exercise of seller market power
    - Often invoked, rarely successful

# Where do we stand in buyer power ex post review?

- Very little done



BUYER POWER AND EXCLUSIONARY CONDUCT:  
SHOULD *BROOKE GROUP* SET THE STANDARDS  
FOR BUYER-INDUCED PRICE DISCRIMINATION  
AND PREDATORY BIDDING?

JOHN B. KIRKWOOD\*

THE WATERBED EFFECT:  
WHERE BUYING AND SELLING POWER  
COME TOGETHER

PAUL W. DOBSON\*  
ROMAN INDERST\*\*

April 2014

*European Competition Journal*

69

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BUYER POWER IN EUROPEAN UNION MERGER CONTROL

ARIEL EZRACHI AND MARIA IOANNIDOU\*

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# On to the cases!



# The Bad – Kesko/Tuko



- Case from 1996
- Declared incompatible with the internal market
  - ‘[t]he acquisition of Tuko by Kesko will create foreclosure effects for new entrants’
- Two food retailers in Finland
  - Kesko had acquired Tuko
- Both parts of buying alliances at the time
  - Reinforcing buyer power
- Concentration had been implemented before decision
  - Gun jumping too

# Three markets assessed

- Effects and relevance of buyer power upstream and downstream
  - Making its economic and legal analysis hard
- Example of the dualistic effect of buyer power (Herrera Anchustegui, 2017)
- A case in which buyer power **reinforces** seller market power & vice versa

# Relevant markets

- **Retail market for consumer goods**

*If the concentration had taken place, the 'K-block would account for at least 55% [...] of all sales of daily consumer goods in Finland'.*

- AKZO threshold reached
- Trebled the second largest competitor

- **Wholesale market for cash & carry (hotels and restaurants)**

- Customers were captive
- Hard for them to switch

- **Upstream market**

- Procurement of daily consumer goods

# Theories of harm

The 'main competitive concerns identified by the Commission concerns the **retail market**, which is the main market, in terms of turnover as well as [the] direct impact on Finnish consumers'.

- Clear **dominance** in the downstream market
  - Smaller rivals would have not constrained the merged entity
  - Significant entry barriers in the food retailing market
    - By having presence in the hyper stores segment
  - Finland being relatively isolated, hard to enter for new foreign firms
  - Loyalty schemes played a role too
  - And private labels

# Buyer power concerns

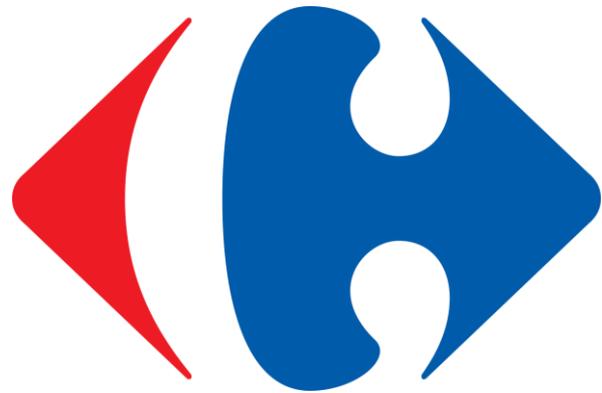
- In the upstream market
  - Not the main reason to block the merger
  - But buyer power also downstream
- Source of buyer power
  - Volume of purchases and the centralization
- Connected to exploitation of **dependent suppliers**
  - Merger would have given Kesko an extremely powerful negotiating position vis-à-vis the producers of daily consumer goods
- Majority of the suppliers **depended** 'on Kesko and Tuko for approximately 50–75% of their total sales in Finland'.
  - Dependence
  - Gate keeping

# Buyer power concerns

- Buyer power as **leverage**:
  - Kesko would have used the buyer power to the detriment of competitors as retailers in the downstream market to further weaken ‘the position of its competitors’ in the long term.
- **Private labels** granted some market power vis-à-vis downstream consumers
  - but also buyer market power
- Buyer power was ‘one of the most significant **barriers to foreign entry**’

# The Ugly – Carrefour/Promodès

- French case from 2000
  - Promodès had 8–13% market share
  - Carrefour about 12–17% market share
- Declared **compatible with the market**
- No dominance either upstream and downstream



# Theories of harm

- Buyer power acted in **upstream and downstream** market
  - Dualistic approach/effect
  - Reinforcing nature
- Downstream risks:
  - Price increases
  - Entry barriers and foreclosure effects vis-à-vis other food retailers
- Upstream risks
  - Exert pernicious buyer market power over providers of the merged entity
    - Exploited as being in a ‘de facto situation of “**economic dependence**”’.

# Theories of harm

- **Spiral effect**
  - buyer power upstream increases market concentration downstream
- The ***taux de menace***
  - Threat point or ability to exert abusive buyer power against suppliers
    - Economic dependence
    - Used also in the Rewe/Meinl
- This threat point was reached when a buyer represents **20 – 22%** of the supplier's turnover
  - Economic dependence
  - 22% comes from polls/inquiries – same in Rewe/Meinl
  - Akin to relative dominance
  - But no discussion on what type of abuses can be imposed
- Again, **private labels** as leverage

# The good – Enso/Stora

- **Countervailing buyer power case**
- Cardboard sector
  - Also in Finland!
- Parties wanted to merge into new firm
- Affecting different markets
  - Newsprint market
  - Magazine paper
  - Cardboard
    - Liquid and non-liquid



# Theories of harm

- All connected to **selling side**

‘the parties’ market share in liquid packaging board applications would be [between 50% and 70%],\* a position far ahead of the other players in the market’, and which were much smaller in comparison

- No clear theory of harm

- Just highlighting dominance
- Sufficient to be prohibited

- High entry barriers

- Little potential competition

# Buyer power to the rescue - CBP

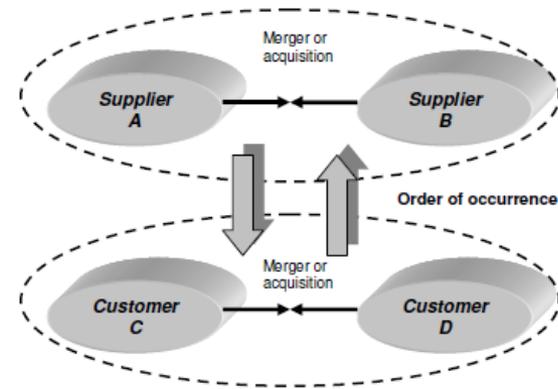
- Focused on a comparison approach
  - Needs to be **sufficient**
- Parties were mutually **interdependent**
  - Years of relations
  - Switching provides of liquid packaging board rare
- CBP came from
  - Proportion of sales represented by buyer key
    - Tetra Pak acquired more than 50% of its demand from Stora and Enso
  - Tetra Pak could also develop new capacity
    - Outside option (key)
- Buyer power benefits had also to be spilled over to smaller buyers
  - Enso/Stora would not have exerted market power to not be entirely dependent on Tetra Pak

# Review of empirical literature

- Ex-post review
- Determinants of EU merger decisions
- Effects of mergers on suppliers
- Merger waves and role of vertical links ('parallel M&A')

# Galbraith and Parallel M&A

‘Galbraith (1952) predicts that industry consolidation in an upstream industry leads to consolidation in a downstream industry to counteract the monopoly power created through the initial consolidation.’



*Oeberg & Holstroem (2006)*

*Ahern and Harford (2014)*

# Our research on EU data

- Sample of horizontal transactions between 1996 and 2020 in two sets of vertically related industries
  - Food & Beverage - Supermarket
  - Pulp & Paper - Packaging
- Filter on bidder (or acquiring subsidiary) and or target are headquartered in Europe
- Only transactions that lead to change of control (i.e. transaction takes ownership share to over 50%)

Industry		Number of mergers in dataset
<i>Industry pair</i> 'Food retailing'	Food and Beverage (upstream)	7,643
	Supermarket (downstream)	899
<i>Industry pair</i> 'Forestry and Paper'	Forestry and Paper—Pulp and Paper (upstream)	233
	Forestry and Paper—Packaging (downstream)	465

# Merger activity in each industry pair

Figure 0.1 Overview of number of transactions per quarter: Forestry and Paper

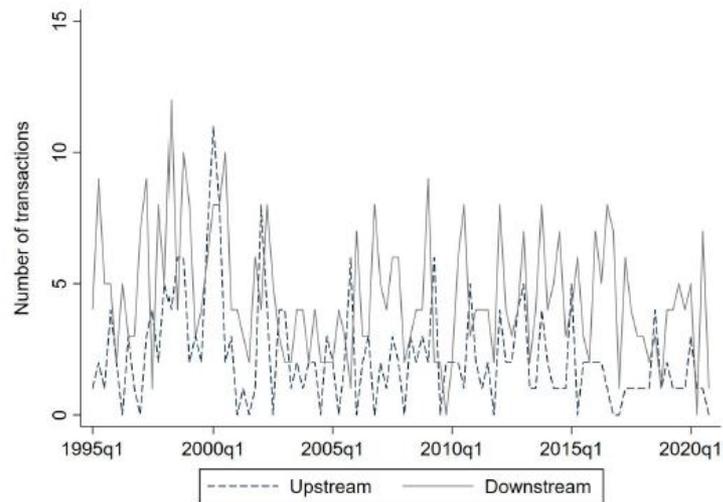
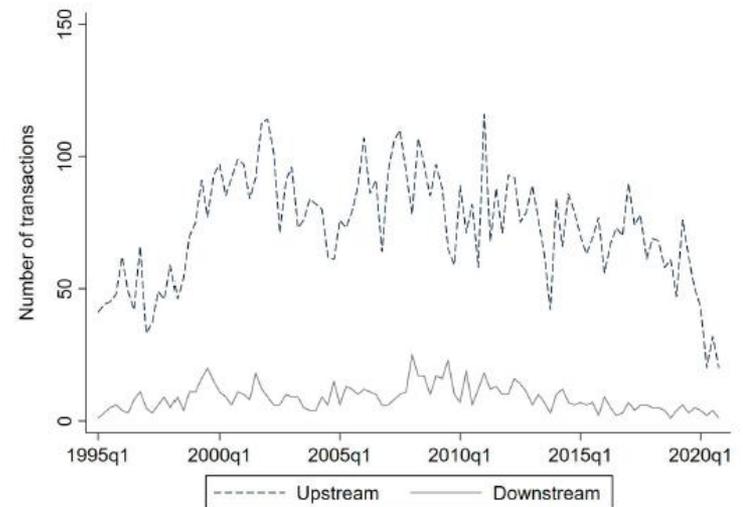


Figure 0.2 Overview of number of transactions per quarter: Food Retailing



# Results

## Results of Granger test for causality

Industry	Time interval	Lags	U granger causes D (p-value)	D granger causes U (p-value)
Supermarket / Food	Monthly	1	0%	0%
Supermarket / Food	Monthly	2	0%	0%
Supermarket / Food	Monthly	3	0%	0%
Supermarket / Food	Monthly	4	1%	2%
Supermarket / Food	Monthly	5	1%	19%
Supermarket / Food	Monthly	6	0%	0%
Paper / Packaging (update)	Monthly	1	0%	15%
Paper / Packaging (update)	Monthly	2	14%	4%
Paper / Packaging (update)	Monthly	3	17%	10%
Paper / Packaging (update)	Monthly	4	15%	7%
Paper / Packaging (update)	Monthly	5	0%	17%
Paper / Packaging (update)	Monthly	6	19%	32%
Supermarket / Food	Quarterly	1	1%	1%
Supermarket / Food	Quarterly	2	3%	7%
Supermarket / Food	Quarterly	3	8%	0%
Paper / Packaging (update)	Quarterly	1	0%	3%
Paper / Packaging (update)	Quarterly	2	2%	29%
Paper / Packaging (update)	Quarterly	3	85%	68%

P-values below or equal to 1%, 5% and 10% indicate significance at the 1% level, 5% level and 10% level, respectively.

# Buyer power as self-correcting harm?

- Seller power as opposed to buyer power appears clear focus of merger control in horizontal mergers
  - Partial foreclosure theory of harm (more) aligned with bargaining power model is applied in vertical mergers
- Firms appear to actively consider their bargaining position in response to upstream or downstream mergers
- Commission work in food retailing in early 2000's and more recently in digital based on concerns of market power versus suppliers
- Many Member States have additional status dealing with 'relative market power'

# Beyond ex post assessment – relative market power

- Buyer power is rare in competition law
  - Few cases
  - Not so much research
- Yet, buyer power is very common in one sector
  - Food retailing
  - imposition of exploitative or unfair purchasing practices
    - By supermarkets
    - Food distributors
  - Common in Europe
    - Also in the US – see contributions done by Carstensen, for example

# Beyond ex post assessment – relative market power

- Legislator has left antitrust to a side
- Yet does not leave this unaddressed
  - Firstly, at the national level
    - Unfair competition acts
    - Relative dominance provisions
    - Special dominance provisions in competition law
  - But now at the EU level
- Unfair Trading Practices in the Agricultural and Food Supply Chain

# Unfair Trading Practices in the Food Supply Chain

- Adopted in 2019
- To be transposed before April 2021
- Prohibits practices & subjects others to written agreement
  - Black and grey lists
- Focuses on fairness
- It is not an antitrust instrument
- Does it go too far?
  - No, not that much
    - Most conducts are a contractual breach anyway
  - But implementation could

# Unfair Trading Practices in the Food Supply Chain

- Influence of the mergers in the Directive?
  - Hard to say
  - But follow a same theme
- In both we find concerns about *suppliers'* markets
  - With some discussion about passing on of efficiencies
  - Focus on dependence
    - Threat point
  - But the Directive goes further in protecting supplier welfare
- Both touch upon the gate-keeping issue
  - Now revived again in digital markets
    - Also a proposal anchored on fairness

# Stay in touch!



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