POLICY ROUNDTABLES

Buying Power of Multiproduct Retailers

1998

Introduction

The OECD Competition Committee debated buying power of multiproduct retailers in October 1998. This document includes an executive summary, an analytical note by Mr. Gary Hewitt for the OECD and submissions from Argentina, Australia, Canada, the Czech Republic, Denmark, the European Commission, Finland, France, Germany, Italy, Japan, Korea, Mexico, Portugal, Spain, Sweden, the United Kingdom, the United States and BIAC, as well as an aide-memoire of the discussion.

Overview

Many OECD countries' competition agencies have been under pressure to take action against the exercise of buyer power by large multiproduct retailers. In several countries, such pressure has been accompanied by the adoption of legal provisions designed to counter abuses of "economic dependence" or to strengthen prohibitions attaching to price discrimination and loss leading. Although there may be valid efficiency justifications for prohibiting the exercise of buyer power by multiproduct retailers, there are also significant risks in doing so. Ill-advised enforcement could amount to protecting inefficient distributors at the expense of consumers.

This kind of buyer power, which is extensively discussed in the analytical note, is quite different from classic monopsony power to push prices below competitive levels by reducing purchases. Instead, the focus here is on what might more accurately be described as negotiating power, particularly in situations where upstream suppliers have market power. Profit maximising distributors would try to reduce their suppliers' rents. Where distribution is competitive, multiproduct retailers would use negotiating power to reduce those rents and pass them on to consumers. As long as distribution is sufficiently competitive, exercise of this kind of multiproduct retailer "buyer power" will tend to benefit consumers.

Related Topics

Resale below Cost (2005)
Predatory Foreclosure (2005)
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Resale Price Maintenance (1997)
Competition Policy and Vertical Restraints – Franchising Agreements (1994)

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BUYING POWER OF MULTIPRODUCT RETAILERS

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FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Buying Power of Multiproduct Retailers which was held by the Committee on Competition Law and Policy in October 1998.

This compilation which is one of several published in a series entitled “Competition Policy Roundtables” is issued to bring information on this topic to the attention of a wider audience.

PRÉFACE

Ce document rassemble la documentation, dans la langue d’origine dans laquelle elle a été soumise, relative à une table ronde sur la puissance d'achat de la distribution multiproduits. Cette table ronde s’est tenue en octobre 1998 dans le cadre de la réunion du Comité du droit et de la politique de la concurrence.

Cette compilation qui fait partie de la série intitulée “Les tables rondes sur la politique de la concurrence” est diffusée pour porter à la connaissance d’un large public les éléments d’information qui ont été réunis à cette occasion.

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EXECUTIVE SUMMARY

by the Secretariat

Considering the discussion at the roundtable, the background paper, and delegate submissions, the following key points emerge:

- *The last twenty years have seen momentous changes in retail distribution including significant increases in concentration and increased reliance, especially in the grocery sector, on private (i.e. retailer owned) labels. It may no longer be true to regard retailers as basically competitive distributors of consumer goods.*

The developments referred to have arisen from changes in consumer shopping habits, greater application of computer technology to retailing, and enhanced marketing capabilities of large scale multi-product retailers. In at least seven countries, the top five grocers now account for more than 60% of retail sales. As for private label goods, although there is considerable variation across countries and sectors, these are certainly growing in importance. In the combined food, household and clothes product sector, the market shares (by value) accounted for by private labels are close to 40% in a few countries and appear to be on the increase in most countries. Instead of remaining simple channels serving up-stream suppliers, large multi-product retailers ("retailers") are increasingly becoming serious competitors of those suppliers.

- *Competition agencies are sometimes asked to deal with the alleged ill-effects of retailers being able to affect the terms on which they buy goods (i.e. exert buyer power). Although such buyer power clearly can have a negative effect on suppliers, its impact on economic welfare is ambiguous*.

In the simplest case where both suppliers and retailers have little or no market power, the exercise of buyer power is associated with reductions in purchase volumes, but not with total amounts sold to consumers (i.e. unaffected suppliers increase their outputs). Economic welfare is reduced because of an inefficient use of productive resources. Those inefficiencies will be exacerbated and supplemented with losses to consumers if the retailers exercising buyer power also have some power to set prices in retail markets. The significance of all these losses, however, could be minuscule if the long run supply curves in affected upstream industries are sufficiently price responsive, i.e. sufficiently price elastic. There is evidence that at least in manufacturing industries long run industry supply curves are indeed highly elastic.

In the more complex case where suppliers enjoy some market power and are initially making supracompetitive profits, buyer power takes a more puzzling and potentially significant form. In this setting, retailers may be able to obtain lower prices despite actually increasing their purchase volumes. The likelihood of this occurring is greater the more competitive are retail markets. Where buyer power is associated with increases in amounts purchased, it will be associated with increases in economic welfare benefiting consumers.

- *Large multi-product retailers could enjoy substantial buyer power despite having retail market shares and consequent shares of manufacturer sales falling well below levels most countries would regard as necessary to constitute a (singl- firm) dominant position on either the selling or buying side.*

Because of significant economies of scope in shopping, many consumers prefer infrequent, one-stop shopping. (The strength of this phenomenon could vary from country to country depending on a host of factors affecting the costs consumers incur in multiplying their shopping trips.) If consumers preferring fewer, one-stop shopping trips find that their primary store is no longer carrying a specific good, they may be more willing to substitute a similar good than eventually to change stores to find the missing product. Where a sufficient number of consumers display that behaviour, the result will be significant buyer power for retailers despite their having market shares well below traditional dominance levels.

- *In the short run, buyer power should leave consumers unaffected or improve their welfare as long as retailing is sufficiently competitive. In the long run, things are not so clear. This is primarily because buyer power could reduce competition at the retail level.*

There is a reasonable probability that the exercise of buyer power will result in persistent discrimination (i.e. non-cost justified differences in treatment) across retail buyers. That in turn could insulate larger retailers (i.e. those most likely to have the greatest buyer power) from pressure by smaller, more efficient rivals. This is especially likely to cause problems for competition when powerful retailers directly interfere in relationships between suppliers and rival retailers. The roundtable discussion touched on two such cases, and also featured two more instances where the exercise of buyer power more directly inhibited horizontal competition.

- *Countries concerned about buyer power should use merger review to attack its roots, i.e. to maintain sufficient competition both upstream and downstream.*

Attention to buyer power may be somewhat misplaced. Several cases discussed in the roundtable featured significant seller power in one or more markets. Were such power effectively reduced, buyer power would also lose much of its significance. Thus, vigorous merger enforcement is a key to the control of buyer power. Similarly, the elimination of laws restricting the entry or expansion of large scale stores would help to reduce problems associated with buyer power.

One obstacle to tougher merger enforcement in the retail sector is overly broad market definition as required by some court decisions. There are reasons to believe that pricing by large scale retailers is not constrained by small scale competitors, as proven in one recent merger case by evidence on the pricing behaviour of the large scale retailers. Competition authorities should obtain and use such evidence wherever possible.

- *In addition to strengthening merger review, countries could respond to possible competitive threats of buyer power by judicious application of laws against discrimination, horizontal agreements, and resale price maintenance. Procedural reforms could also be made to encourage complaints concerning potentially anticompetitive uses of buyer power.*

Prohibitions on discriminatory treatment are a potentially potent weapon against anticompetitive use of buyer power. They require, however, careful application because price discrimination, including that based on the exercise of buyer power, can increase economic welfare if it effectively destabilises supplier cartels or otherwise increases output.

In many countries, price discrimination prohibitions are included within the abuse of dominance provisions. That approach has an important advantage, namely the need to establish a dominant position

makes it unlikely that pro-competitive price discrimination will be prohibited. Unfortunately, for the same reason, it will also be more difficult to attack anticompetitive price discrimination within an abuse of dominance framework. The buyer's market share could often fall below levels at which, in some countries' competition laws, dominance can be presumed. This problem could be somewhat less in countries which prohibit abuses of collective as well as single-firm dominant positions.

Horizontal agreements are another area where buyer power concerns could arise. Sensitive application of competition law to horizontal agreements is required in order to permit smaller retailers to pool their purchases so as to match the buyer power of larger competitors. Such groupings could presumably reduce or even eliminate the incidence of inefficient discrimination in supplier treatment of competing retailers.

There is one more area where evolving relations between suppliers and retailers may necessitate rethinking enforcement policy. This has to do with resale price maintenance. Due to increased reliance on private branding, retailers are increasingly both customers and competitors in relation to their suppliers. Thus, it would make sense to allow manufacturers to cap the price that retailers can charge on goods purchased from them. This is an area where a case by case, rule of reason approach would be appropriate.

Finally, there is a procedural reform which could have considerable practical importance in making more efficient use of existing antitrust tools to deal with buyer power. Steps could be taken to protect complainants who are naturally reluctant to risk the wrath of their most important customers. This is not to say that all complaints are valid, but increased awareness of what is happening in the marketplace should lead to better enforcement of competition laws.

- *Trying to reduce buyer power in ways making either retailing or manufacturing less competitive are unlikely to be of much long term assistance to affected parties, and present considerable risks of harming consumer welfare.*

Some measures to control buyer power might do more harm than good in terms of overall economic efficiency. Laws which inhibit the opening or expansion of new large scale retailers, reduce the use of price competition (through restrictions for example on loss leading), or make it more difficult for retailers to change suppliers tend to reduce competition to the detriment of consumers while offering little or no long term relief to threatened small stores and manufacturers. The dangers inherent in laws restricting competition are increased when *per se* prohibitions are used. A number of delegations emphasised that protecting competitors is not equivalent to protecting competition. Focusing on competition and consumer welfare tends to clarify the analysis and at the same time puts buyer power into proper focus.

- *Laws taking direct aim at buyer power, such as prohibitions on abuse of economic dependence, have not been very successful and tend to be reinforced with per se prohibitions which could reduce retail competition and harm consumers.*

Supplementing laws on abuse of dominance with provisions taking direct aim at abuse of economic dependence is problematical. Despite doing away with the need to establish that powerful buyers have dominant positions, prohibitions of abuse of economic dependence have resulted in few successful cases against powerful buyers. It remains difficult to prove that an affected supplier actually lacks an equivalent alternative to dealing with an accused retailer. Disappointment with the new prohibitions has sometimes led to still more restrictive laws being passed, such as prohibitions on the use of certain contractual terms. This attack on symptoms rather than causes could lead to more and more detailed regulation of contractual relations. Blocking certain exercises of buyer power could simply stimulate a search for new ways to exert it.

SYNTHÈSE

par le Secrétariat

A la lumière des travaux de la table ronde, du document de référence et des contributions des délégués, il ressort les points suivants :

- *Le secteur de la distribution a connu d'importants bouleversements ces vingt dernières années. Citons notamment la grande vague de concentrations et le rôle croissant des marques de distributeur, particulièrement dans le domaine de l'alimentation. L'ère où la grande distribution consistait essentiellement dans la distribution concurrentielle de biens de consommation pourrait bien être révolue.*

Les évolutions en question ont été possibles grâce à des changements dans les habitudes de consommation, à l'utilisation croissante de l'informatique dans l'activité de distribution et à l'efficacité de commercialisation accrue dont bénéficient les grands distributeurs diversifiés. Dans sept pays au moins, les cinq plus grands distributeurs d'alimentation totalisent plus de 60 pour cent des ventes au détail. La performance des marques de distributeurs varie considérablement selon les pays et les secteurs, mais dans l'ensemble elles gagnent du terrain. La part de marché cumulée (en valeur) des marques de distributeurs dans les secteurs alimentation, équipements ménagers et habillement avoisine 40 pour cent dans quelques pays et paraît en progression dans la plupart des pays. La grande distribution diversifiée a ainsi largement dépassé le stade du simple canal de transmission vers le consommateur et se présente de plus en plus comme un concurrent des producteurs.

- *Il arrive que les autorités de la concurrence soient appelées à intervenir pour corriger les effets considérés comme néfastes de la capacité des grands distributeurs à peser sur les conditions de leurs achats (c'est-à-dire à faire usage de leur puissance d'achat). Certes, cette puissance d'achat peut indéniablement être un facteur néfaste pour les fournisseurs, mais son impact sur le bien-être économique est ambigu.*

Dans le cas de figure le plus simple, celui où fournisseurs et distributeurs n'ont pratiquement pas de pouvoir de marché, l'exercice de la puissance d'achat s'accompagne d'une diminution des volumes achetés au fournisseur, mais non d'une réduction des volumes totaux vendus aux consommateurs (car dans ce cas, les fournisseurs non pénalisés accroissent leur production). Le bien-être économique est moindre du fait d'une utilisation inefficiente de ressources productives. A ce gaspillage viendra s'ajouter le préjudice causé aux consommateurs si les distributeurs qui font usage de leur puissance d'achat peuvent également influer sur les prix du marché de la distribution. Toutes ces pertes pourraient toutefois être minimes si les courbes à long terme de l'offre des fournisseurs sont suffisamment sensibles au prix, c'est-à-dire si leur élasticité par rapport au prix est suffisante. Or, on sait que, dans les industries manufacturières, du moins, les courbes d'offre à long terme sont extrêmement élastiques.

Dans le cas plus complexe où les fournisseurs bénéficient d'un certain pouvoir sur le marché et réalisent au départ des superbénéfices, la puissance d'achat revêt une forme plus surprenante et potentiellement plus significative. Les distributeurs peuvent alors obtenir des prix plus bas sans accroître le volume de leurs achats. Une telle éventualité est d'autant plus probable que le marché de la distribution est

plus concurrentiel. Dès lors que la puissance d'achat entraîne une augmentation des volumes achetés, elle bénéficie au bien-être économique des consommateurs.

- *Les gros distributeurs diversifiés pourraient jouir d'une puissance d'achat considérable bien que leur part du marché de la distribution et leur part corrélative des ventes des producteurs soient bien inférieures à ce qui, dans la plupart des pays, est considéré comme nécessaire pour constituer une (entreprise unique en) position dominante, que ce soit côté offre ou côté demande.*

Beaucoup de consommateurs, pour optimiser l'efficacité de leurs déplacements, préfèrent faire leurs courses moins souvent et sur un seul point de vente (l'ampleur de ce phénomène varie d'un pays à l'autre en fonction d'une gamme de facteurs affectant les coûts encourus par les consommateurs en multipliant les déplacements). Si un consommateur préférant les achats moins fréquents et sur un seul point de vente constate qu'un produit n'est plus référencé dans sa grande surface habituelle, il aura tendance à y substituer un produit comparable plutôt que de changer de grande surface pour se procurer le produit manquant. Lorsqu'un certain nombre de consommateurs adoptent ce comportement, les distributeurs en retirent une puissance d'achat considérable, même si leurs parts de marché sont très inférieures au niveau normal de domination du marché.

- *A court terme, la puissance d'achat devrait avoir une incidence neutre ou favorable sur le bien-être des consommateurs, à condition que la distribution soit suffisamment concurrentielle. A long terme, en revanche, les choses ne sont pas aussi claires. En effet, la puissance d'achat pourrait restreindre la concurrence entre distributeurs.*

On peut prévoir que l'exercice de la puissance d'achat se traduira par une discrimination persistante (c'est-à-dire par des différences de traitement non justifiées par les prix) entre les acheteurs distributeurs. Cette situation pourrait abriter les plus gros distributeurs (qui bénéficient de la plus grande puissance d'achat) des pressions de rivaux plus petits et plus efficients. Cela risque particulièrement de nuire à la concurrence si de puissants distributeurs interviennent dans les relations entre les fournisseurs et les distributeurs concurrents. Deux exemples de cette situation ont été évoqués lors de la table ronde, de même que deux cas où l'exercice de la puissance d'achat entravait plus directement la concurrence horizontale.

- *Les pays dans lesquels la puissance d'achat est un sujet de préoccupation peuvent recourir à l'examen des fusions pour s'attaquer aux racines du mal, c'est-à-dire assurer un niveau de concurrence suffisant, tant en amont qu'en aval.*

Il est peut-être inopportun de se focaliser sur la puissance d'achat. Plusieurs des cas évoqués lors de la table ronde faisaient intervenir une forte puissance de vente sur un ou plusieurs marchés. Si on parvenait à réduire notablement cette puissance de vente, la puissance d'achat ne constituerait plus un problème majeur. Ainsi, le contrôle rigoureux des fusions est un élément clé de la limitation de la puissance d'achat. De même, la suppression des lois ayant pour effet de restreindre l'implantation ou l'expansion des grandes surfaces contribuerait à atténuer les problèmes associés à la puissance d'achat.

Un contrôle plus rigoureux des fusions dans le secteur de la distribution se heurte à un obstacle : celui d'une définition trop large du marché de la distribution dans certaines décisions de justice. Il est permis de penser que la politique de prix des grands distributeurs n'est pas contrariée par l'action de leurs concurrents plus petits, comme en témoignent les éléments de preuves concernant la politique de prix des grands distributeurs qui ont pu être recueillis à l'occasion d'une affaire récente de fusion. Il faudrait que les autorités de la concurrence se procurent et utilisent ces éléments de preuve chaque fois que possible.

- *Outre le renforcement de l'examen des fusions, les pays pourraient lutter contre la menace que la puissance d'achat peut représenter pour la concurrence en appliquant à bon escient les lois visant la discrimination, les accords horizontaux et les prix imposés . Des réformes de procédures pourraient aussi être envisagées afin d'encourager les plaintes concernant une utilisation anticoncurrentielle de la puissance d'achat.*

L'interdiction des traitements discriminatoires peut être une arme efficace contre l'usage anti-concurrentiel de la puissance d'achat. Son application est toutefois délicate, car la discrimination sur les prix peut, notamment lorsqu'elle repose sur l'exercice de la puissance d'achat, accroître le bien-être économique si elle a pour effet de déstabiliser les ententes entre fournisseurs ou d'augmenter autrement la production.

Dans de nombreux pays, l'interdiction de la discrimination sur les prix est incluse dans les dispositions concernant l'abus de position dominante. Cette démarche présente un avantage de taille : la nécessité d'établir l'existence d'une position dominante rend très improbable l'interdiction de la discrimination sur les prix lorsqu'elle a un caractère proconcurrentiel. Hélas, pour la même raison, il sera aussi plus difficile d'attaquer les cas de discrimination anticoncurrentielle sur les prix dans le cadre d'un abus de position dominante. La part de marché de l'acheteur peut souvent être inférieure aux niveaux auxquels, dans le droit de la concurrence de certains pays, il y a présomption de position dominante. Ce problème pourrait être moindre dans les pays qui interdisent les abus de position dominante d'entreprises collectives comme d'entreprises uniques.

Les accords horizontaux constituent un autre domaine dans lequel les problèmes de puissance d'achat peuvent se poser. Il convient d'appliquer le droit de la concurrence avec discernement pour permettre aux petits distributeurs de grouper leurs achats face à la puissance d'achat de leurs concurrents de plus grande taille. On peut penser que de tels groupements atténuent, voire supprimeront l'incidence d'une discrimination inefficiente dans le traitement par les fournisseurs des distributeurs concurrents.

Il existe un autre aspect pour lequel l'évolution des relations entre fournisseurs et distributeurs peut nécessiter de repenser l'application de la législation. Il s'agit des prix imposés. Du fait de l'importance croissante des marques de distributeurs, les distributeurs tendent à devenir à la fois clients et concurrents de leurs fournisseurs. Il serait donc logique d'autoriser les producteurs à plafonner le prix que les distributeurs peuvent pratiquer pour les produits qui leur ont été achetés. Dans ce domaine, une approche au cas par cas serait indiquée.

Enfin, une réforme des procédures pourrait avoir une importance concrète considérable en facilitant l'usage des outils antitrust dans leur application à la puissance d'achat. Certaines mesures pourraient être prises pour protéger les plaignants contre l'ire de leurs principaux clients. Cela ne signifie pas que toutes les plaintes soient fondées, mais une prise de conscience du fonctionnement du marché devrait permettre une meilleure application du droit de la concurrence.

- *La lutte contre la puissance d'achat par des moyens freinant la concurrence, soit au niveau de la distribution soit au niveau de la production, n'a guère de chances d'être bénéfique pour les acteurs affectés et présente des risques considérables pour le bien-être des consommateurs.*

Certaines mesures de lutte contre la puissance d'achat sont susceptibles d'être plus néfastes qu'utiles en termes d'efficience économique globale. Les lois interdisant l'ouverture ou l'agrandissement de grandes surfaces, limitant le jeu de la concurrence sur les prix (par exemple par des restrictions sur les produits d'appel) ou rendant plus difficile pour les distributeurs un changement de fournisseur tendent à entraver la concurrence sans guère protéger à long terme le petit commerce et les petits producteurs. Les dangers inhérents aux lois restreignant la concurrence sont encore aggravés lorsqu'on s'appuie sur un

régime d'interdiction automatique. Un certain nombre de délégations l'ont souligné : protéger les concurrents n'équivaut pas à protéger la concurrence. S'attacher à la concurrence et au bien-être des consommateurs tend à clarifier l'analyse tout en plaçant la puissance d'achat dans la perspective appropriée.

- *Les lois visant directement la puissance d'achat, telles que les interdictions d'abus de dépendance économique, n'ont pas donné les résultats escomptés et tendent à être renforcées par des interdictions automatiques qui risquent d'entraver la concurrence dans la distribution et de porter préjudice aux consommateurs.*

Il est délicat de compléter les lois relatives à l'abus de position dominante des dispositions visant directement l'abus de dépendance économique. Bien que cette démarche supprime la nécessité d'établir que les acheteurs sont en position dominante, l'interdiction de l'abus de dépendance économique n'a que rarement permis d'incriminer les acheteurs en situation de puissance d'achat. Il demeure difficile de démontrer qu'un fournisseur plaignant n'a pas d'autre choix équivalent que de traiter avec un distributeur incriminé. La déception causée par l'inefficacité des nouvelles interdictions a souvent conduit à l'adoption de lois encore plus restrictives, comme l'interdiction de certaines dispositions contractuelles. En s'attaquant ainsi aux symptômes et non aux causes, on s'achemine vers une réglementation de plus en plus détaillée des relations contractuelles. L'interdiction de certains modes d'exercice de la puissance d'achat pourrait ne faire que stimuler la recherche de nouvelles manières de l'exercer.

BACKGROUND PAPER

by the Secretariat

1. Introduction

If there ever was a time when manufacturers, especially those with strong brands, could regard retailers as transparent windows onto the marketplace or suppliers of complementary services, that time seems long past. Large scale multiproduct retailers have now evolved well beyond being mere undifferentiated channels to the consumer. Instead, they are looking more and more like competitors for manufacturers, especially those offering weaker brands. Corstjens and Corstjens (1995, 5) have described the change as follows:

> ...Modern retailers are not at all transparent to the manufacturer and they are making efforts to become even more opaque. They have woken up to the value of their contact with the consumer and the importance of the marketing variables (price, display, promotions) under their control. As they begin to manipulate these marketing variables to further their own objectives, they construct an obstacle between the manufacturers and the end consumer, about as welcome as a row of high-rise hotels between the manufacturer's villa and the beach.

There is a growing list of complaints that competition agencies are hearing concerning the alleged abuse of retail buyer power, including things like "unjustified" discounts, demands for help against rival retailers, loss-leading, and shelf allowances/slotting fees/listing fees. Some manufacturers say they are being forced to cave in to retailer demands because they fear being delisted or finding their products relegated to the lowest of the low shelves in important retail chains. It is not immediately apparent on what such buyer power actually rests and, more importantly, whether competition agencies should welcome or seek to suppress it. The economics literature is also not much help because as Steiner (1991, 59) noted:

> By and large economics has not seriously tried to understand the process by which goods move from manufacturers through the wholesale/retail channels of distribution to household consumers. Worse still, the discipline has tended to ignore these downstream markets entirely by the tacit assumption that they are inert and perfectly competitive, so their omission from economic models does not bias the results.

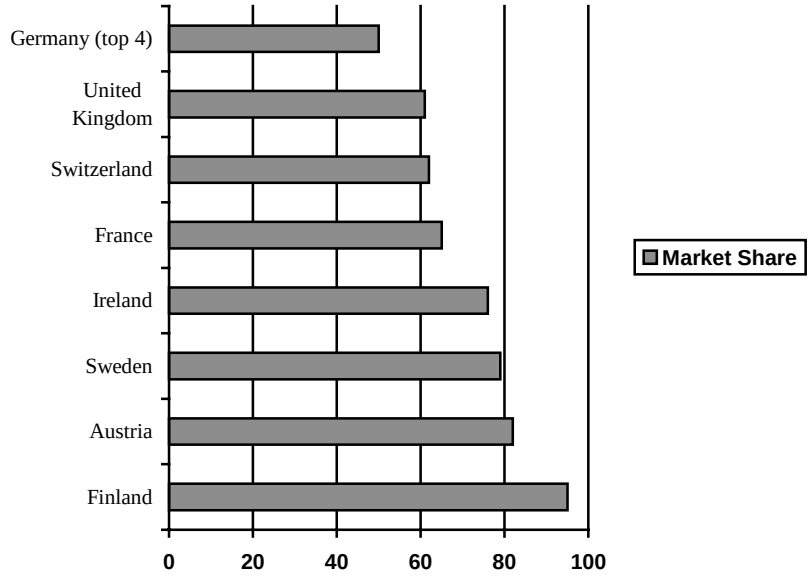
This paper begins to fill part of the void by providing a preliminary analysis of buyer power ostensibly wielded by large scale multiproduct retailers. Such buyer power encompasses quite a bit more than classic monopsony power, so the paper will necessarily address issues involving rather complex economic welfare effects.

1.1 Increasing Retail Concentration

Though economists have not provided a great deal in the way of guidance concerning broadly defined retail buyer power, that does not mean that certain significant changes in retailing have gone unnoticed. The two most important are a general growth in retail concentration within national markets and a significant increase in the share of retail sales accounted for by private labels (i.e. brands owned and usually exclusively distributed by one or more retailers).

On the concentration front, in several OECD Members the top five supermarket retailers now account for over 50 percent of the groceries market:[1]

Market Share Accounted for by top 5 Retailers



Cotterill (1997, 128) noted that retail concentration appears to be considerably lower in the United States, where the top 20 supermarket retailers account for only 38 percent of sales. He notes, however, that if the US. is broken down into smaller geographic areas, "...it is not difficult to produce regional seller concentration ratios that are as high or even higher than those that exist in European countries including the UK."[2] To a certain degree, the above chart understates the concentration picture. This is because even the largest retailers sometimes belong to still bigger, mostly international purchasing groups.[3]

There are probably many causes of these rather high levels of retail sales concentration, but the following are certainly prominent among them:

1. changes in consumer shopping habits, linked to demographic, transportation, and income changes, which tend to favour "one-stop", weekly shopping especially for fast moving consumer goods;

2. changes in application of computer technology to retailing (especially point of sale scanning) which tend to create or reinforce economies of scale in retailing, open the way to major stock management savings (including direct dealing with manufacturers), and grant retailers unique access to valuable consumer spending data (in connection with customer loyalty rebates); and

3. changes in marketing sophistication and capability of large retailers, i.e. greater ability and willingness to sell private brands.

Aside from clarifying that some retailers have grown into giant enterprises, not much can be directly deduced about buyer power from high retail concentration ratios. At a minimum, they need to be interpreted through comparison with concentration levels prevailing in manufacturing markets.

Regarding private brands, in some OECD Members their share of retail sales has reached levels high enough to warrant re-thinking the idea that large scale retailers are merely or mainly channels for manufacturers. Cullen and Whelan (1997, 910), relying on data (presumably for 1994) from the Oxford Institute of Retail Management, reported combined food, household and clothes product market shares (by value) accounted for by private labels in fifteen European countries. At the high end were: Switzerland (41.2 percent); UK. (37.1 percent); Belgium (19.8 percent); France (16.4 percent); and Netherlands (16.3 percent). At the low end were Ireland, Greece and Portugal all with less than four percent.[4] Tat Keh and Park (1997, 842) noted that although private brands only accounted for 15.2 percent of food dollar sales in the US. in 1996, that share was growing considerably faster than even the share going to the leading manufacturers.[5]

A subsequent section will take an in-depth look at the private branding phenomenon. Suffice to say at this point that there are grounds for believing that private branding could increase buyer power, but that is far from being the only reason for their rapid growth in recent years.

In addition to being implicated in high and growing retail concentrations and increased importance of private brands, some experts believe that growing buyer power has something to do with increased manufacturer reliance on trade promotion (i.e. essentially subsidising retailer promotion) at the expense of direct manufacturer advertising.[6] An alternative explanation for this begins with Bell et al. (1997, 856) observing that consumers are more and more making their brand choice decisions while in the store. If this is true, retailer promotional activities have probably gained in efficiency compared with manufacturer advertising. Another somewhat debatable piece of evidence for increased buyer power is the increased pressure that "second tier" brands are experiencing.[7]

1.2 Empirical Evidence On Buyer Power

While conventional wisdom among retailing experts appears to be that buyer power is growing and somewhat worrying, two recent empirical studies have cast some doubt on such views. Both attempted to test the hypothesis that if relative power has shifted from manufacturers to retailers, then one might expect manufacturing profitability to have declined relative to retail profitability. Using data for US. food manufacturers and retailers over the years 1972-1990, Farris and Ailawadi (1992, 354) instead found:

> The profitability indices, do not show a relative increase for retailers. On the contrary, if any change in relative profitability is present, it seems to favour the manufacturers. Even gross margins, which have, on average, been increasing for retailers, have increased much more rapidly for manufacturers....

It is worth noting, however, that these divergent trends were apparently due to an increase in profitability among the larger manufacturers. For the smaller ones, the profit trend has actually been negative.

Farris and Ailawadi (1992, 361) suggested three possible explanations for their findings: power has not shifted in favour of retailers; it has shifted but retailers have been unable to capitalise on it "...because of a combination of managerial ineptness, market constraints, and ferocity of inter-retailer competition....", or "[t]he whole concept of measuring power of manufacturers relative to retailers may be in need of reconsideration."

The Farris and Ailawadi findings have been supported by a more recent and thorough study, again focused on US. food manufacturing and retailing, concentrating on the 1970s and 1980s. Messinger and Narasimhan (1995, 217-218) found that:

> ...neither accounting nor... stock market data clearly indicates a shift in channel profitability from manufacturers to retailers. Profitability declined for both manufacturers and retailers, as measured by operating return on assets, although there is a bit more variation for retailers and there are differences across food sectors. The stock price data show that firms involved in both manufacturing and retailing of packaged goods outperformed the market as a whole in the 1980s, owing to the merger wave at the time but there is inconclusive evidence that retailing out-performed manufacturing.
>
> They also made an important deduction:
>
> If both manufacturer and retailer profitability have declined modestly in recent years, consumers may be better off. Re-examination of the evidence supports this view. While manufacturer and retailer profitability declined modestly from 1981 to 1991, prices for food consumed in the home rose slower than the inflation rate.... More important, perhaps, are the other benefits that consumers may have obtained as a result of new forms of channel rivalry, including greater product variety, increased supermarket size, greater availability of new store formats, more in-store services, and increased consumer promotions.... From this perspective, one might well ask... "Isn't power really shifting to the consumer? Shouldn't retailers and manufacturers be working together...." (at 219)

It needs to be pointed out that both the Farris/Ailawadi and Messinger/Narasimhan findings may not generalise beyond the U.S. to countries where, as previously noted, private brands account for a much larger share of retail business. More specifically, there is evidence that in the U.K where private branding is especially important, large scale food retailers might be doing considerably better than their counterparts in other countries.[8]

We have shown that complaints about retailer buyer power are occurring in the context of retail markets which in many countries have become somewhat concentrated and in which private brands now play an important role. We have also mentioned some related changes in consumer shopping habits, application of computer technology, and retailer marketing sophistication and capability. In addition, our introduction has touched on some empirical work which appears to cast doubt on the proposition that power has shifted from manufacturers to retailers and in the process somehow harmed consumers. This paper will explore some of the changes mentioned in order to throw greater light on the sources of buyer power and how it might affect economic welfare. Once a foundation has been laid, including a closer look at private branding, the paper will consider various legal prohibitions that are or could be used to address alleged buyer power problems. The paper closes with some observations about the wisdom of attacking the symptoms rather than sources of such power.

2. Definition and preliminary analysis of the economic effects of multiproduct retailer buyer power

Throughout what follows, unless otherwise stated, "retailer" refers to a multiproduct reseller of goods purchased from suppliers, and buyer power always refers to such power in the hands of retailers. Buyer power is used in several different ways in this paper but is globally defined as the ability of a buyer to influence the terms and conditions on which it purchases goods. This definition will be made more precise as we discuss various types of buyer power.

There are two ways in which this section's analysis is preliminary. First, it does not present a rigorous game theoretic exposition of buyer power. This shortcoming is particularly regretful in situations where outcomes depend on relative negotiating strengths and it is exactly these cases which receive the

bulk of the paper's attention. Second, the analysis is preliminary in the sense that some of the topics are revisited in greater detail later in the paper.

Buyer power is often discussed in the context of "monopsony" power defined for example by Carlton and Perloff (1989, 116) as "...the ability to profitably set wages (or any other input price) below competitive levels". The usual illustrations of monopsony power feature a competitive upstream supply sector selling to a single buyer who, because of its importance as a purchaser and the presence of certain barriers to entry into the buyer's market, faces an upward sloping long run industry supply curve for some input (goods for resale in the case of retailers). Such a buyer would have a profit incentive to reduce its purchases in order to reduce the market price of goods purchased. The same power could be enjoyed on a lesser scale by each of a small number of large buyers, i.e. oligopsonists. The welfare effects of such reductions in outputs and associated market prices differ significantly according to the degree of seller power enjoyed by the buyer or buyers.

Before beginning to analyse the effects of buyer power under various conditions, we must stress that such power cannot exist unless there are some barriers to entry into retailing. If such barriers were completely non-existent, suppliers faced with price reductions (especially prices below full average costs) could presumably respond by opening their own distribution channels or switching their sales to new entrants which would appear shortly after any buyer superprofits materialise. Prominent among barriers to entry into the retail sector are legal constraints on the opening of large scale distributors. It is beyond the scope of this paper to detail the extent and effect of such regulatory barriers, though some will receive brief mention.[9]

Annex 1 to this paper analyses four polar cases in order to shed some light on the possible economic welfare effects of buyer power. The first two cases of that Annex focus on the exercise of buyer power in the context of an upstream competitive industry and offer the following predictions about its effects on economic welfare:

1. where the buyer(s) has (have) no seller power - there will be no effect on consumers' surplus but a net loss in producers' surplus [i.e. the suppliers lose more than the buyer(s) gain(s)]; and

2. where the buyer(s) has (have) seller power - there will be a net loss in producers' surplus and a further reduction in consumers' surplus (i.e. beyond that lost solely because of the downstream selling power). This is one form of the phenomenon known as double marginalisation.

These welfare effects will be greater the fewer the buyers exercising buyer power, unless a number of oligopsonists learn to co-ordinate their purchases and related activities.[10] They will also be greater the less elastic is the suppliers' long run industry supply curve.

From a competition policy perspective, the first conclusion one might draw is that buyer power in this context is not worth worrying about if there is good reason to believe that upstream industry supply curves are highly elastic. Interestingly, there appears to be at least some evidence that in manufacturing, long run supply curves are indeed likely to be highly elastic.[11] The second policy conclusion is that where upstream industry supply curves are significantly upward sloping, buyer power will have a considerably greater detrimental effect in cases where buyers also have seller power. If they are faced with such cases, competition agencies should consider taking steps to reduce both retailer buyer and seller power because the two interact in reducing economic welfare.

It is worth emphasising that when the upstream industry is competitive, buyer power succeeds in lowering upstream market prices solely because reductions in industry-wide outputs cause a decrease in suppliers' long run unit costs. This follows directly from the assumption that suppliers are and remain perfectly competitive, i.e. they earn no supracompetitive profits.

A particular form of buyer power arises when sunk costs, switching costs, transactions costs and other friction's create a "captive supplier". Such a supplier not only lacks seller power; it could be forced to sell some or even all of its output at a price exceeding average variable cost but below full average costs. In the long run, an "exploited" captive supplier must exit the industry.

Though competition offices might certainly be sympathetic to the exploitation of captive suppliers, they could nevertheless be unable or unwilling to intervene to protect them. This is because the treatment they receive produces a strictly transitory price change for one or a small number of buyers. There should be no significant lasting effect on consumer prices nor on total producers' surplus.[12] Nothing more will be said about such instances in this paper.

Let us turn now to the case where buyer power is exercised against a concentrated upstream industry - that is, against an upstream industry with some seller power. As noted in Annex 1 (Cases C and D), it is difficult to make precise predictions concerning what will happen when buyer power is superimposed on situations where suppliers were previously exercising seller power. The price and quantity outcomes will depend crucially on the relative negotiating strengths of the parties. Since upstream suppliers initially are making supracompetitive profits, there will be a range of prices the parties could agree on, and this range could be expanded if suppliers change their outputs. Concerning those output levels, it seems reasonably safe to conclude that they will be increased or left unchanged as a result of superimposing buyer power. In other words, buyer power should either have no effect on consumers or actually increase their welfare. As for producers' surplus, buyer power will leave it unchanged (as when quantity produced is left unchanged and rent is merely transferred from suppliers to retailers), or perhaps increase it (if, as seems reasonable to expect, buyer power moves quantity produced closer to rather than further away from joint profit maximising levels).

Before simply concluding that buyer power in this context probably can be described as countervailing power benefiting or at least not harming economic welfare, it is well to bear in mind three important qualifiers to what has just been said. First, even if the addition of buyer power does improve economic welfare, such improvement will fall considerably short of what could be achieved with perfect competition in all markets. Second, as previously mentioned, a thorough investigation of this topic should employ a game theoretic framework going well beyond the scope of this paper. Until that is done, a good deal of scepticism seems warranted about whether or not buyer power will be associated with efficiency improvements.[13] Though the present paper will not supply such a framework, it will hopefully provide some of the necessary background in terms of helping to identify the basic underlying questions and to indicate possible answers. Finally, the analysis presented in Annex I does not address a very important question - how will attempts to acquire and offset buyer power, as well as its simple exercise, impact on seller power and efficiency at both the supplier and retail levels?

One should not simply assume that buyer power leaves upstream and downstream seller power and efficiency unchanged. An example of the seller power point is found in the growing phenomenon of private branding. A desire to obtain or strengthen buyer power is one possible reason retailers are developing private brands. Unfortunately, in addition to increasing buyer power, private brands could contribute to product differentiation possibly having anti-competitive effects. These points are dealt with at some length in Section IV of the paper. As an example of efficiency effects, it is possible that buyer power could encourage suppliers to engage in socially inefficient conglomerate mergers (see Section V).

The mere use of buyer power can also produce some anti-competitive effects. Absent an extensive web of "most favoured nation" clauses, buyer power could be associated with non-cost justified differences in treatment accorded to different buyers (i.e. discrimination).[14] Interestingly, some authors have virtually defined buyer power wholly or partly with reference to discrimination.[15] Section V of the paper begins with an extensive discussion of buyer power and discrimination. We show there that such discrimination could negatively impact competition and efficiency at the retail level, i.e. weaken the link between current relative efficiencies and market shares. The danger of this occurring is particularly great if powerful buyers go beyond insisting on improved terms. They may be strong enough to interfere with suppliers' relations with rival retailers. This could be done for example by requiring contractual commitments that suppliers charge more to the powerful buyer's competitors or even refuse to sell to them.

Despite the associated risks, price discrimination, whether or not linked with buyer power, typically is and should be subject to a rule of reason under competition law. Unless contractually blocked, price discrimination could initiate a process whereby a supplier's less powerful customers eventually succeed in obtaining roughly the same treatment as the originally favoured buyer. In addition, price discrimination can destabilise seller cartels.

Buyer power could directly induce inefficiency upstream as well. Larger suppliers should be better able to resist buyer power, i.e. be more able to protect economic rents. The greater ability to retain such rents could be particularly important as regards innovation. In short, buyer power could result in larger suppliers conducting a greater share of innovation activities than their relative innovative efficiency would warrant.[16]

3. A Closer Look at Retailer Buyer Power

We turn now to take a closer look at the exercise of buyer power against a firm with upstream market power. As has been suggested earlier, we can view this interaction as a form of negotiation. Economic theory does not yield concrete predictions about the outcome of such bargaining games. However, it is common to assume that the outcome of bargaining will depend, at least, in part on the "threat points" of the parties - that is, on the harm that each can inflict on the other in the event of disagreement. As we will see, the relative harm incurred by a manufacturer and a retailer in the event of failure of negotiations will depend upon a variety of factors including, most importantly, the response of consumers to discovering that a specific product is no longer available at a particular retail outlet. If consumers simply choose to substitute another brand in-store, then the retailer may not suffer at all, while the manufacturer may lose a sizeable portion of sales. On the other hand, if the consumer changes stores to seek out the missing product, the retailer will incur a significant loss, while the manufacturer may not lose at all. We begin, therefore, by examining the buying habits of consumers.

3.1 Buying Habits

Though it is difficult to be precise about it, there appear to be significant economies of scope in shopping (largely rooted in transportation and waiting costs). As a result many consumers may strongly favour one-stop weekly or bi-weekly shopping at least for fast moving consumer goods (FMCG).[17] The one-stop shopping phenomenon does not necessarily mean shoppers are fiercely loyal to a single retailer. The strength of such loyalties will presumably depend on consumer switching costs based mainly on learning costs plus product and service differentiation across retailers. Corstjens and Corstjens (1995, 201) cited United States survey data, presumably from 1993, showing that 73 percent of supermarket shoppers visited two or more supermarkets each week, while only 27 percent shopped at just one. Survey data from France, collected in April 1998, show that French supermarket shoppers may be more inclined to restrict the number of supermarkets patronised, i.e. 35 percent regularly patronise just one store, 40 percent, two,

and 25 percent three or more.[18] Whatever the degree of attachment to one-stop and perhaps one store shopping, FMCG retailers would seem to have a strong incentive to qualify as an attractive one-stop shopping location even if they have to share patronage with other one-stop rivals.

Because of their preference for infrequent one-stop shopping, consumers will not necessarily switch stores merely because their current favourite outlet decides to delist one or a small number of preferred brands. Nor will they necessarily switch stores or visit a large number of them merely to take advantage of especially low prices on a small number of goods. Evidence supporting these points can be found in the constantly changing weekly advertised specials offered by large scale grocers and hypermarkets, i.e. the practice of what is known as "high-low" pricing. Since it seems unlikely that promotional prices are entirely due to special price breaks received from suppliers (especially in countries having laws against price discrimination), it follows that most consumers do not readily shop around to assemble the lowest priced total basket of weekly FMCG. If they did, retailers would presumably discontinue high-low pricing.

Unwillingness to make multiple shopping trips in order to lower total purchase costs, does not mean the typical consumer is unconcerned about the total price paid. On this score, it is worth noting that the high-low pricing strategy seems to have two objectives: attract swing customers for whom the promoted goods are particularly important and thereby hope to acquaint them with the store and possibly win their regular weekly custom; and help convince existing loyal customers that their store truly is a low price outlet.[19] According to Corstjens and Corstjens (1995, 157), a retailer which is not a "hard discounter":

> ...has to develop its price image through a strategy of continual, but unpredictable, promotions. The point of high-low pricing is to discriminate, both across consumers and across product lines. High-low gives the opportunity of improving margins by selling to non-price sensitive consumers at higher margins, and also providing higher margins on some less key lines. Low prices are appropriate on lines which are known to be price sensitive, and/or which are easy to use for comparisons. This is not 'limited EDLP' [every day low pricing] - it is the low half of high-low pricing. Promotions and the occasional real bargain are used to impress the shopper, supported by competitive prices on easy to compare items.

Again according to Corstjens and Corstjens (1995, 163):

> There are only two [pricing strategies] in retailing: EDLP and high-low pricing. Only the committed hard discounter can go for EDLP. Every retailer has to be competitive on easily compared, regularly purchased lines and every retailer must continuously manage its competitive price image. This is an imperative of retail marketing which is different from FMCG marketing: product brands which are perceived to be premium priced can do very well, supermarkets cannot.

The EDLP strategy tends to be adopted by retailers making cost control their main competitive weapon and doing this partly by offering a reduced product selection and set of in-store services. Stores choosing to maintain more convenient locations and offering larger product and service arrays cannot compete head on with the discounters on price. Nevertheless, they must avoid appearing to be too un-competitive on baskets of goods that account for a significant portion of a typical consumer's total budget. High-low pricing appears to be the best way to do that. Not only does this price strategy shield a retailer from hard discounters, it also insulates the other large scale stores from each other's price competition. High-low pricing does this by considerably complicating the task of determining which of a number of possible stores is truly the best deal at any given time.[20]

3.2 Implications for Buyer Power

As stated earlier, the outcome of the negotiation between the retailer and the manufacturer will depend, in part, on:

1. how quickly and easily an affected manufacturer could find alternative outlets for its present line of goods and on what terms, or alternatively, how quickly and easily could the manufacturer produce a different line of goods; and

2. how will the retailer's customers react to not being able to buy a certain good.

The answer to the second question largely determines the answer to the first half of the first. What then are the customers' options when they suddenly discover that a particular preferred brand is not available this week in their favourite store? Basically they have four alternatives.[21] We will mention each and then briefly discuss the profit implications for both manufacturer and retailer. In this portion of the paper, "profits" include a normal return on investment.

1. Consumers simply cancel purchases, i.e. this is a non-substitutable impulse good.

If this is how all or most consumers react, both the manufacturer and retailer lose the profits they used to earn through sales at the delisting retailer. What that means in relative terms depends on which had the higher profit margin and on the relative sizes of the two enterprises. From the limited data available in Farris and Ailawadi (1992, 355-356) and Messinger and Narasimhan (1995, 206), it appears that margins are typically higher for manufacturers. That difference in margins, along with the fact that the large scale retailers are now bigger than most manufacturers means that if delisting results in cancelled purchases, the manufacturer will be hurt proportionally more. The safest prediction though is that buyer power would exist but not be particularly strong if both manufacturers and retailers believed that most consumers would cancel purchases in response to delisting.

2. Consumers defer purchase of unavailable goods, i.e. they temporarily modify their one-stop shop habits in order to find the product elsewhere.

In this situation, the manufacturer foregoes the profits it would have made on units of product that would have been consumed during the deferral period. The manufacturer's long run profits on sales to consumers choosing this option will rise or fall depending on whether margins on sales to the alternative outlet are higher or lower than they were to the delisting store. The delisting retailer is much worse off. In addition to losing profits it would have made on goods now purchased elsewhere, it takes the risk of catalysing the next possible response.

3. In the long run, the consumers switch stores.

For the manufacturer this option produces the same results as deferral. The retailer though, fares much worse. For each affected consumer, the retailer eventually loses the profits on an entire basket of goods times the number of weeks it takes to win the customer back, if ever.

4. Consumers switch brands, i.e. they alter their long term buying patterns by substituting a stocked product for a delisted one.

This time the manufacturer is the big loser since he foregoes profits on previously sold volume in the delisting store. The retailer's profits might actually increase if the substituted good bears a higher

profit margin, and this could well be the case if consumers substitute a private brand for the delisted national brand product.

In most cases where a single product is being delisted, the options with the greatest probability of being chosen are cancel purchase or switch brand. According to Corstjens and Corstjens (1995, 197-198):

> FMCG purchases rank among some of the least important decisions we make in our lives. According to one American survey 69 percent of people do not use shopping lists, and 66 percent of purchases are not planned, indeed many shopping trips are not planned. It seems reasonable to assume that when shoppers do not plan, the selection of brands on offer will tend to set the agenda for the purchase decision and non-stocked brands will not even be considered. Winning presence in store is gaining relative importance compared to the manufacturer's traditional priority, winning consumer preference.

There is some statistical evidence supporting this view. In a recent survey, French consumers were asked to indicate what they would do if their usual brand were absent in their primary supermarket. The results were that 56 percent said they would substitute an equivalent branded good, 20 percent stated they would go to another store, and 24 percent reported they would postpone purchasing the good until their next visit to their primary supermarket.[22]

The risks entailed in delisting grow considerably larger as the number of products delisted grows. Unfortunately for the manufacturer, the retailer is in a much better position to know how close it is skating to the edge, i.e. the point where an additional delisting could cause a significant number of his customers to decide that their broadly defined "costs of switching stores" ("CSS") are lower than the cumulative "costs of switching brands" ("CSB").[23]

Summing up concerning negotiations between manufacturers and retailers in situations where consumers illustrate strong one-stop shop preferences, both parties need to estimate:

1. the importance to consumers of the good in question (i.e. is it of sufficient importance to justify adding another store to weekly shopping trips rather than going without or substituting another brand); and

2. if consumers will not respond to delisting by relaxing their one-stop shop preference, the probability that consumers will judge the relevant CSB to be greater than the CSS.

It is entirely possible that, except for the strongest manufacturer brands, these estimates will tend to favour the retailer, i.e. endow it with relative negotiating power, hence with buyer power as well. A good example of such buyer power can be found in the fairly recent United States Toys "R" Us (TRU) case.[24] Michael Antalics, a staff member of the United States Federal Trade Commission (FTC) described the key facts relating to buyer power in the TRU case as follows:

> As a buyer, TRU represents approximately 30 percent of the sales of the top ten toy manufacturers. It would be very difficult for manufacturers to replace the 30 percent of their sales accounted for by TRU, especially given the fact that the manufacturers already have broad distribution and are selling as much as they can through other retailers. Because of transaction cost savings achieved by dealing with a retailer with such a high market share, a manufacturer would have much higher costs even if it was able to replace the TRU volume with sales to smaller retailers. Consequently, a decision by TRU not to carry a toy could have serious financial consequences for a manufacturer. [Antalics (1997, 7)]

A more general review of the kind of buyer power we have been examining is available in the written submission of the Spanish Court of First Instance to the economic dependence section of the European Commission's Competition Forum in April 1995 ("EC Forum"). Noting that following WWII manufacturers were very much in the driver's seat, the submission went on to say that the situation had changed dramatically because of a growth in concentration by FMCG distributors and their introduction of private brands:

> Large distributors absorb substantial shares of their suppliers' turnover: between ten and 20 percent in the case of large manufacturers and much more for small or medium-sized firms. Yet, the largest manufacturer accounts for less than 1 percent of the turnover of the large distributors, who can substitute other brands with similar characteristics for any given manufacturer's products.
>
> Consequently, the retailer is able to switch his source of supply to any other manufacturer, while the manufacturer has no equivalent alternative customer to make up for the shortfall in sales. The attraction of hypermarkets and large supermarkets in their geographic area of influence gradually forces competing retailers in that area out of business, creating corridors that are cut off from each other by mobility costs, disinformation and consumer habits.... Where a manufacturer loses a distributor as customer, he cannot find another retailer (because none exists) in the area of influence concerned. Thus, he loses the turnover generated by the captive consumers in that area.
>
> This new balance of market power accounts for the emergence of unfair practices: manufacturers forced to accept guarantees, discounts and other costs without retailers granting corresponding advantages in return; business dealings with suppliers terminated or orders cut back to induce them to accept unfair terms; late payment of goods taken to unreasonable extremes; suppliers made to finance stocks held by distributors; distribution firms "ganging up" on a particular supplier; etc.[25]

All the above is presumably well known to the Competition Court in Spain, yet its representative at the EC Forum noted its opposition:

> ...to the introduction of a Community directive or guidelines [to combat buyer power], or to providing instructions on this type of problem. The pressure from Spanish producers is already sufficiently great, and legislating to restrict the power of large department stores at the moment would be unwelcome. The existence of large distributors implies that distribution is more efficient, and the effects of that efficiency are passed on to the consumer through lower prices. Thus, the Spanish Competition Court argues that combating not only political pressures, but also the pressure of instructions derived from Community directives or guidelines would be disastrous.[26]

This section has shown why larger retailers dealing with suppliers having seller power could have a party specific power to lower prices or insist on equivalent advantages, without cutting quantities purchased. Indeed powerful retailers could well be in a position to lower price and simultaneously increase amounts purchased even where that does not reduce manufacturers' unit costs. Larger retailers could have such power despite having very little themselves in the way of seller power. In a way, this is reassuring because it lends credence to the view that where upstream seller power exists, buyer power could act as countervailing power benefiting consumers. As earlier noted, this is simply a preliminary conclusion. We must also consider ways in which the exercise of existing buyer power or attempts to secure and expand it could affect upstream efficiency and the degree of competition prevailing downstream. Moreover, it is an incomplete conclusion because once again it must be stressed that reducing or eliminating upstream market

power would be better than relying on hoped for beneficial effects flowing from the exercise of countervailing power.

Before going on to explore private brands and the policy implications of buyers having and exercising relative negotiating power, it should be noted that the mere possession of such power does not mean that delisting will always result from its exercise (there is obviously no need to delist if the threat alone is enough to secure the desired improved terms). It is equally true that delisting could occur in the absence of relative negotiating power, and is not in itself a thing which competition agencies should oppose.

Building on the analysis of this section, buyer power will subsequently be taken to refer to buyer power resting on relative negotiating power and exercised against one or more suppliers having seller power.

4. Private Branding

> "The development of own label (sic) has been one of the most important changes in retailing in this century. It has changed the nature of retailing competition, given considerable market (buyer) power to retailers and in the process squeezed secondary brands." Dobson (1998, 34)

Since a considerable part of the debate about the effects of buyer power concerns its connections with private branding (i.e. brands owned, and usually exclusively sold through, a single distributor or distributor group), that phenomenon deserves extensive development. Private branding is also of direct interest to competition authorities charged with reviewing vertical mergers or looser arrangements between retailers and manufacturers. The two are actually substitute methods whereby a retailer obtains goods to be resold not under the manufacturer's label but rather under a brand name owned, and commonly exclusively distributed, by one or more retailers. Private label goods are apparently seldom supplied as a simple sale of goods having a particular packaging chosen by the retailer. London Economics (1997, 41) has aptly noted that:

> …the line between vertical intervention and vertical integration has become blurred: if a retailer makes the majority of the manufacturer's investment and production decisions for him, then the retailer is effectively acting as if it owns the manufacturer. There is no obvious difference between this behaviour and full vertical integration in terms of implications for competition policy.

The reasons why retailers may find it profitable to sell private brands either exclusively or as one of a number of offerings in a given product category are complex and intertwined, but they can be roughly categorised under efficiency and buyer power related rationales. We will discuss both before trying to draw together the upstream and downstream competitive effects of private labels.

4.1 Efficiency Rationales

One motivation for private branding might be that it is a way to avoid the efficiency losses occasioned by double marginalization, or to reduce the transactions costs and uncertainties associated with bilateral monopoly. As previously noted, where double marginalization or bilateral monopoly exist, both manufacturers and retailers have an interest in moving to a joint profit maximising output. Actually achieving such an outcome and then haggling over the manufacturer's price will naturally impose considerable negotiation and co-ordination costs which will have to be re-incurred each time there is a significant change in market conditions. There are a number of arrangements, involving various degrees of

vertical co-ordination, which a manufacturer and a retailer could employ to reduce those costs and uncertainties.[27] Where outright vertical integration is chosen, there is a strong likelihood that the retailer will become the exclusive distributor of the manufacturer's goods as rival retailers might understandably be very reluctant to source goods from a competitor. Exclusive distributorship is also likely to be chosen if the retailer supplies sensitive information to the manufacturer or otherwise works with it to improve either the product or its supply logistics. It is even more likely where the retailer is required to make some sunk cost investments to cement its relationship with the manufacturer. Under such circumstances it is easy to see why the retailer may want at least the partial security that private branding can give against post-contractual opportunistic behaviour or free-riding by other retailers.

There are other efficiency rationales which could supplement the above. The first is that the retailer might be able to provide some branding services more cheaply than a manufacturer. This ability is rooted in a synergy between a store's reputation and that of the goods it carries. An improved quality reputation for the store benefits the products it sells and *vice versa*. To a certain extent, a retailer can raise its reputation and ability to charge generally higher prices by carrying national brands already enjoying a high quality reputation among consumers. It will likely have to pay the manufacturers of those brands, however, part of the rents earned by this strategy. On the other hand, the retailer may be able to exact a quality enhancement charge from manufacturers whose brand names do not have a high quality reputation. It could be considerably more efficient to internalise this rent paying and receiving exercise through the use of private brands, especially since there is an additional economy of scope that works in favour of private brands. A good quality reputation on one product bearing the brand could benefit all the other products bearing that brand. This is the same type of economy of scope enjoyed by multiproduct manufacturers of well known national brands, but it potentially extends much further to cover many of the goods the retailer sells.[28] The qualification "many" is very much required because private branding works considerably better for goods where brands merely identify and assure rather than confer a positive image.[29]

There are potential costs to the private brand strategy. First, the retailer might have to invest in its own quality control, since it may have more to lose by quality lapses than will its suppliers. A second "cost" is that over-use of private branding could produce a consumer perception that the store offers inadequate variety.[30] Third, where the retailer desires to open stores in new territories, its smaller array of national brands will mean that it must persuade consumers not just to switch stores (incurring CSS), but also to simultaneously change the brands they purchase (incurring CSB as well). Finally, there could be some diseconomies of scope especially if private branding is accomplished through vertical integration. As Steenkamp and Dekimpe (1997, 928) expressed it:

> National-brand manufacturers can be expected to have more insight into consumer needs with respect to their specific product category (after all, a supermarket chain has to spread its attention across numerous categories), and be more knowledgeable about the manufacturing process and technological changes. This provides a viable basis for quality improvement and innovation.... Few store brands can afford to pay for the research and development needed to develop really new or improved products, and this could therefore offer a strategic advantage to national brands.[31]

Be that as it may, there is supporting evidence that private branding is very cost effective. Bell et al. (1997, 855) note that, "Research at OXIRM suggests that the costs of advertising, research, selling and distribution avoided by private label products account for 25 percent of the brand price."

4.2 Effects on Buyer Power

There could well be some important efficiencies obtained through private branding, but that in no way rules out such branding having other motivations including a desire to enhance buyer power. To the extent that private branding helps the retailer differentiate itself from its competition, it increases buyer power by augmenting CSS.[32] It could also enhance buyer power by reducing CSB. Where a retailer sources its private label goods from independent suppliers it could, given sufficient quality control, switch suppliers without customers even being aware of the change. In such cases, the CSB factor favouring a supplier is virtually eliminated. There could also be cases where the private brand is a better substitute for a product the retailer is threatening to delist than are its national brand competitors - this too would reduce CSB.

Since retailers frequently carry private and national brand merchandise in each product category, private labelling usually amounts to "tapered vertical integration", thus conferring the usual negotiating advantages conferred by that strategy, i.e. expanded options and better cost information, especially where the retailer owns its supplier. Naturally, insofar as the private brand is produced in the retailer's own plant (presumably involving some sunk cost investment), the negotiating advantages of tapered vertical integration come at the expense of giving up the benefits flowing from greater ease of switching suppliers.

4.3 Upstream competitive effects of private labels

There is some evidence that private brands are increasing the pressure on weaker, "secondary" national brands which were already losing out to more successful "primary" brands.[33] Such evidence does not, however, establish that private branding will produce increased concentration in manufacturing and perhaps reduce economic efficiency. One could argue the reverse. Private branding amounts to combining: the ever growing database which large retailers are accumulating with regard to consumer spending; the more efficient promotion such retailers can provide; and increased pressure to produce high quality products at low unit costs (i.e. suppliers' are selected primarily according to their production skills). That translates into the emergence of powerful new competitors for existing manufacturers.[34] Moreover, to the extent that retailers take over the marketing function they also effectively lower barriers to entry into manufacturing. The result of all this could be considerably more competitive manufacturing markets and a better deal for consumers. Dobson (1998, 20) cited interesting evidence from Hoch (1996) and Wills and Mueller (1989) apparently suggesting that private labels are priced significantly below the national brands, and that private label market share exerts a negative influence on national brand prices.

Dobson (1998, 27) also suggests a number of possibilities which are not so good for competition. The main one affecting upstream markets is a supposed negative effect on product innovation brought about by reduced upstream pre-innovation profitability, more rapid and effective imitation by private brands of truly significant innovation, and reduced information sharing with national brand manufacturers. The first point rests on the assumption that significant imperfections in capital markets cause a firm's R & D expenditures to be closely linked to its current profitability. As for the second point, it is not immediately clear why private brand owners should concentrate on secondary rather than primary innovation, thereby shortening the time before imitative products erode the profits earned on major innovations.[35] It is fair though to assume that the information which manufacturers need to share well in advance with retailers about their new product plans could work to reduce the time needed for private brands to imitate promising innovations. It is also certainly credible that after they are selling private brands, retailers will be less willing to share information with national brand manufacturers. This could well have a negative effect on innovation but its significance is hard to gauge given that manufacturers still appear to be able to purchase electronic point of sale information from private companies such as Neilson.

Borghesani et al. (1997, 21) have expressed similar concerns about the effects on innovation of the private brands' penchant to imitate national brands and have tied it into what they see as a disturbing trend in US. market structure:

> Markets for daily consumer goods have typically consisted of several strong branded goods manufacturers with R & D capabilities, a number of smaller brand manufacturers (secondary brands), and private label producers (which are not in the product development business, but which copy or modify successfully marketed branded products). In some sectors, market structure is changing, with two groups controlling three-fourths of the market: a single branded goods manufacturer with R & D capabilities, and several private label retailers. The remaining companies have very small market shares and little influence on market developments. The impact on long-term market health remains to be seen, but the lack of competition at the primary brands level is quite troubling.

There is another aspect of information sharing that is worth noting. According to Borghesani et al. (1997, 20):

> Because the need for co-ordination and timing forces manufacturers to communicate their promotional programs and pricing information to retailers months in advance, private label retailers are able to plan their "shielding" activities. This gives them an unfair competitive advantage over other manufacturers.

Perhaps this explains why some major branded goods sellers have abandoned periodic promotions in favour of an every day low price strategy. It is possible that such a switch could have the side effect of generally decreasing the vigour of competition among manufacturers especially as regards innovation.

4.4 Downstream competitive effects

Private branding poses much more of a threat to downstream than to upstream competition especially since it could amount to a powerful means of retailer differentiation. The effect of this on consumer welfare is, however, somewhat ambiguous since it could harm some consumers while helping others. Less ambiguous, however, are potential foreclosure effects. If all the large scale retailers engage in private branding through vertical integration, there could be some foreclosure effect whose anti-competitive potential will depend on how much barriers to entry are raised by requiring new entrants to enter on two levels at once. There could also be an impact in terms of raising un-integrated rivals' costs if the number of unaffiliated manufacturers grows small enough. That is the worst case scenario. In actual fact private branding does not require vertical integration. Indeed, Corstjens and Corstjens (1995, 265) report that the majority of FMCG manufacturers supply private brand products.[36]

4.5 Conclusion regarding private brands

While the desire to acquire greater buyer power could be pushing retailers in the direction of greater reliance of private branding, there are other probably more powerful forces working in the same direction. It follows that policies designed to reduce buyer power should certainly not rest solely or heavily on a desire to roll back private branding, especially since there may be little need to be concerned about that phenomenon.

There are good reasons to believe that private branding may improve upstream competition. There are also reasons, not necessarily persuasive, that private branding may diminish upstream innovation. The downstream effects of private branding could well be harmful, but only if it contributes little to product choice, is widespread, and conducted mainly through vertical integration. Taken as a whole, the case is far from convincing that private brands have a net harmful effect on economic efficiency. Negative effects are, however, much more plausible as regards weaker manufacturers of secondary brands. These may well be facing a difficult choice between bankruptcy or surviving almost entirely on their ability to produce at lowest possible unit costs. That is certainly unpleasant for them, but price competition benefiting consumers is rarely enjoyable for sellers.

5. Discussion of possible legal remedies for problems linked to Buyer Power

5.1 Buyer instigated price and non-price discrimination

Price and non-price discrimination are non-cost justified advantages given to selected buyers. The existence, source and effects of such advantages are at the heart of many treatments of buyer power. Indeed, as previously noted, buyer power is very frequently defined in terms of some form of discrimination.[37]

5.1.1 Analysis

We begin by reviewing the pre-requisites for systematic price or non-price discrimination. They are: seller market power (otherwise all buyers would be able to purchase on the same competitive terms); something effectively blocking resale among customers; and different price elasticities of demand across buyers. All these are likely satisfied as regards suppliers selling to a set of competing retailers having buyer power. Such buyer power would, by definition, not exist without upstream seller power. In addition, competing retailers are highly unlikely to engage in re-selling goods to undo the effects of supplier discrimination. As for different price elasticities of demand, this at first sight seems problematic. Competing retailers presumably sell to the same set of customers so their derived demand curves for upstream goods should be the same. That is not the whole story though. Differences in buyer power, virtually assured if the retailers are significantly different in size, could play the same role as different price elasticities of demand. One could even say that absent differences in buyer power, price discrimination across competing retailers should not occur.

Economists generally look favourably upon price discrimination when it expands the quantity of a product being sold or has the effect of destabilising producer cartels and other forms of upstream price discipline. They acknowledge, however, that price discrimination could also have negative effects when it is used to disadvantage new entry (i.e. a type of selective predatory pricing - see Annex 2).[38] There is a close parallel to this danger when buyer induced price discrimination distorts downstream competition by conferring on larger incumbent retailers an advantage disconnected to an efficiency edge. The result could be that the market shares of more efficient but initially lower volume retailers are kept artificially small. On this point, Dobson et al. (1998, 37) remarked that the issue of buyer power:

> ...has become more prominent in recent times not least because buyer power and seller power often appear to go hand-in-hand, such that a dominant market position may serve to provide a firm with buyer power, allowing it to obtain more favourable terms than its competitors which in turn provides it with a competitive advantage in the downstream market and the opportunity to exploit seller power. In this sense, scale, over and above that of rivals, allows the firm to enter a virtuous circle whereby it operates with (unit) costs below those of competitors, allowing it to

increase its profits from which it can invest in R & D and product quality/branding, which in turn increases sales, allowing it to obtain even greater discounts from suppliers, further reinforcing its cost advantage over rivals, and so on.

Even where such "virtuous circles" do start turning, it does not necessarily follow that discrimination in favour of retailers with buyer power will be harmful for competition. With a sufficient number of existing or potential entrant retailers enjoying roughly equal degrees of buyer power, downstream competition could be efficiently vigorous even if new entrants lacking buyer power are effectively being excluded from the market. Significant efficiency losses could arise, however, if substantial differences in buyer power work to exclude a more efficient new entrant.

It seems unlikely though that buyer power would be able to block one or a number of more efficient new entrants. If such firms enjoy a sufficient efficiency edge, they will be able to charge the same or lower prices as incumbent firms despite their lack of buyer power. Even when their efficiency edge falls short of that threshold, new entrants might still be able eventually to grow large enough to eliminate or match incumbent buyer power, but they would need assistance from either an efficient capital market or one or more forward looking manufacturers.[39] Such help might be readily forthcoming if the new entrant(s) is(are) demonstrably more efficient. Manufacturers should be natural allies of more efficient retailers. Unless they are enjoying a share of the total rents accruing to downstream seller power (which would be difficult to square with their being victimised by buyer power), manufacturers have a long term interest in ensuring that retail net profit margins and prices are as low as possible.[40] Fostering more efficient retailing should mean more profits for manufacturers, especially if this is brought about in ways that will eventually reduce buyer power.

There is another point that needs to be mentioned about potential inefficiencies caused by discrimination linked to buyer power. One could take the view that retailers "sell" distribution services to upstream suppliers. Such retailers are in a good position to discriminate as to the terms they offer (i.e. profit margins they require). In specific, they are likely to favour the larger and especially the more diversified suppliers (more on the diversification issue will follow in the merger section below). One might at first surmise that there should be no welfare losses associated with such discrimination. After all, except for the captive supplier cases, the worst that can happen to a supplier is that he is paid his full unit costs. The potential problems, however, arise more by way of incentives to innovate. The larger and more diversified a supplier, the greater will be its incentive to undertake innovation because it stands a better chance of keeping a larger share of any resulting economic rents. Unfortunately, it will not always be true that larger, more diversified suppliers are currently the more efficient innovators. It must be admitted, however, that there should be a lose correlation between past and future innovative success, as well as between past innovative prowess and current size. Moreover, this could be regarded as a problem having to do as much with capital market imperfections as with buyer power.

5.1.2 Policy implications (including a brief mention of horizontal agreements)

Our discussion above was couched in terms of "discrimination" rather than price discrimination, because powerful buyers could choose to cut deals which favour them in many other ways besides merely lower prices. A good example of this can be found in the Australian Safeway Stores case.[41] The Woolworth division of Australian Safeway Stores is Australia's largest retail grocery. Woolworth baked its own bread but also resold the bread of an independent baker, Tip Top. When another retailer began discounting Tip Top bread, Woolworth is alleged to have pressured Tip Top to institute resale price maintenance to put an end to the discounting. After successfully prosecuting Tip Top for illegal resale price maintenance, Australia's Competition and Consumer Protection Commission (ACCC) is continuing action against Woolworth's. Another good example along the same lines can be found in the previously mentioned Toys "R" Us (TRU) case brought by the US. FTC.

In the TRU case the well-known toy retailer, enjoying an approximately 20 percent share of the U.S. market [averaging more than 30 percent in the geographic markets where TRU had stores - see Antalics (1997, 6)] had threatened to delist manufacturers who supplied identical toys to both TRU and the warehouse clubs which were increasingly cutting into its market share. More particularly, it required manufacturers selling a particular toy to offer it in a slightly different combination to the warehouse clubs compared to what would be sold in TRU outlets. As a hypothetical example, if a manufacturer sold a particular doll to TRU, it was being forced to sell that same doll to the warehouse club only if it were packaged along with a particular set of accessories. This discriminatory treatment tended to reduce competition in the retail toy market in two different ways. It made direct price comparisons more difficult and it tended to raise the cost of toys supplied to the warehouse clubs because of more expensive packaging associated with the goods they were restricted to purchase. The manufacturers apparently might not have co-operated with TRU absent assurances that their competitors would all be subject to the same delisting sanction if they failed to cooperate. This case therefore went beyond the mere use of buyer power to protect a buyer's market share. It also showed how buyer power could be used to facilitate understandings among competing manufacturers to deal in a similar anti-competitive way with certain retailers.[42]

As described in the FTC press release relating to the TRU case, the FTC decision to prohibit TRU's conduct was based on both vertical and horizontal (i.e. producer boycott) grounds. The horizontal aspect of the case seems to be open to some question.[43] The vertical side received the following interesting comment in the FTC press release:

> "Toys "R" Us rose to its current position as the largest toy retailer in the United States by offering a larger selection of toys than any other retailer at the lowest prices," said Chairman Pitofsky. "Indeed, a remarkable irony of this case is that if the law were as Toys "R" Us contends - if a large [retailer] could cut off or encumber a new or innovative [company's] source of supply by exercising market power against suppliers - then Toys "R" Us, itself an innovative marketer resented by larger and less dynamic [companies] a generation ago, could have been denied an opportunity to compete on the merits and win in the marketplace." [United States Federal Trade Commission (1998, 1)]

The form of discrimination used by Toys "R" Us was perhaps influenced by the fact that the U.S. has a particularly strong law against price discrimination. It is possible that this law, the Robinson-Patman Act, biased Toys "R" Us against using its buyer power in a more direct fashion, i.e. obtaining lower prices than its warehouse club competitors. If that is the case, however, it was not likely because of fear of public prosecution. There has been very little in the way of public enforcement of the Robinson-Patman Act in more than ten years in the United States. The following quote from Scherer (1990, 510) helps explain why the statute has fallen into disfavour with the competition agencies:

> The core of the Robinson-Patman Act is embodied in Sections 2(a) and 2(b). They prohibit charging different prices to different purchasers of "goods of like grade and quality" where the effect "may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." Three potential escape routes are then specified. Discrimination may be justified through proof (*1*) that it was carried out to dispose of perishable or obsolescent goods, or under a close-out or bankruptcy sale; (*2*) that it merely made due allowance for differences in "the cost of manufacture, sale, or delivery resulting from the differing methods or quantities" in which the commodity is sold or delivered; or (*3*) that it was effected "in good faith to meet an equally low price of a competitor."

Buyers as well as sellers are caught under this law. The legislative history of the Robinson-Patman Act makes clear that it was intended as depression era protection for small retailers facing competitive pressures from the rising, more efficient chain stores.

The general verdict of most economists is that the Robinson-Patman Act has not been good for competition, nor has it really offered much protection to the intended beneficiaries, i.e. small retailers. It has also likely resulted in higher prices to consumers.[44] According to Dobson et al. (1998, 29):

> The American Bar Association (1980, 27-37) [cited] five major concerns with the Act - namely: it contributes to price rigidity (particularly across different geographic sub-markets); it contributes to oligopolistic price discipline (by discouraging selective price cuts); it discourages entry by firms established in other markets (by preventing the use of differential 'penetration' pricing in this form of new entry); it induces inefficient product differentiation (by encouraging the production of different varieties to allow for different prices); and, finally, it imposes an undue regulatory burden (as businesses incur expenses in seeking to justify price differences to the government and the high distribution costs that result when business opts for inefficient methods of distribution because of the cost of justifying the offering of different prices to different types of distributors).

Perhaps this list should be supplemented with the fact that laws against price discrimination are inherently ineffective because they do not outlaw the many other ways in which buyer power can be used to gain advantage. It seems to be a good thing that enforcement under the Robinson-Patman Act has apparently declined substantially in recent years.

The United States is far from the only country having laws against price discrimination, and much of what the American Bar Association criticised would probably apply to them as well.[45]

Given the problems inherent in price discrimination prohibitions, plus the fact that in many cases it will be difficult to ascribe price discrimination to buyer power, it might be wise to use other tools to address harm to retail competition ostensibly linked to buyer power. In the same vein it would make sense to restrict legal prohibitions to cases where there is evidence that price or non-price discrimination is significantly inhibiting competition among retailers, i.e. apply a rule of reason rather than a *per se* approach. Such an approach would lend itself to making an important distinction, i.e. facilitate applying stricter treatment to cases where buyer power was used to discriminate directly rather than merely indirectly. There seems to be a greater potential for anti-competitive harm when a powerful buyer insists on more favourable terms than are given to its competitors, compared to when it simply demands and obtains better terms for itself without reference to the treatment accorded to other buyers.

In reviewing price and non-price discrimination prohibitions, countries might also wish to consider how their competition laws affect smaller retailers trying to pool their purchasing power in order to match that of their larger competitors. Assessing the impact such groups have on competition calls for a very sensitive application of competition law because merely matching purchasing power may not be enough to close the competitive gap. Smaller retailers might wish to supplement their joint purchasing arrangements with ways to match economies of scale in promotion, and that could require potentially anti-competitive common promotional pricing.

Larger retailers are also forming groupings which fall short of mergers, apparently to enhance buyer power through matching the global presence of many of their suppliers.[46] These too will call for sensitive application of laws against horizontal agreements and the same is true for emerging producer groups that seem to be partly motivated by desires for better defences against buyer power.[47]

This is the most natural place in the paper to discuss another interesting case described in the Australian delegation's submission to the roundtable. This is the Carlton and United Breweries (CUB) case which involved the use of buyer power in one market to restrict horizontal competition in another.[48] The case had its roots in the South Australia Brewing Company (SABC) agreeing to manufacture and supply a private brand beer to a small supermarket group. CUB, Australia's largest brewer, contacted its smaller rival and asked it to withdraw from the agreement under threat that if it did not, CUB might review its purchases of beer cans from a SABC subsidiary. CUB was purchasing around 70 percent of its cans from a SABC subsidiary and those sales accounted for about 50 percent of the subsidiary's total can sales. The outcome was that SABC stopped supplying private brand beer. In other words, CUB used its buyer power in the can market to restrict competition in the beer market. CUB conceded the facts to the ACCC and penalties were imposed.

5.2 Loss-leading/selling below costs

Scherer (1980, 592) defines loss-leaders as follows, "...items sold by a retailer at sharply reduced prices, and perhaps even below cost, in order to attract customers who, once they have entered the store, will buy other goods at standard prices." Perhaps this should be widened to say that loss-leading is basically an advertising technique consisting of exceptionally low prices on a subset of a retailer's goods.

There is a considerable degree of overlap between the earlier discussed high-low price strategy employed by many large scale retailers and loss-leading. According to London Economics (1997, 29):

> When choosing between multi-product retailers, consumers often have only very vague ideas of the relative qualities and prices of individual products. In this case, consumers tend to choose between retailers on the basis of their reputation for good product range and general low prices. One method of gaining a reputation for general low prices under these circumstances is loss leading. By setting low prices on a number of key items, and then by promoting these products and their prices, retailers induce consumers to compare retailers on the basis of the prices of these products.

5.2.1 Analysis

Though consumers should certainly benefit from loss-leading, at least in the short run, there could be complaints from two other quarters. Small retailers heavily reliant on the loss-led products will naturally be concerned about the practice. A good example would be stand-alone bakeries which may find it difficult to survive if large scale grocers begin to use bread as a loss-leader. It is worth noting, however, that even if loss-leading drives certain specialised retailers out of business, consumers will not be harmed unless the former loss-leader later reverts to charging supracompetitive prices. Loss-leading in that case really amounts to predatory pricing, which is unlikely to be a profitable strategy given the expected low barriers to entry into specialised retailing.[49]

The other possible complainants against loss-leading are manufacturers. At first sight, one might think that manufacturers of loss-led products would be helped by lower retail prices for their products. Alternatively, should they actually suffer harm, would they not be able to protect themselves by terminating the loss-leaders? The answer, surprisingly, may be no. Manufacturers may lack such a defence either because of laws against resale price maintenance (RPM), or because the loss-leaders have buyer power (i.e. termination would hurt the manufacturer even more than continued loss-leading). The RPM enforcement issue seems sufficiently remote to warrant further analysis, though we will return to it briefly when considering policy responses.

Focusing on the possible harm of loss-leading to a manufacturer, one must consider whether the practice could eventually force it to lower prices and, or lose sales volume. Such results could materialise if loss-leading reduces consumers' quality perception of the goods involved, thus reducing demand and rendering it more price elastic. One can accept, however, that consumers generally associate price and quality, without deducing that loss-leading will actually erode product quality perceptions. Consumers should be able to distinguish between loss-leading and every day low pricing. In addition, loss-leaders should have little interest in continuing the practice to the point where the product loses so much quality image that the low price no longer represents exceptional value. Finally, there is reason to be sceptical of the claim that reputation for quality will be in any way damaged by loss-leading in the FMCG sector. By definition, these goods are repeatedly purchased by consumers who can directly assess quality through their own experience.

It might seem that loss-leading could also produce lower manufacturer prices by enhancing buyer power if it concentrates sales in the hands of the loss-leader.[50] This seems a remote possibility because it may involve an inherent contradiction. As noted in an earlier section, buyer power requires more than a high share of purchases, i.e. it depends on a low CSB/CSS ratio. But for loss-leading to concentrate sales through switching customers to the loss-leader, a high CSB/CSS ratio would be best. Another way that loss-leading could concentrate sales is through the loss-leader greatly increasing sales of the good to its existing customers. This too is unlikely because retailers will probably avoid loss-leading products with high price elasticities of demand since that could be exceedingly costly.[51]

One final point - when manufacturer complaints about loss-leading concern, as expected, products characterised by low CSB/CSS ratios and low price elasticities of demand, competition authorities should discount manufacturer fears that loss-leading will cause other, non-loss leading retailers to delist them. Because of presumed low CSB/CSS ratios and price elasticities, the hold-out retailers should be experiencing little in the way of lost sales or customers. Why then would they take the risk of delisting products other retailers temporarily loss-lead? They can certainly be expected to seek lower prices from the manufacturer and perhaps threaten to delist, but few of those threats should be carried out. A far more likely response would be to reduce promotional efforts of such goods.

To summarise, when loss-leading harms manufacturers there is a high probability that it will be associated with buyer power. It is unlikely, however, to increase buyer power or lead to immediate sales reductions. It is also improbable that loss-leading will truly reduce consumers' quality perceptions of loss-led products. Nevertheless, where such quality depreciation does take place, manufacturers could lose both sales and an ability to charge a price high enough to warrant investment in maintaining product quality. The real, and difficult to assess, risk of loss-leading is that manufacturers vulnerable to it will be dissuaded from making investments to create high quality products.

5.2.2 Policy response

Since we earlier noted that there is probably little in the way of an economic efficiency rationale for protecting smaller, more specialised retailers against loss-leading, the focus here will be on the advisability of seeking to protect manufacturers from the possible quality and sales reducing effects of loss-leading.

If manufacturers faced with powerful buyers are unable to protect themselves against misappropriation of their quality reputation, would prohibitions on loss-leading necessarily restore an efficient level of investment in product quality? Unfortunately, the answer is negative. A manufacturer unwilling to cut off a large retailer practising loss-leading is vulnerable not just to loss-leading but to a more direct misappropriation of his investment, i.e. buyer insistence that the product be sold below full average costs (including a normal return on past quality investments). Indeed, if loss-leading is prohibited,

retailers wishing to follow a high-low pricing strategy, will be forced to seek special, discriminatory prices from manufacturers in order to accomplish the same result as loss-leading does more directly. Manufacturers might well end up being subject to more rather than less retail buyer power.

Not only are loss-leading prohibitions by themselves unlikely to offer much help to certain manufacturers and retailers, they will also prove difficult to enforce unless loss-leading is defined as selling below invoice cost.[52] In actual fact some countries have taken things a step further by adding to invoice cost a supposed normal profit margin. Calculating the size of such a margin would drag competition authorities into a disguised form of price regulation.

A final note of caution about loss-leading prohibitions is in order because manufacturer demands for laws against loss-leading need not actually be rooted in harm to their product reputation. Manufacturers might dislike loss-leading simply because it undermines both collusion and tight oligopoly high pricing. Exceptionally low retail prices could engender manufacturer suspicions that something other than loss-leading is taking place, i.e. a competing manufacturer is supplying goods at below "normal" prices. Effectively enforced laws against loss-leading would help put an end to such suspicions, but the resulting greater price transparency would hinder rather than advance greater competition among manufacturers. It would also make it easier for retailers to detect deviations from most favoured nation (MFN) agreements thus making such arrangements more attractive. That too would tend to be bad for competition and consumers because widespread MFN helps to stabilise manufacturer cartels and parallel pricing.

We mentioned earlier that manufacturers harmed by loss-leading might hesitate to terminate loss-leaders partly out of fear they will be charged with RPM. If true, that is more a reason for moving away from *per se* prohibitions of RPM than for supporting a law against loss-leading. It is interesting that at least two OECD countries have responded to this issue in a more efficient manner by simply providing an exception to their laws governing refusal to deal.[53]

In sum, loss-leading prohibitions may offer very little protection to either manufacturers or smaller, specialised retailers, but they may well harm competition. If they are adopted at all, harm to competition should be a required element, i.e. a rule of reason rather than *per se* approach is advised, and the cost base used to define loss-leading should be simple invoice price.

5.3 Vertical restraints between retailers and manufacturers

While in the past many vertical restraints were imposed by manufacturers on retailers, now that retailers occupy a much more important role in the value chain such arrangements are being used to maximise joint interests of manufacturers and retailers. That at least is the view expressed in London Economics (1997, 40) which highlighted the following practices:

- exclusive supply;
- refusal to stock or 'delisting';
- minimum supply levels: where retailers demand minimum quantities from manufacturers (in order to prevent the manufacturer from being able to supply further retailers);
- minimum advertising requirements: where retailers refuse to stock a good unless a minimum amount has been spent in advertising it;

- sunk facility requirements: where retailers refuse to give manufacturers a contract for supply (especially of own-brand products) until they have sunk costs in production facilities.

Even more important, this report also stated that refusal to supply:

> ...has traditionally been a method instigated by manufacturers for overcoming free-rider problems among retailers....However, there have been recent allegations of retailers instigating refusal to supply, by forcing manufacturers to refuse to supply certain other retailers in order to reduce the effectiveness of these other retailers as competitors. [London Economics (1997, 40)]

The U.S. Toys "R" Us case discussed above may have parallels then in other countries.

A full analysis of vertical restraints detailing their possible pro- and anticompetitive effects in the context of buyer power is well beyond the scope of this paper. There are nevertheless five vertical restraints which warrant at least a brief mention in relation to buyer power.

5.3.1 Analysis

i) Exclusive territories

Giving a retailer exclusive rights to distribute a product over a certain territory certainly could increase buyer power by concentrating purchases and possibly by raising CSS if the territories are big enough. Running counter to that tendency, exclusive territories could be associated with an increase in CSB for the affected good and a decrease in CSB for goods competing with it. This seems especially probable where an exclusive territory was instituted by a manufacturer to encourage a retailer to improve its marketing of the affected good. In sum, exclusive territories have a difficult to predict effect on buyer power in relation to subject goods, but could, when instituted by the manufacturer, generally increase buyer power as regards competing goods handled by the retailer. Where exclusive territories are instead initiated by a powerful buyer, the most likely result is a simple increase in buyer power as regards the subject goods.

ii) Exclusive supply contracts

Such contracts come most clearly into play in cases of private branding where the buyer may insist on being the sole outlet of the goods. Where practised by a dominant firm, or if the practice is sufficiently widespread, exclusive supply arrangements could have an anticompetitive effect through reducing entry or reducing the viability of competing retailers. On the other hand, exclusive supply could be procompetitive through facilitating fuller, more timely information exchange between retailers and their suppliers. It could also be true that exclusive supply contracts are superior to vertical integration because they permit a better division of labour between top management's of both manufacturers and retailers, and because they preserve greater efficiency incentives for the suppliers. Moreover, there may be capital market imperfections which make exclusive supply contracts superior to vertical integration.

iii) Tying and full-line forcing

Manufacturers seeking to reduce buyer power might well employ these techniques. By grouping their products together, they might succeed in raising the CSB/CSS attaching to their combination of offerings. Though consumers may be unlikely to switch stores just because they do not find one nationally branded good, they could well do so if delisting applied to all the consumer goods produced by a well-known diversified manufacturer.

iv) RPM

Retailers offering their own private brands in competition with national brands might naturally favour the sale of their own goods, including by refusing to carry competing national brands. A less risky strategy however would be to increase the price gap in favour of private brands. They might well prefer to do this not by lowering prices on private brands, but instead raising prices on national brands. Manufacturers might naturally want to restrict such a strategy through application of maximum RPM. Indeed, once retailers are competing with their suppliers, there seems to be a valid argument for giving manufacturers the same power to set retail price as is enjoyed by their private brand competitors.

There is a possible link between minimum RPM and buyer power. Steiner (1997, 442) illustrates that with some comments attributed to Wal-Mart Senior Vice President S. Robson Walton:

> I think it's probably true that manufacturers would get higher factory prices under resale price maintenance - especially where you have a limited number of manufacturers - and even if you rule out collusion. The manufacturer's price is something that's determined largely by negotiating power of the retailers that carry his merchandise. The more these retailers have to gain from that negotiating process, the harder they are going to bargain and in our case we'll negotiate harder for price concessions from the manufacturer where these savings will enable us to sell more of the merchandise as contrasted with where there's a fixed retail price that would simply generate a larger margin. [Walton (1982, 15-16)]

v) Slotting allowances and listing fees

Dobson et al. (1998, 22) has provided a good definition and comment regarding slotting allowances:

> These are payments, for example, to a supermarket for the right to have one's goods on display in a particular place on the shelves, or even to have them on display at all. It relies on the fact that shelf space, however large the supermarket, is in some sense in scarce supply and therefore that goods compete for space. Clearly, those goods that the supermarket can ill afford to be without are unlikely to be charged a great deal, but second brands are vulnerable to such pressure.

The key point to note about the fees is that they do not vary with subsequent retail sales and are sometimes paid merely to obtain listing rights in the context of purchasing groups. Slotting allowances may amount to a very considerable sum of money. Shaffer (1991, 121) observed:

> Unfortunately, these fees are negotiated orally and in private, hence public data is non-existent. However, recent trade press articles quote industry sources that suggest the practice accounts for one-third to one-half of the $19 billion spent by producers on trade promotions in 1987. Some warehouses and grocery chains are said to be demanding up to $100 000 for each product stocked.

Michael Antalics, a staff member of the U.S. FTC, has provided a good analysis of the pro- and anti-competitive effects of slotting allowances which he defined as typically referring to "...one-time payments made by manufacturers to retailers in order obtain placement of a new product on the shelf."[54] Among the pro-competitive effects, he mentioned that the fees constituted a form of price competition by producers, and a means of assigning shelf space to the best use. He also noted that slotting allowances were not the same thing as simply offering the retailer a lower wholesale price. This is because a fixed up-front fee transfers to the manufacturer most of the risk that new products might flop. Such a risk transfer

makes sense because the manufacturer should know more about the market appeal of its goods than the retailer.

In terms of anticompetitive effects, Antalics began by downplaying the notion that slotting fees raise the capital costs of entry:

> ...this is not usually considered improperly exclusionary. Many generally-accepted business techniques, such as advertising or the use of efficient capital-intensive manufacturing processes, may also increase the capital costs of entry. [Antalics (1997, 2)]

He did find, however, that slotting allowances could attract antitrust concern in the areas of predatory pricing, exclusive dealing and price discrimination. His treatment of each of these dwelt more on legal than economic factors and was somewhat specific to U.S. law. Predatory pricing comes into play because the slotting fees could amount to disguised predatory pricing by a manufacturer.[55] The fees could also be a way of purchasing an exclusive dealing arrangement which could have anti-competitive impact if the foreclosure effect were sufficiently large. Variation in slotting fees paid to different retailers certainly could amount in law to price discrimination, having, as earlier explained, difficult to determine effects on competition. Antalics finished his examination of anti-competitive effects by noting that horizontal agreements among manufacturers not to pay slotting allowances would amount to an illegal and probably anticompetitive horizontal agreement.

Antalics' remarks should be supplemented with Shaffer's (1991) interesting analysis of slotting allowances and RPM as alternative ways in which a manufacturer could assist a retailer to credibly commit to charging higher than competitive prices. His theory implicitly assumes a high degree of upstream competition, hence an absence of buyer power, and requires as well that wholesale prices be observable by other retailers and runs as follows:

> Each practice [RPM and slotting allowances] serves to increase retailer profits. At first blush, shelf space rental fees appear to be innocuous, since pure transfers of profit between industries have no welfare consequence. However, this implicitly assumes that the sum of producer and retailer industry profits is fixed. In general, this will not be true. Manufacturers are in competition with each other to obtain retailer patronage, and retailers compete among themselves to obtain customer favour. Slotting allowances, by lessening competition at the retail level, serve to increase the profit pie. Since manufacturers must earn non-negative profits, slotting allowance contracts coincide with per-unit wholesale prices which are above production marginal cost. Retailers who sign such contracts not only receive a direct up-front payment but also benefit indirectly from the reduced downstream price competition. By committing to a relatively high wholesale cost, a retail firm essentially announces its intention to be less aggressive in its pricing. Other firms are induced to raise their retail prices, and the original firm gains through the feedback effects.[56]

Virtually all of what we have noted about slotting allowances, at least as regards one time charges in relation to new products, applies only to that portion of such allowances exceeding the actual costs of listing a new product. Those costs should be small and largely arise in terms of arranging transportation, storage and payment logistics.

5.3.2 Policy implications

The fact that a buyer power dimension may be one of the motivating factors behind a vertical restraint changes little in terms of the general analysis that should be applied to such restraints in order to determine whether they have a net pro- or anticompetitive effect. Only three general comments seem to be

required. The first is that there may be a need to review RPM prohibitions, especially those restricting maximum RPM, in cases where they essentially enable a retailer to set both its own and a rivals' prices. Relaxing laws against maximum RPM, or at least applying a rule of reason instead of *per se* prohibition to such restraints, seems highly advisable. Indeed, when buyer power concerns enter the picture, the case becomes stronger for applying a rule of reason analysis to all types of vertical restraints. The second noteworthy point is that the presence of buyer power makes it somewhat more likely that vertical restraints will be negotiated under pressure from buyers for reasons other than obtaining pro-competitive efficiencies. In particular, the presence of buyer power would make exclusive supply arrangements somewhat more suspect when they have the effect of disadvantaging third party retailers. To a lesser degree this same point also applies to exclusive territories. The final general point is that tying and full-line forcing used ostensibly to countervail buyer power does not reduce the need to subject such arrangements to close analysis when they are practised by dominant firms or are widespread in the market. The presence of buyer power does not modify the potential these restraints have to reduce upstream competition.

5.4 Abuse of dominance laws

5.4.1 Analysis

Powerful buyers could be characterised as dominant enterprises vis à vis their suppliers whether or not they are with respect to their customers. In addition, their suppliers could possibly be abused either through "exploitation" (i.e. prices below competitive levels) or through exclusion (i.e. efforts to discourage others from offering them access to consumers). Indeed, many OECD country competition laws have prohibitions against abuse of dominance which are clearly intended to be applied to both buying and selling activity. There is nevertheless an important difference here. While abuse of dominance by a seller will virtually by definition reduce economic welfare, abuse of dominance by a buyer may not. It is even possible that buyer power could act to countervail upstream seller power, thus enhancing economic efficiency and consumer welfare. This is more plausible in the short than in the long run, but even short run benefits could be enough to justify a more sensitive application of abuse of dominance directed against suppliers as opposed to consumers.

5.4.2 Policy implications

Abuse of dominance laws could either complement or be used as a substitute for other laws more directly targeted on buyer power, including the ones surveyed above. In terms of advancing economic efficiency, abuse of dominance laws have an advantage over laws which dispense with the need to show either anti-competitive effect or at least some form of durable market power possessed by the buyer. That advantage though needs to be weighed against an important potential disadvantage. Whereas other laws simply declare that a specific behaviour is prohibited, abuse of dominance provisions frequently give a competition agency the power to act as a kind of regulator essentially mandating terms of access to a facility, in this case retailers' shelves. There have even been hints that the essential facilities doctrine could and should be applied to solve some buyer power problems.[57] But failure to access a single outlet is unlikely to deprive a manufacturer of more than 20 percent of his potential customers, hardly the level normally required to consider something an essential facility.[58]

Though great caution is warranted against using abuse of dominance laws to regulate prices, a much lower degree of risk seems to be entailed in taking action against terms which raise barriers to entry, e.g. tied selling, exclusive territories, and exclusive supply. It is in these areas where abuse of dominance laws seem well suited to supplementing or even substituting for laws reviewed above.

Whatever the wisdom of applying abuse of dominance provisions as a check on buyer power, there have been very few cases where this has actually been done. The reason is quite straightforward. The standard method of establishing at least a presumption of dominance is through market shares. Few countries have a published presumptive dominant market share threshold, but as a general rule dominance is unlikely to be presumed below 33 1/3 percent.[59] Retailers are commonly alleged to have buyer power even when they account for considerably less than that in the way of upstream purchases and downstream sales. There are two possible policy responses to this problem. The first, which has been applied in Germany, France and Portugal, is to supplement abuse of dominance laws with prohibitions of abuse of "economic dependence". These are explored immediately below. The second method is perhaps better described as a proposal. It would focus on the services retailers provide to upstream suppliers and seek a logical basis for segmenting that service market.[60] The same result could be obtained by narrowing the geographic dimension of the market. Either technique could establish that a retailer exceeds, on the selling side, the market threshold supporting a presumption of dominance. Incidentally, the refined market definition approach could also be applied downstream since many countries' abuse of dominance laws do not require that dominance and abuse need apply to one and the same market. We will say something more about the critical market definition issue in the course of considering merger review.

5.5 Abuse of economic dependence

5.5.1 Description and analysis

Historically, prohibitions against abuse of economic dependence arose first in Germany (1973), then spread to France (1986) and later to Portugal (1993).[61] The basic intention of such prohibitions is to extend the reach of abuse of dominance laws to situations where buyers which are not dominant in their selling markets are nevertheless in a position of strength *vis à vis* other firms. In the manufacturer-retailer context, a supplier is considered economically dependent if it has no equivalent alternative to a certain retailer as an outlet for its goods, or if the retailer is an inescapable partner for it. Where such economic dependence exists, there is a presumed imbalance between the parties, a fundamental difference in negotiating power. This imbalance allows the retailer to obtain treatment which would not be accorded by the manufacturer under normal competitive conditions. Common examples include unusually easy credit conditions, non-cost justified discounts including retroactive rebates, exclusive supply conditions, and slotting allowances/listing fees.

Since abuse of economic dependence provisions are basically extensions of abuse of dominance laws, it is not enough for a manufacturer to show that it is dependent and has been harmed by some practice. There must usually be some "adverse effect on the market", i.e. anti-competitive effect. What would or should qualify as harm to competition seems to be open to debate. For example, at the EC Forum, Christian Babusiaux, from France's Direction générale de la Concurrence, de la Consommation et de la Répression des Fraudes, listed and rejected arguments in favour of curbing abuses of economic dependence through "...specific provisions on fair dealings in competition, rather than on protecting competition."[62] In a section headed, "The restriction of competition brought about by [abuse of economic dependence] can be proven from their effects", Mr. Babusiaux provided the following three points:

1. the manufacturer loses some of his capacity to take decisions independently. In particular, the risk of being refused access to the market as a result of decisions taken by a few purchasers and of being forced to make concessions which he was unwilling to make when business relations were first established deprives him of a large measure of his freedom as a supplier. He can no longer choose with whom to deal, determine the price level below which a transaction is not profitable for him, obtain remuneration for specific services or sometimes even offer such services;

2. uncertainty is removed because the dominant party can, at any time, force the supplier to match the terms agreed with a competitor. Yet uncertainty about the behaviour of competitors is one of the most powerful stimulants to competition;

3. a barrier to new market entrants is created because distributors can obtain concessions out of proportion with the quantities sold and the commercial services rendered to suppliers. This is due to exaggeration of the effects of scale, and in production, the extremely high entry cost of establishing business relations (listing) and the commercial co-operation that is imposed. [Ehlermann and Laudati, eds. (1997, 198)]

5.5.2 Policy implications

Abuse of economic dependence prohibitions appear to have disappointed their proponents, but perhaps the very small number of cases, and frustrating failure in most of those, should have been predicted. Suppliers willing to complain of abuse are probably not truly dependent while those who are, endure in silence.[63] Moreover, as Vogel (1998, 8-9) pointed out, to the extent such laws are motivated by a desire to protect competitors, they run against the grain of current trends in antitrust enforcement and have no established theoretical basis on which to stand. There is also the vexed problem of how to design a remedy without short-circuiting the market economy. In a note supplied to the author, the Portuguese competition authority recognised this danger:[64]

> What is intended to be sanctioned is mostly the abuse of a dependant's situation, rather than practices and behaviours dictated by better commercial options.
>
> It is impossible to oblige someone to keep a supplier or a client when the market offers better alternatives to sell or buy the same product. Otherwise the main principle of the market economy which is based on the autonomy of economic actors to define their own commercial policy would be threatened, favouring the maintenance of dependent undertakings and hampering the entry of potential competitors in the market. (lightly edited by author)

This is not to say that countries with abuse of economic dependence laws believe they have had no beneficial effects. At the EC Forum, Christian Dobler of the German Federal Cartel Office stated:

> These provisions have not been enforced in many cases, but we think they have had a deterrent effect. The cases which arise usually relate to entry fees, listing fees and shelf rentals. Our attempts to prevent economic dependence have only been successful in individual cases. As for attacking the problem of concentration of buyer power at the root, the existing provisions, including the merger control provision, are of little use. [Ehlermann and Laudati, eds. (1997, 174)]

All three of the countries who have adopted abuse of economic dependence provisions have found it necessary to strengthen them. Germany has introduced "presumptions" of dependence in order to simplify proof of dependence. France has defined cases of dependence that no longer require proof that the abuse has a restrictive effect on the market as a whole, disallowed television advertising by large scale retailers, and has adopted restrictions on opening new large scale stores or expanding existing ones. It is in Portugal, however, that the most far reaching supplement to the abuse of economic dependence laws has been made. In May 1998 it amended its competition law to add a series of *per se* prohibitions (i.e. there is no need to show adverse economic effects) against "abusive bargaining practices" which can be enforced without a complaint being filed. These practices can generally be described as obtaining from a supplier, prices, payment conditions, selling conditions or commercial co-operation conditions which are exorbitant

compared with general selling conditions. "Exorbitant" conditions refer to terms which give a clear benefit to the buyer disproportionate to the size of its sales or to the value of the service supplied.

It is obviously too early to tell whether attempts to strengthen and supplement abuse of economic dependence laws will curtail buyer power in a way which benefits both competitors and competition. Just as with laws against price discrimination, there seem to be clear risks in trying to ameliorate the symptoms of buyer power. A better approach might be to prevent the emergence or strengthening of buyer power whenever that is likely to be used to anticompetitive effect. Our attention therefore turns to merger review.

5.6 Conglomerate mergers among manufacturers plus horizontal and vertical mergers among retailers

5.6.1 Analysis

Buyer power, as we have been using the term, virtually requires the existence of upstream seller power. It is also probably true that the prospect of gaining a share of upstream rents could supply retailers with increased motivation to augment their market share and differentiate themselves from other retailers. To the extent that winning and exercising buyer power may harm consumers, and the dimensions of these problems are by no means clear, competition agencies have yet another reason to apply close scrutiny to potentially anticompetitive manufacturer mergers.[65]

Once buyer power has emerged, there could be further developments upstream related to it. Manufacturers could seek to combine to counter balance retail buyer power.[66] By bringing together a large enough collection of sufficiently popular brands, manufacturers could avoid having to share rents with retailers. Where such mergers are truly *conglomerate* in nature, they stand a good chance of passing muster under most competition laws. Perhaps such policies deserve review since insulating manufacturers from buyer power might spell higher prices for consumers.

In addition to a measure of upstream market power, some degree of retail concentration, though not necessarily traditional seller power, is probably needed to give birth to retail buyer power. There is at least some anecdotal evidence that the accumulation of buyer power or the ability to match competitors' buyer power has fuelled some retail mergers. [67] Few competition agencies will be in a position, however, to put a brake on the accumulation of buyer power by blocking mergers associated with market shares below levels normally thought necessary to create seller power problems. This could be unfortunate if there are cases where retail mergers create buyer power initially benefiting consumers but simultaneously spark an anticompetitive concentrating trend among retailers.[68] Such a trend could develop even without further mergers because retailers lacking buyer power might be gradually driven out of the market.

Buyer power may also deserve careful, forward looking consideration when competition agencies are reviewing potentially anti-competitive vertical mergers between manufacturers and retailers, but once again the effects of buyer power could go either way. A vertical merger having foreclosure effects might still benefit consumers if it spawns buyer power leading to lower manufacturer prices which are subsequently passed on to consumers.

5.6.2 Policy implications

There are two difficult policy issues which buyer power raises for merger review. The first concerns the competition test applied in mergers. Some countries employ a variant of the "substantial lessening of competition" test, while others can prohibit mergers only if they will either "create or strengthen a dominant position". The two tests are typically merged somewhat by widening dominance to

cover joint or collective dominance as well. This goes only part way, however, towards taking account of how mergers could facilitate collusion or improve the chances of anti-competitive oligopolistic pricing. In any case, the dominance based test creates real problems for reviewing mergers among retailers in circumstances where buyer power will be increased and will in turn tend to produce anticompetitive effects. These were well described in Germany's written submission to the EC Forum:

> ...since the early 1980s, [the Federal Cartel Office] has consistently applied merger control to mergers and acquisitions in food retailing. Its position was that large distributive groups formed a market-dominating oligopoly on both the demand and supply sides. Oligopolists, unlike smaller competitors, were believed to be indispensable to their suppliers, since the latter were dependent on sales to these large buyers. The Federal Cartel Office's view was that no substantial competition existed between the oligopolists on the demand side, since satisfying the requirements of one buyer is no obstacle to satisfying the requirements of others. The Federal Cartel Office regularly prohibited members of the oligopoly group from acquiring competitors since every acquisition would have strengthened the oligopoly's buying power and hence its dominant position. This *de facto* ban on mergers for large firms did much to curb the concentration process over several years.
>
> However, the German courts did not agree. Case-law denied that the leading distributors formed a market-dominating oligopoly. In contrast to the Federal Cartel Office, which considered that only one procurement market existed, the court held that different procurement markets existed for different product groups. This included all the manufacturers' potential markets, not only retailing but also the catering trade and industrial processing firms. Although the court recognised that many suppliers were dependent on the oligopsony, it did not think that the oligopsony had a dominant position *vis-à-vis* all suppliers. The differences between the terms and conditions identified by the Federal Cartel Office, the court held, suggested that competition between the oligopolists existed, even though, taking all the product groups together, the oligopoly group obtained significantly better buying terms.
>
> The Federal Cartel Office is bound by the court's decision. Since market shares on demand markets are typically smaller than on supply markets, currently the Federal Cartel Office sees no further scope for proving market domination on the demand side. That is why, when looking into mergers and acquisitions in food retailing, the Federal Cartel Office now focuses solely on whether supplier power is created *vis-à-vis* the final consumer on regional markets. But in examining whether the oligopoly group of leading large distributors achieves a paramount market position regionally in relation to its competitors, account is taken of the group's prominent position on procurement markets. [see Ehlermann and Laudati eds. (1997, 202-203)]

As illustrated in the above extract, the second difficult policy issue that buyer power raises for merger review has to do with market definition. In examining retail markets, competition agencies should be careful to adopt market definitions reflecting the kind of consumer behaviour we have described in Section III of this paper. More specifically, in certain markets, one-stop shopping is an important consideration and significantly narrows the group of competing outlets. This is reflected in two recent merger decisions. The first is the merger of Finnish food retailers Kesko and Tuko and the second concerns the US merger of office products suppliers, Staples and Office Depot.

In the Kesko/Tuko merger the European Commission defined the market as applying to baskets of fresh and dried groceries plus non-food products generally sold in supermarkets (household detergents etc., toiletries, disposable paper goods and personal hygiene products). Explicitly excluded from the market definition were sales by specialised retailers, kiosques and petrol stations. In arriving at this definition, the Commission noted that:

> ...competition in Finland occurs among supermarkets and other retail formats capable of offering consumers an extended range of products permitting the purchase of everyday necessities in one and the same store, and offering closely linked services such as parking lots, shopping carts, etc.[69]

In the Staples/Office Depot merger, the U. S. FTC found that prices for office supplies (including computers and computer related products plus office furniture) were significantly lower in markets where all three of the largest office supply superstores competed. This constituted good evidence that, as earlier mentioned, office supply superstores offering the convenience of one-stop shopping at deeply discounted prices effectively constituted a different market from the one served by smaller, more limited range stores (of which there were many in every city).

6. Closing remarks

Sensitive application of prohibitions on horizontal arrangements, vertical restraints, and abuse of dominance, plus strict merger review (despite the problems mentioned above), appear to be the best way to address buyer power problems. Unlike prohibitions on price and non-price discrimination, loss-leading and abuse of economic dependence which seek to regulate the use of buyer power, the more standard antitrust tools can be applied to reduce both its incidence and potential to harm consumers.[70] They do this by directly preserving and protecting competition in both upstream and downstream markets. In the absence of upstream market power, the type of buyer power we have focused on would be irrelevant, and if downstream markets are sufficiently competitive, buyer power should generally be harmless to consumers. It might even help them.

There are two additional reasons for preferring to hone the standard provisions found in most competition statutes rather than to develop a customised approach to buyer power. The first is that it is very difficult to devise discrimination, loss-leading, or abuse of economic dependence prohibitions which are both enforceable and unlikely to have negative side effects on efficient, pro-competitive arrangements. Price discrimination could have many causes besides buyer power, and might be very useful as a means for introducing greater competition among manufacturers. There is no guarantee that prohibiting loss-leading will protect investments in quality products (or indeed that loss-leading damages quality reputation), but it could well put an end to an efficient advertising technique and possibly squeeze out large scale retailers following strategies other than hard discounting. There seems to be no easy way to make prohibitions of abuse of economic dependence enforceable yet avoid ossifying existing distribution patterns.

There is an important caveat that must be added to our cautions about devising a customised approach to regulate buyer power. Countries should ensure that their competition laws effectively prohibit large scale retailers using buyer power directly to arrange discriminatory terms in their favour. As seen for example in the Australian Safeway Stores, Carlton and United Breweries, and Toys “R” Us cases, there is a real potential for anticompetitive harm when retailers use buyer power to regulate how suppliers deal both with them and their competitors.

While a customised approach to buyer power is not patently necessary and may even be harmful, this is not to say that competition agencies need not worry much about it. Trends having close connection with buyer power, i.e. increasing concentration at the retail level, may indeed spell trouble for consumers. One may seriously question assumptions that large scale retailing is and will always remain inherently competitive. While barriers to entry into small scale and specialised retailing may typically be very low, the same is not the case for large scale retailing combining groceries, other FMCG, and a very wide range of consumer durables. Many competition authorities may want to re-think market definitions in cases involving retailers, and find more effective ways to convince courts that service stations and kiosques cannot effectively restrain the market power of the large scale retail chains.

Competition authorities will certainly wish to keep a close watch on retailing if it is clear that the sector may not be as inherently competitive as it was in the past. Retailing is critically important because a lack of competition at that level could have the same effects on consumers as significant increases in concentration across not just one branch, but virtually the entire spectrum of FMCG and consumer durables manufacturing. If retail markets are concentrated enough, especially where retailers succeed in differentiating themselves using private labels and other techniques, they may acquire significant power to unilaterally raise price. They may also learn how to co-ordinate pricing with other large scale retailers.

Changes in retail markets call for more than enhanced enforcement action. They also require some rethinking of certain parts of competition policy, especially in relation to vertical restraints. To take one prominent and controversial example, the arguments in favour of *per se* prohibitions of RPM deserve re-examination in a setting where retailers compete with rather than simply complement their suppliers.

Competition officials should go beyond being vigilant in applying standard antitrust tools to an increasingly segmented and concentrated retail sector. They should also advocate the repeal of laws and argue against legislative proposals offering dubious protection to smaller manufacturers and retailers. Dubious has a double meaning here. For example, the protection offered to small manufacturers through loss-leading provisions is ephemeral at best, and such laws might also directly reduce price competition beneficial for consumers. One area calling for urgent attention are regulations constraining the establishment or expansion of large scale stores. Governments may have valid social policies for restrictions in this area, but competition authorities should regard themselves as having a duty to explain the economic costs of these policies.

Should competition laws be restricted to protecting competition rather than competitors?

This question is never far below the surface in discussions of buyer power, though it has not been highlighted in this paper. Several times, however, we have alluded to the fact that buyer power may have adverse effects on certain manufacturing and retailing enterprises while simultaneously benefiting consumers. If competition agencies have a double mandate to protect both competitors and competition, they will almost certainly have to make difficult trade-offs in cases involving buyer power. Even a single purpose mandate, i.e. to promote economic efficiency through preserving and protecting competition, will not necessarily insulate a competition office from pressures to protect certain competitors. Those being hurt by the competitive process will be quick to argue that competition requires competitors, so they are entirely deserving of protection against what they see as unfair bargaining power. Courts, especially those with general jurisdiction, may also readily accept such reasoning. Competition agencies, however, should be more than a little suspicious of such arguments.[71]

It is true that protecting competition will also protect competitors, but only those which are efficient in meeting consumer needs. But conversely, saying that protecting competitors also means protecting competition is a dangerously misleading proposition. At the EC Forum, Dr. Groger from the German Economics Ministry offered the following important comment which also provides a good concluding note for this paper:

> Whether to protect competition or protect the competitor is really a central question. We have considered this issue from all angles in Germany, and I believe ultimately that it is a question of philosophy. My own philosophy is that if we protect competition as an institution in itself, then automatically we will also be protecting the competitor. But if we attempt to provide justice in individual cases and to individual competitors, I feel that we will win the battle, but we may lose the war for protecting competition, and competition will ultimately suffer.[72] [Ehlermann and Laudati, eds. (1997, 184)]

NOTES

1. Except for France and Germany, these data come from Cotterill (1997, 128) citing David Hughes (1994). The French market share comes from Borghesani et al. (1997, 18) while the German figure, which applies only to the top four firms, is from a working paper by the German Federal Cartel Office appearing in Ehlermann and Laudati, eds. (1997, 201).

2. Further detail on concentration in the distribution sector can be found in a series of OECD (1993) Working Papers by J. Dawson (#140), L. Pellegrini and A. Cardani (#139), P. Messerlin (#138), and J. Lachner, U. Tger, and G. Weitzel (#137), dealing with U.K., Italian, French and German distribution systems also describing increasing concentration in wholesaling and retailing in Europe.

3. See Corstjens and Corstjens (1995, 283) for a table of European buying groups. More recent data (September 1998) are available from the European Brands Association (AIM), Brussels (FAX - 32 2 734 67 02). The AIM data show that the large scale retailers apparently join only one group each, and avoid joining groups containing another large scale retailer from their main base country.

4. Very similar numbers for 1992 and 1995, 15 and 12 EEA countries respectively, are published in European Commission (1998, 22). See also Steenkamp and Dekimpe (1997, 919) for further data reflecting the growing importance of private brands in France, Great Britain and Spain.

5. See Cotterill (1997) for a good discussion of private branding and other notable differences in food retailing between the U.K. and U.S..

6. See Kumar (1997, 834) and Stern and Weitz (1997, 832).

7. See Cullen and Whelan (1997) who argue that second tier mass market brands are rapidly becoming casualties to the combined force of higher retail and manufacturer concentration and increased importance of private branding.

8. Dobson and Waterson (1996, 30) note a considerable growth in U.K. retail concentration and profitability:

> The most striking case has occurred in the retail grocery trade where...the market share of the top five firms increased from under 25 percent of national sales in 1982 to 61 percent in 1990. Perhaps not unconnected with this sharp increase in concentration, net profit margins for this group roughly doubled over this period to average around the seven percent mark. Furthermore, the extent to which retailers now dominate manufacturers in this sector is reflected by the fact that the return on capital employed in food retailing is nearly double that of food manufacturing. Even the power of the large multinational companies which supply heavily advertised brands has largely been circumvented by the ability of retailers to control the allocation of selling space while introducing in-store marketed own-label brands as effective rival products.

They expanded on this later (p. 31):

> [increases in gross margins]...may have resulted from retailers reaping economies of scale and improving productivity levels, as well as integrating backwards into wholesaling, but it may also reflect their increased ability to exercise buying and selling power. Indeed...British retailers are generally the most profitable in Europe. The top six profit earners are all UK based firms and, for example, in the largest sector, the grocery trade, net margins among the major British firms are nearly three times the EU average.

And at p. 38 they say:

> In some such areas, e.g. grocery, the concentration in power of retailers in the UK is unusual by comparison with many other developed Western economies and although Germany, France and the USA, for example, have seen rising concentration levels, the nature of competition appears to be different. Increases in concentration in these other countries has been largely due to the development of hypermarket discount chains, operating with low margins. By contrast, the UK grocery market has become dominated by large firms seeking to emphasise retail brands and service differentiation, with the result that rigorous price competition has on the whole been avoided, allowing for high net margins and high profit levels to be maintained.

In a later report [Dobson et al. (1998, 42)], it is again emphasized that something different may be happening in the U.K.:

> For example, in the grocery trade, average net margins among large retailers in the UK were found to be roughly three times higher than in France, Germany, Italy and Spain (where particularly in the former two countries hypermarket discount stores are much more common).

For a general comparison of the U.S. and U.K grocery businesses, including the different emphasis on private branding, see Cotterill (1997).

9. Even a brief mention of barriers to entry is incomplete without a reference to the growing use of the Internet to facilitate direct selling from manufacturers to consumers. This trend could have an impact on virtually everything this paper has to say about retail buyer power. As a recent newspaper article put it: "The tug of war that manufacturer and retailers have long played on the ground is spreading on-line and becoming more intense, potentially affecting all sectors of retail (sic) and manufacturing - and consumers as well." (Stoughton and Walker, 1999, p. 1). There is some reason to suspect that retailers selling goods whose quality requires physical inspection might be somewhat immune to the identified trend. That would prominently include retailers selling groceries.

10. Some readers may already be questioning whether oligopsonist retailers, at least those selling to the same set of consumers, actually have the power to reduce upstream production. If they buy and sell less (and at a higher retail price), why will their consumers not simply switch to purchasing the goods in other retail outlets, with the result that upstream production remains unchanged. Section III of this paper seeks to answer this question by focusing on consumer buying behaviour and in particular on a supposed preference for one-stop shopping.

11. Jacobson and Dorman (1991, 13, n.22) cite several references to support their contention that "...upward-sloping supply curves in manufacturing industries are the exception rather than the rule."

12. In the most simplified case, an efficient but captured supplier transfers its owners' capital to the powerful retailer by charging the latter a price below full average cost. When the transfer is complete, the supplier is forced to sell its business. A new or existing supplier will be willing to buy it as long as the purchaser can ensure it will not share its predecessor's fate. If contractual protection cannot be obtained, the only buyer will be a retailer. In either case, assuming backward vertical integration means no change in productive efficiency, the "price" of the bankrupted supplier's goods will soon return to the full average cost level.

    There is a possibility that buyer power could be used to bankrupt such a large number of small suppliers that it creates a dangerously concentrated supply sector. That would probably not be in the best interest of retailers. However, if this does eventually happen, it will have more to do with unexploited economies of scale upstream than with retail buyer power.

13. Three areas especially require further systematic attention. First, some of the Annex I analysis could change if buyer power is presumed and then changes are made in the degree of upstream or downstream

market power instead of the other way around. Second, explicit account should be taken of any reputational effects on both buyers and sellers. Externalities to the negotiating process mean that relative negotiating strengths are not all that needs to be canvassed in order to predict results. Finally, somewhat related to the second point, when suppliers sell to competing retailers, special discounts provided to one could change the negotiation "game" as concerns the others. We are inclined to believe, but this is strictly conjecture, that those dynamics will tend to increase the likelihood and significance of discounts granted in subsequent negotiations and further increase the quantities sold to ultimate consumers.

14. Most favoured nation clauses are enforceable contractual obligations to sell to a buyer at the lowest price charged to any other buyer. As to the close association of buyer power with price discrimination, it should be rare indeed to find that a supplier's customers have exactly equal buyer power and are equally adept at exploiting it.

15. For example, Dobson et al. (1998, 5) stated that buyer power is exercised when, "... a firm or group of firms obtain from suppliers more favourable terms than those available to other buyers or would otherwise be expected under normal competitive conditions." This definition would be considerably improved by restricting it to "...more favourable terms than those available to competing buyers". Competing buyers are selling to the same set of final customers so their derived demand for the upstream suppliers' products should display similar elasticities unless the buyers have different degrees of buyer power. Alternatively, the Dobson et al. definition could be usefully fine tuned by incorporating a reference to the cause of the discriminatory terms. A good example of that approach is found in an earlier OECD review of buyer power where we read:

> Buying power may be defined as the 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 a 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. [OECD(1981, 10), emphasis added]

A very similar definition was provided at the EC Forum, by Professor Antunes, at the time, head of the Portuguese competition agency:

> Buyer power exists when an undertaking or group of undertakings, either by having a dominant position in buying a product or service, or through advantages in commercial strategy, or great negotiating strength resulting from size or other characteristics, is able to obtain from a supplier conditions more favourable than those offered to other buyers. [Ehlermann and Laudati, eds. (1997, 225)]

16. This and the previously mentioned discriminatory treatment accorded competing retailers problem would be non-existent if capital markets and suppliers were perfectly, costlessly informed. Such perfection, though, is not present in the real world.

17. Bell et al. (1997, 854) explain some of the reasons behind one-stop shopping as follows:

> There has been a pronounced change in patterns of consumer shopping, influenced both by socio-demographic factors and by the size and location of retail outlets. One stop shopping has been fostered by increases in ownership of cars, the number of working wormen and in disposable income. Consumers undertake their major food shopping occasions less frequently, travel further to the store, and spend more money on each shopping occasion.

They later (p. 858) added that one-stop shopping is promoted by distance to out of town stores and planning restrictions preventing hypermarkets from being close together.

Data from Belgium, France, Germany, Italy, Spain and the United Kingdom, showed that 90 percent or more of consumers surveyed shopped weekly or less frequently for packaged food products. In the Netherlands, this dropped down to 80 percent. See Food Marketing Institute (1992). More recent (1995)

data for sixteen Western European countries (Switzerland was the notable exception) tend to weaken the infrequent shopping story. They show that European shoppers visit their primary store (i.e. for groceries and related goods) an average of 2.14 times per week, but this varies according to type of primary store. Shoppers whose primary store is a small neighbourhood market visit it an average of 3.44 times per week. At the other end of the spectrum, shoppers whose primary store is a hypermarket visit it on average only 1.38 times per week. See Food Marketing Institute (1995, 32).

The attractiveness of one-stop shopping is not limited to the FMCG sector. The U.S. Federal Trade Commission (FTC) essentially blocked the merger of Staples, Inc. and Office Depot, Inc. because it had clear empirical information supporting the idea that there was a separate market for office supply superstores offering "...consumers the convenience of one-stop shopping for a wide variety of office supplies, computers and computer related products, and office furniture at deep discount prices." United States Federal Trade Commission (1997a, 1)

18. See INSEE (1998, 2)

19. The fact that some promotional prices are unadvertised may be evidence that high-low pricing is not targeted simply on swing customers.

20. Accurate comparisons would not only require extensive record keeping and careful checking, it would also necessitate some way of adjusting for the fact that different baskets of goods would be purchased in each possible store because they offer an ever changing set of relative prices, not to mention a number of goods which are never directly comparable (i.e. fresh meat and produce plus privately branded goods). It is no wonder that there is some disparity between actual and perceived price differences across stores as illustrated in data presented in Corstjens and Corstjens (1995, 153)

21. Much of what follows is closely inspired by Corstjens and Corstjens (1995, 196-218).

22. Surprisingly, even among shoppers who frequently patronise more than one supermarket, 53 percent said they would substitute an equivalent brand, and only 24 percent would go to another store - see INSEE (1998, 2). Note that the option "go to another store" did not necessarily mean changing primary outlet, and that the option of simply cancelling the purchase was apparently not given.

23. To simplify subsequent exposition, the consequences of the deferral and switching stores options will be conflated. This is reasonable given that CSS and the costs of a supplemental shopping trip (CSST) are likely strongly positively correlated. Furthermore, risk averse retailers would tend to fear deferral decisions almost as much as decisions to switch stores since sampling another store could considerably influence a consumer's subsequent choice of one-stop shop location. References in the text to CSS should be read as including CSST.

24. See United States Federal Trade Commission (1996 and 1997c) for a review of this case, which is currently under review by the FTC.

25. Ehlermann and Laudati, eds. (1997, 226).

26. Ibid., page 187.

27. See Blair and Harrison (1993, 117-121) for a discussion of the more important alternative solutions including: vertical integration, vertical integration by contract, and formula price contracts. Also see Scherer (1990, 521-522) for a discussion of why it might be difficult for the parties having seller and buyer power to cooperate in achieving a joint profit maximising result, hence vertical integration might result.

28. According to Cotterill (1997, 131):

> One reason that the retailer brands have a price advantage relative to manufacturer brands is their ability to limit marketing expenses because they have economies of scope across all products due to the brand equity of their trusted and respected name, e.g., Sainsbury.

Dobson and Waterson (1996, 37) cited a Tesco director for the proposition that:

> The value which the store name acquires can be transferred to a range of goods which themselves reinforce the image of the store.

29. Corstjens and Corstjens (1995, 246-247) provide valuable insights into how branding can add to consumer welfare. They also deal with the comparative advantages of manufacturers, retailers and third parties ("weightless or free-floating brand ownership" - see 178) as competing suppliers of branding services:

> Branding provides three services to the consumer: identification, quality assurance and associations. Retailers are perfectly able to provide the first of these services. The second branding service depends on: (*a*) being able to acquire high-quality produts, and (*b*) being able to reassure. In product areas where the technology for making good products is widely diffused, and the assessment of the product is simple for the consumer, retailers reassure very well. Retailers have problems when the technology for making excellent products is held by a small number of large manufacturers, or where specific functions are sought and their assessment is rather difficult.

The third branding service, associations, poses a special set of problems for retailers. Retailers tend to have functional, good-value images, and where this fits with the branding need, they can provide satisfactory associations. When the associations required involve image or answer a need for dentification or fun, retailers are held back by their down-to-earth images. In these areas the critical mass of the manufacturers allows them to create the desired images via advertising, and invest in understanding their markets to optimise their psychographic positionings and innovations.

> Consumers will 'buy' branding from the organisation which can provide it most cost efficiently. Consumers are willing, to a variable degree, to trade-off some and any of their three branding needs for a lower price.

Steenkamp and Dekimpe (1997, 920) concluded that the considerable variation in private brand penetration across product categories illustrates that they face a "...tougher battle in categories where:

1. the quality difference vis-a-vis national brands is larger...;

2. the level of technical sophistication is high (as only a few players, which typically are national manufacturers with vested interests, have the necessary expertise...);

3. the level of innovativeness in the industry is high (as this limits the remaining number of 'niches'in the product space...);

4. the extent of price competition between the national brands is high...;

5. there is a greater emphasis on advertising versus sales promotions...."

30. On the other hand, some consumers may value simplified choice. Steenkamp and Dekimpe (1997, 919) noted that consumer benefits from private labels include: wider selection of higher quality products at lower prices, "...and for consumers who have developed store loyalty, the existence of a store label offering consistently high quality across a wide range of product categories can considerably facilitate the shopping experience."

31. Corstjens and Corstjens (1995, 189) present a chart which backs this point by showing that even the largest FMCG companies operate in a very small number of product categories, i.e. ranging from 15 down to 2.

32. This is well described in London Economics (1997, 34):

> The own-brand strategy chosen will be partly determined by, and will partly determine, the image of the retailer itself. If the retailer decides to sell only branded products, then the market positioning of that retailer, in terms of product portfolio and price, is highly dependent on the manufacturers whose products are stocked. If, on the other hand, the retailer also stocks own-brand products, it can differentiate itself from rival retailers by the quality and price of those products.
>
> The importance of this method of retailer differentiation can be seen from the degree of correlation between the extent of own-brand penetration and the market positioning of retailers in particular retail markets. In the grocery sector, for example, those retailers which stock the most own-brand products (Sainsbury's, Tesco and Asda) are also positioned more upmarket than those which focus on branded products (Kwik Save, Aldi and Netto). The nature of this correlation is complex and causation works in two directions:
>
> * the success of a retailer in selling own-brand products is dependent on the reputation for quality that the retailer has; and
>
> * the retailer's reputation for quality depends on the quality of its own-brand products (in exactly the same way that a manufacturer's reputation depends on the quality of its products).

33. See Bell et al. (1997, 857) who chart selected products for U.K. and Belgium showing a reduction between 1990 and 1993 in secondary brand market share. Cullen and Whelan (1997) considered the impact of growing retail and manufacturer concentration plus private label growth and noted:

> On a European level the balance of power in the marketplace is likely to rest between manufacturers of Euro-brands or global brands and the large retail chains, while national brand manufacturers with brands ranked third or fourth in FMCG markets are faced with the prospect of continuous share erosion or the choice to specialise either as niche brands or possibly as private label suppliers.

Corstjens and Corstjens (1995, 192-194) also predict a tough future for "smaller brands" increasingly squeezed between private brands and the leading national brands.

34. Referring to private brands, Cotterill (1997, 129) stated: "This entry into the food manufacturing sector [whether by vertical integration or contract] creates a new player albeit an informed buyer, and thus may very well lead to lower wholesale prices for not only private label but also branded food products."

35. Perhaps the argument would run along the lines cited in the above quote from Steenkamp and Dekimpe (1997, 928), i.e. retailers would essentially be directing the innovation efforts of the private brand producers, and they are simply not as well equipped for primary innovation as are independent manufacturers. Moreover, the profit potential of a private brand innovation could be restricted by the fact that private brands are exclusively distributed in only one of a number of competing retail outlets each having a kernel of semi-captured consumers. This latter argument is only as strong as presumed imperfections in licensing markets.

36. The majority apparently includes such well known companies as Unilever, PepsiCo, Nestlé, Heinz, Playtex, Ralston Purina, Hershey, RJR Nabisco and McCain.

37. See n. 15 supra.

38. For a good overview of the economics of price discrimination, see Varian (1989).

39. Armed with sufficient loans, a more efficient new entrant would be able to undercut the prices of its temporarily larger rivals. Based on those lower prices, it could eventually obtain an equal or greater market share than its rivals and thereby eventually match or eliminate their buyer power.

40. "Total rents" are intended to include rents earned on products other than those the manufacturer is providing to the retailer.

41. The Australian delegation's submission to the OECD's Competition Law and Policy Committee's roundtable on buyer power (Paris, October 29, 1998) contains a brief description of the case at page 10. See also page 4 of the Aide-Mémoire of the roundtable discussion.

42. For further details about this case, see United States Federal Trade Commission (1996,1997c and 1998). The case has now been decided by the Federal Trade Commission, and will likely be appealed.

43. Commissioner Orson Swindle, dissented from the majority view concerning the horizontal boycott aspect of the case. The press release stated:

> According to Commissioner Swindle, "it is precisely the plausibililtly of the vertical theory and the strength of the evidence underpinning that theory that undercut the majority's finding of a horizontal conspiracy among toy manufacturers." Swindle further stated that "[t]here is a paucity of evidence - direct or circumstantial - that the manufacturers developed among themselves a scheme to boycott the clubs." Indeed, "TRU's hammerlock on the manufacturers made [any such] horizontal agreement among the manufacturers simply unnecessary." He observed that "TRU's very indispensability gave each toy manufacturer every incentive - every unilateral incentive - to knuckle under to TRU's demands regarding the clubs." In Swindle's view, "No inference of horizontal agreement is necessary to make sense of the manufacturers' actions." [United States Federal Trade Commission (1998, 3)]

44. See for example, see Scherer (1990, 515-516), Carlton and Perloff (1989, 773-774) and Martin (1994). The latter was cited by Dobson et al. (1998, 29) as observing that "...the Robinson-Patman Act is almost universally condemned by economists as protecting inefficient modes of distribution and imposing substantial costs on society."

45. In a now somewhat dated survey, price discrimination prohibitions in eight other OECD countries were discussed - see OECD (1981, 66-79).

46. In the course of a workshop on buyer power sponsored by the French Direction générale de la Concurrence, de la Consommation et de la Répression des Fraudes, the purchasing director for Auchan, one of France's hypermarkets, took issue with the idea that his firm had buyer power as concerns multinational manufacturers and gave the example that Auchan represented 15% of Procter and Gamble's sales in France, but this was only 0.8 percent of Procter and Gamble's sales world-wide - see France (1997, 26). The purchasing director's point seems a bit misleading since Auchan is also a multinational enterprise with, as of 1996, stores in Spain, Italy, Portugal, Poland and the United States. See European Commission (1998, pp. 23 & 26). Furthermore, it belongs to international purchasing groups - see n.3 supra.

47. The former head of the Portuguese competition office, Dr. Luis Antunes stated that Portuguese producers have reacted to buyer power "...by creating their own trump card, attempting to group together in negotiations with retailers and wholesalers." [Ehlermann and Laudati, eds. (1997, 182)] See also de Wilt and Krishnan (1995, 38) for five examples of strategic alliances in the food industry which might be partly a response to buyer power, namely: Nestlé - Coca-Cola (tea/coffee drinks); PepsiCo - Unilever (tea based drinks); PepsiCo - General Mills (snack foods in Europe); Unilever - BSN (ice-cream, yoghurt); and Twinings - Seven Up (iced tea). These alliances may involve something specific to beverage industries and perhaps do not represent any kind of trend.

48. The Australian delegation's submission to the OECD's Competition Law and Policy Committee's roundtable on buyer power (Paris, October 29, 1998) contains, at page 9, a brief description of the case. See also pp.13-14 of the Aide-Mémoire of the roundtable discussion.

49. See Annex 2 for a brief overview of the pre-requisites for true predatory pricing.

50. We speak of enhancing rather than creating buyer power, because harmful loss-leading will not likely survive in the absence of sufficient initial buyer power.

51. In addition to low price elasticity of demand, retailers will see the following as desirable qualities in a loss-led product: difficult for a consumer to store; frequently purchased by most customers; standardised or well-known enough to facilitate comparative pricing; and relatively low priced (so that a large percentage price reduction does not translate into a large absolute "loss" on each unit sold).

52. London Economics (1997, 102) noted:

> ...it is very hard to distinguish between loss leading and the normal pricing of a high-elasticity, strongly-branded, fast-selling product. In addition, the cost structures and cost allocation systems of different retailers can vary substantially, so that any simple percentage mark-up test for loss leading which is valid for one retailer is unlikely to be valid for another. Moreover, the use of a general rule of this type is tantamount to RPM, which the Resale Prices Act specifically outlawed.

53. See s.61(10)(a & b) of Canada's *Competition Act*, R.S., 1985, c.C-34 as amended (December 1990). See also London Economics (1997, 101) where it is noted that the U.K. allows suppliers "...to lawfully withhold supplies of goods from a retailer if he has reasonable cause to believe that the retailer has been using them as loss leaders."

54. Antalics (1997, 1) emphasis added.

55. The reader is again referred to Annex 2 for an analysis of predatory pricing.

56. Shaffer (1991, 121)

57. Dobson et al. (1998, 37) state:

> The tight gatekeeper role that the major chain-stores now enjoy, by controlling access to consumers, means that they are increasingly in a position to exercise buyer power - given that, for manufacturers, distribution through these outlets is critical to their business and the problem is one of access to an essential facility (where the manufacturer has no other viable means of setting up distribution which offers the same scale and economic benefits).

58. See the digest of Jérôme Philippe's presentation at L'Atelier de la concurrence, "L'Analyse de la puissance d'achat" [France (1997, 12-15)] He pointed out that a difficulty in accessing certain customers is not tantamount to a difficulty in accessing a market. Besides, when consumers fail to find a product in one store, what do they actually do? M. Philippe said that few studies, to his knowledge, answered that question but then added:

> ...one recent study by a specialised company, shows that the average consumer frequents at least three large scale stores. Postponing purchases is therefore possible, and they have sometimes been observed in massive proportions in certain concrete cases." (14 - author's translation).

Unfortunately, the "recent study" was not more precisely identified. The finding that "...the average consumer frequents at least three large scale stores" sits uneasily with earlier mentioned survey results [only 26 percent of U.S. supermarket shoppers visited three or more supermarkets each week - see

Corstjens and Corstjens (1995, 201), and only 20 percent of French supermarket shoppers regularly frequent three or more supermarkets - see INSEE (1998, 2)]. Perhaps these different results have to do with the exact meaning of "frequents" or "regularly frequent(s)", i.e. with the implied periodicity.

59. Section 22(2)1 of the German Act Against Restraints of Competition presumes dominance above a 33 1/3 percent market share. This is the lowest such threshold among OECD countries that the author is aware of.

60. See Vogel (1998). Actually applying his proposal would likely require some changes to laws since in actual fact services are not "sold" to upstream suppliers. Incidentally, Vogel proposed segmenting by "...characteristics of services provided and conditions in which products are sold...." (11)

61. Section 22(1)2 of the German "Act Against Restraints of Competition" sets out a somewhat expanded definition of dominance, which is later applied in 22(4 & 5), 26(2, 3 & 4) to constitute the prohibition. Section 22(1)2 reads:

> [an enterprise is market-dominating...insofar as, in its capacity as a supplier or buyer of a certain type of goods or commercial services] it has a paramount market position in relation to its competitors; for this purpose, its share of the market, its financial strength, its access to the supply or sales markets, its links with other enterprises, its ability to switch its supply or its demand to other goods or commercial services, as well as the ability of the opposite side of the market to deal with other enterprises shall in particular be taken into account. (emphasis added)

Section 26(2) prohibits "market-dominating" firms from unfairly hindering another enterprise, or according unjustified different treatment to similar enterprises. It goes on to provide extra protection in situations where "...small or medium-sized enterprises as suppliers or purchasers of a certain type of goods or commercial services depend on [market-dominating firms] to such an extent that sufficient and reasonable possibilities of dealing with other enterprises do not exist." Section 26(2) also provides a presumption of such dependence where a purchaser "...regularly obtains special benefits not granted to similar purchasers." Section 26(3) is more directly targeted on buyer power because it prohibits market-dominating enterprises and associations of such enterprises from using their market position to obtain discriminatory terms. This is reinforced by Section 26(4): "Enterprises having superior market power in relation to small and medium-sized competitors must not use their market power to unfairly hinder those competitors either directly or indirectly."

Articles 7, 8 and 9 of France's competition statute (Order No. 86-1243 of 1 December 1986 - On Freedom in Pricing and Competition) prohibits a business or group of businesses from "taking unfair advantage" of "a client or supplier business which is economically dependent upon it and which has no equivalent alternative." This prohibition applies, however, only when unfair advantage is "...is designed for, or may have the effect of, curbing, restraining, or distorting competition in a given market...." Exactly what constitutes dependence or a lack of "equivalent alternative" is somewhat debated in France - see the quite different views expressed by Christian Babusiaux (from the Direction générale de la Concurrence, de la Consommation et de la Répression des Fraudes) and by the French Conseil de la Concurrence, in Ehlermann and Laudati, editors (1997, 197, 222-223).

While it is certainly possible to have a situation where both a manufacturer and a retailer are each economically dependent on the other, it would be hard to imagine either such party being able to take unfair advantage of the other unless the degrees of dependence were quite different. It should also be noted that the first part of Article 8, read together with Articles 7 and 9, prohibit anti-competitive abuses of a dominant position. With these points in mind, it seems fair to conclude that the second part of Article 8 is intended to apply to situations where despite the absence of a dominant position, there is a such a degree of inequality in negotiating power that unfair advantage is being taken of the weaker party.

The Portuguese competition statute's Article 4 states: "Also prohibited is the abuse, by one or more undertakings of a position of economic dependence upon that undertaking by a supplier or buyer as the result of the absence of an equivalent alternative...." The abuses are defined with reference to Article 2(1)

which sets out a general abuse of dominance prohibition and supplies a non-exhaustive list of abusive practices, including one directed to discrimination applied to equivalent transactions.

62. Ehlermann and Laudati, eds. (1997, 196)

63. The earlier discussed Toys "R" Us case suggests that this problem might be somewhat exaggerated. Perhaps the most damaging application of buyer power, from the consumer's point of view, arises when a retailer causes one or more manufacturers to discriminate in its sales so as to strengthen the position of the powerful buyer at the expense of its competitors. One might expect that one or more such competitors would be willing to complain if they discerned what was happening. Obtaining proof would be more difficult, however, for such third parties.

64. Similar views are also expressed in the Portuguese delegation's submission to the OECD's Competition Law and Policy Committee's roundtable on buyer power (Paris, October 29, 1998), p.3.

65. Speaking at the EC Forum, Frédéric Jenny, from France's Conseil de la Concurrence, remarked:

> The representative from Germany has said that merger control had not been entirely efficient, and had not really solved the problems of abuse of dependence in Germany. But I think it would be better to deal with the problem upstream, and thus avoid some of the reasons which in France have led to a very strong concentration in the distribution sector. [Ehlermann and Laudati, eds. (1997, 181)]

66. Closely related to this would be instances where parties to a merger insist that despite its creating market power, no harm to consumers will follow because there exist powerful buyers who will somehow be able to offset the seller power. See Steptoe (1993) for a discussion of the buyer power defence in merger cases.

67. Nirmalya Kumar (1997, 830) cited a desire to acquire buyer power as one of four reasons for the merger wave among retailers, including some very large cross-border mergers.

See also Stern and Weitz (1997, 826) who reported that:

> One of the major motivations for the merger between Federated Department Stores and Macy's in 1994 was to provide the combined companies with buying power similar to that exercised by J. C. Penny and The May (sic) Company, the largest U.S. department store chains prior to the merger.

68. Of course it is also possible that a merger will simultaneously create buyer power and sufficient seller power that consumers do not even receive initially lower prices. This seems to have been one of the reasons the UK's Monopolies and Mergers Commission (1990, 67) rejected the Kingfisher and Dixons Group merger.

69. European Commission's written submission to the OECD's Competition Law and Policy Committee's roundtable discussion on buyer power, October 29, 1998, Paris, page. 3 (author's translation).

70. In some OECD countries, the standard approach includes the ability to directly alter market structure. For example, in France the competition authorities brought about in June 1987 a "...dissolution of the mammoth purchasing agencies, i.e. the groupings which had been brought together from major distribution businesses." [Ehlermann and Laudati, eds. (1997, 168)]

71. For example, at the EC Forum, the chairman of the section dealing with "Economic Dependence", Professor Walter Van Gerven, a former Advocate-General at the European Court of Justice, stated:

> Is it not striking for competition law that the Commission's Decisions and the Court's case-law have systematically treated all restrictions of competitors' freedom as a restriction of competition? That is a very legalistic approach, considering the right to compete as a basic human right, any restriction thereof

> constitutes an infringement of Article 85. However, competition must also be understood as the state of the market, as is apparent in the court's case-law and the Commission's practice through the notion of agreements of lesser significance. Not every restriction of competitive freedom is prohibited: the restriction must exceed a certain threshold. After 35 years, it may now be time to review the foundation of competition law. [Ehlermann and Laudati, eds. (1997, 183)]

72. Also speaking to the EC Forum, Frédéric Jenny, from France's Conseil de la Concurrence, stated:

> We must be clear on this. We should not confuse the protection of competition with the protection of a competitor, which are two very different objectives....
>
> The abuse of economic dependence concerns a bilateral relationship. Thus, the natural inclination is to look towards protecting a competitor, the person in a position of dependence, rather than protecting the market against distortions of competition.... [Ehlerman and Laudati, eds. (1997, 180)]

Annex 1

INITIAL ECONOMIC EFFECTS OF BUYER POWER EXERCISED BY MULTIPRODUCT RETAILERS

Readers interested in diagrammatically illustrated proofs are referred to Blair and Harrison (1993, 36-61, 109-129), Dobson et al. (1998, 11-21), or Jacobson and Dorman (1991, 5-19). None of these, however, deal adequately with Case C below. It is assumed throughout that we are dealing with manufacturers selling directly to retailers, i.e. there are no wholesalers.

1. Perfectly competitive upstream and downstream markets

To simplify the analysis, let us take as a starting point perfectly competitive equilibria both upstream and downstream, and assume it is disturbed by the emergence of a retail monopsonist (i.e. at least a sub-group of suppliers face just one buyer). Upon obtaining monopsony status, a retailer might be able to offer something between full average cost and average variable cost and still find a short run willingness to supply. It would also have a long run profit incentive to do this, if the affected suppliers collectively have an upward sloping long run supply curve, and there are barriers to entry into the upstream market. Under those conditions and assuming the monopsonist continues to sell in a perfectly competitive market, the long run consequences of monopsony power, would be:

1. the suppliers' price level would drop below what it was before the monopsonist appeared;

2. the quantity supplied by the affected suppliers would decline and one or more of the suppliers would exit the industry;

3. the monopsonist would earn supracompetitive profits;

4. a gap would emerge between the price the monopsonist pays for an additional unit and the full cost of the extra unit to the monopsonist (because increases in the quantity purchased raise the cost of all previous units purchased);

5. producers' surplus garnered by suppliers would be reduced by more than the monopsonist gains in producer's surplus (i.e. there would be a deadweight loss to the economy); and

6. consumers would continue to purchase the same quantity as before at the same prices - provided that unaffected suppliers are able to make up the quantity reduction with no increase in price (i.e. they collectively constitute a constant cost industry).

All the above consequences would fail to materialise if the affected suppliers' supply curve is horizontal, as might be the typical case for manufacturing industries.[1] They would also not apply if their supply curve were downward sloping, but that seems quite unlikely in the long run.[2]

The predicted long run results should generalise, though probably with attenuated harm, to oligopsony. Exploring this further lies outside the scope of the current paper.

In sum, assuming perfectly competitive manufacturing and retailing, monopsony power imposes a deadweight loss on the economy and creates superprofits for the retailers enjoying such power, but will not necessarily reduce consumers' surplus. Such situations are of limited interest from the competition

policy point of view because the associated deadweight losses are likely to be small (especially if long term industry supply curves are relatively elastic), and because competition offices are increasingly inclined to protect competition rather than competitors.

There are two seeming "contradictions" in the above analysis that should be pointed out. The first is that an upward sloping long run supply curve is presumed for the affected suppliers, but a horizontal supply curve for a group of unaffected suppliers. Foreign trade could perhaps resolve this seeming paradox, but why should imports be readily available while exports by the afflicted manufacturers presumably are not? One possible answer could be that the unlucky manufacturers are too small to profitably engage in international trade. Another potential contradiction concerns the assumption that a retailer can have buyer power yet simultaneously be selling into a perfectly competitive market. In the absence of some (improbable) government regulation restricting certain suppliers to sell only to one or a small number of retailers, it seems unlikely that retail buyer power and competitive retail markets could co-exist.

Strictly speaking, it is impossible to have perfectly competitive conditions at the retail level, including no barriers to entry and still have buyer power. If retailing were perfectly competitive (and that includes perfectly informed consumers having no economies of scope in purchasing), someone would always be able to quickly set up efficient alternative outlets for goods which powerful retailers delist or otherwise disadvantage. It is possible, however, for there to be certain kinds of market imperfections which permit buyer power to coexist with retail competition sufficiently vigorous to keep supracompetitive retail profits to low or non-existent levels. Such a set of circumstances, related to consumer shopping behaviour, is the main issue explored in the paper's Section III.

2. Perfect Competition Upstream Combined with Downstream Seller and Buyer Power

This is a repeat of Case A except that this time it is assumed that the starting point includes downstream monopoly. This time the addition of the monopsony power will reduce price at the manufacturer level and further reduce and raise, respectively, quantity sold and prices charged at the retail level. In other words, it is expected that the exercise of buyer power will reduce both producers' and consumers' surplus, i.e. there will be deadweight loss resulting from both misallocation of productive resources and inefficient consumer good substitution. As in Case A, these expected results would probably generalise to oligopsony and oligopoly, but exploring that once again lies outside the scope of this paper.[3]

Again as in Case A, the buyer power aspect of this situation is unlikely to be of great interest to competition authorities if long run supply curves are highly elastic. Under those circumstances, the lion's share of any reduction in consumers' surplus would likely be attributable to retail seller rather than buyer power.

3. Upstream market power coupled with buyer power but no seller power at the retail level

In its most extreme form, this is the classic "bilateral monopoly" case (monopolist manufacturer faces a single retailer). Unlike the first two cases it opens the door to the possibility of buyer power being exercised to simultaneously decrease the price paid to suppliers yet increase the quantity purchased. In other words, price concessions would not be directly linked to changes in suppliers' unit costs. Rather they would result primarily from the exercise of negotiating power.

Bilateral monopoly is often said to lead to an indeterminate result. Nevertheless it is worth pointing out that in a market where a profit maximising monopoly manufacturer at first encounters zero

buyer power, the quantity initially purchased from the manufacturer and resold by the retailer should be the one which maximises the profits of manufacturer and retailer taken together (i.e. Qm). If this situation is disturbed by the emergence of monopsony, both parties would have a joint interest in retaining the profit maximising output, Qm, and somehow agreeing on an acceptable division of the profits. Whether that actually happens or not will depend on how bargaining takes place, in turn greatly influenced by what each party knows about each other. The uncertainty concerning the ultimate result will be considerably increased if instead of an upstream monopolist facing a downstream monopsonist there is oligopoly dealing with oligopsony. All the parties would still have an incentive to restrict purchase volume to the joint profit maximising quantity, i.e. Qm, but this will now require a quota distribution system which *de facto* prevents competition at least as regards the resale of goods purchased from the upstream monopolist.

The intuitively appealing prediction for this case, especially in its generalised form of upstream oligopoly and downstream oligopsony, is that buyer power may well lower the price paid to manufacturers and expand the amount being purchased and resold as retailers compete away the rent they were initially able to obtain from suppliers. That seems to make sense because if the oligopsonists were able to confront the oligopolists with a firm price (so that the oligopolists effectively are faced with a perfectly elastic demand curve) the equilibrium profit maximising output would be greater than Qm. On the other hand, if the oligopolists were able to act as price setters, they would seek to hold the quantity sold to Qm. No one would have an incentive to decrease output below Qm. The most realistic possibility then is that the emergence of buyer power will probably cause output to increase and price to consumers to decrease. Even if this happens, however, output and prices will still remain respectively below and above levels which would prevail with competitive upstream and downstream markets and an absence of buyer power.

We must again note, without resolving, a type of contradiction applying at least in the simplified bilateral monopoly story. A monopsonist retailer constitutes the sole channel to market for the upstream monopolist. As such the retailer effectively steps into the shoes of the upstream monopolist and therefore obtains the same market power its supplier enjoys, i.e. we are effectively in the fourth case discussed below.

Once one assumes a downstream oligopsony instead of monopsony, there is the possibility that an upstream supplier with seller power will engage in price or non-price discrimination, either unilaterally or because of pressure from differentially powerful buyers. In general, such price discrimination should be welfare enhancing since it should result in a larger quantity being sold at both the manufacturer and retail level. This might not be the case, however, where discrimination results in a less competitive market structure either at the manufacturer or retail level. More will be said about that in Section V of the paper.

4. Upstream market power coupled with downstream market power plus buyer power

The principle difference between this and the previous case, assuming again that the addition of buyer power will promote the parties moving to the joint profit maximising position, is somewhat surprising and open to question. It is that there would be a greater chance that buyer power would be associated with an increase in the quantity transacted than would be the case where there is no downstream seller power. This is because the pre-buyer power situation features a double marginalisation problem, i.e. the initial quantity exchanged should be below the joint profit maximising level.[4] It is worth pointing out, though, that even without the addition of buyer power, the parties have an incentive to engage in some form of vertical arrangement or even vertical integration to put an end to the inefficiencies occasioned by double marginalization. In any event, once again the exact results in terms of quantity sold and prices charged depend on relative negotiating power.[5]

NOTES

1. See n. 11 supra.

2. If their collective long run supply curve were indeed downward sloping, there could well be an unstable equilibrium. Moreover, curtailing purchases would tend to raise the suppliers' price, and more than simple buyer power would be needed to make that a profitable development for retailers.

3. After discussing what we have labelled Cases A and B, Dobson et al. (1998, 13) note:

> Although this discussion is presented primarily in terms of a monopsonist, as the only buyer in the market, the principles are readily applicable to situations where some buyers (either singly or jointly) recognise their ability to influence market prices. In such instances, three conditions appear necessary for the exercise of buyer power: first, that the buyers contribute to a substantial portion of purchases in the market; secondly, that there are barriers to entry into the buyer's (sic) market; and thirdly, that the supply curve is upward sloping.

4. In the United Kingdom submission to the economic dependence portion of the European Community's Competition Forum, in April 1995 [Ehlermann and Laudati, eds. (1997, 209)], we read:

> ...even if buyer power is a significant influence on price discrimination by sellers, this cannot be viewed as *per se* harmful. The exercise of buyer power reduces the problems associated with double marginalisation and raises consumers' surplus above that which would prevail if that power were not exercised. The less market power that exists at retail level, the greater will be the benefits of buyer power to the consumer. However, the current concerns about buyer power arise due to the mistaken attribution of the detriments of market power to the - generally beneficial - exercise of buyer power.

5. Blair and Harrison (1993, 112-121, plus 126-129) and Dobson et al. (1998, 18) take the view that one can confidently predict in this case that the parties will move to the joint profit maximising output (Qm) and later bargain over how the resulting profits are shared. One can agree that the parties do in fact have a joint interest in moving to Qm but remain sceptical concerning the reliability of a mechanism for reaching that result. More work appears to be needed on this point.

Annex 2

PREDATORY PRICING

The following are excerpts from the conclusions section of OECD (1989, 81-83).

Predatory pricing refers to the use of short-run price-cutting in an effort to exclude rivals on a basis other than efficiency in order to gain or protect market power. It has been of concern to competition policy officials since the passage of the first antitrust laws and continues to be so in many jurisdictions. Competition policy officials often receive complaints of predatory pricing by self-described "prey" and private actions continue to be filed where they are permitted....

Predatory pricing... is a complex form of anticompetitive conduct. It requires the perpetrator to incur substantial losses or at least to forego present profits in the hope that those losses can be more than recouped in the future through the exercise of market power. Thus market conditions play a key role in determining whether price predation is a feasible tactic for a firm to employ. The predator must have a very substantial share of the market or at least the capacity to acquire such a share. In addition, entry conditions must be such that market power can be exercised for some period of time following a predatory episode in order to provide recoupment for the predator's "investment". To the extent that a predator mistakes market conditions his self-inflicted losses will not be regained and in this sense predation can be said to be self-deterring.

....Complaints of predation.are presented to competition authorities with some regularity, although the great majority of these cases involve nothing more than healthy price competition. Thus competition authorities need some method to separate systematically the occasional violation from numerous complaints. Such a rule should thus be able to identify predatory pricing when it occurs yet impose little or no restraint on the ability of firms to compete vigorously on price. These potentially conflicting requirements demand a cautious approach in developing a minimally restrictive rule. Any rule, moreover, should provide clear guidance to the business community in order to encourage price competition and limit abusive litigation.

Predation rules such as the one suggested below are not the only mechanism by which competition authorities can attack predatory pricing. Predatory pricing can only succeed when markets do not function properly. Efforts by competition authorities to encourage and protect competitive market conditions should limit the possibility for successful predation. Thus efforts to improve the conditions for entry and expansion in a given market, including the removal of barriers to international competition, should help combat the threat of effective predation.

One promising line of action against predatory pricing is the "two-tier" approach under which competition authorities would look first to the market in question and determine whether it is susceptible to successful predation. This could involve a quick inquiry into product and geographic market definitions and entry conditions under supra-competitive pricing. If it appeared unlikely due to market structure and entry conditions that the alleged predator would be able to exercise market power in the post-predation period, the inquiry should end, as there would be no harm to competition even if some competitors suffered during the price-cutting episode. In a similar vein, current rules prohibiting sales below some cost floor without regard to market conditions could be reconsidered, as such rules likely inhibit some measure of pro-competitive price-cutting.

For those cases which survive the first tier, a multifaceted inquiry would be appropriate. The main focus of this second stage should be on prices in relation to costs in light of the economic context. In conducting this inquiry there should be no single bright line below which a price is necessarily predatory; even free goods can be justified in certain circumstances. Competition authorities thus should consider what factors justify sharp price-cutting:

a) prices above total cost should not be considered to be predatory. Numerous decisions have noted that a rule requiring prices above total costs will tend to protect inefficient producers;

b) pricing between average variable and average total costs, even though not sustainable in the long run, can be economically sound and non-predatory in a variety of circumstances. For example, such pricing can be non-predatory when there is excess capacity for whatever reason or when there are goods which must be cleared out, e.g. due to obsolescence, the risk of spoilage or shifting consumer tastes. The pressure of competition in a particular market may also produce prices in this range, thus the fact that price differentials exist across markets may indicate merely differing levels of competition and not necessarily predation;

c) even prices below average variable costs may be economically justified, e.g. when there are circumstances as described in the preceding paragraph and re-start-up costs which make below average cost pricing the loss-minimising choice. In addition, new entrants in a market should be given great freedom in their pricing decisions in order to induce purchasers to change their habits or to gain economies of scale. Similar latitude should be given to the pricing of a new product, where initially low prices can be justified by the need to gain manufacturing experience and volume.

The question of how costs should be defined has no easy answer; the case-by-case approach adopted by some courts seems to be the most pragmatic solution. However, costs may be misrepresented by a predator and the adoption of cost-based rules will likely encourage the use of creative accounting techniques. Of particular concern here is the transfer pricing of a vertically-integrated firm and the allocation of costs by multiproduct firms. The opportunity for such firms to disguise predatory activities both increases the likelihood that the predation will succeed (because of asymmetry of information) and that it will go unpunished (because prices will appear to be above costs). Thus courts and competition authorities need to pay careful attention to purported costs and not hesitate to disregard cost figures which seem to be unrealistic.

If prices seem fully justified in relation to costs and economic conditions, the inquiry should end. There seems to be little point in inquiring into intent when pricing can be fully explained by the objective economic circumstances. Further, such an inquiry could produce anomalous results. For example, it would make little sense to prosecute someone with “bad” intent when no liability would attach to the same pricing by someone with other intentions. Rather, intent and other factors would seem to be useful only when the price-cost comparison is ambiguous, e.g. when cost allocations are-uncertain or the economic setting unclear.

If intent is thus brought into the inquiry, documentary evidence of the state-of-mind of the responsible company officials can be relevant. Such evidence, however, should not be required as any well-counselled firm can assure that no such material will be found. A better method of discovering the intentions of the alleged firm would be to examine its actions. In some cases, non-price anti-competitive conduct will be found alongside pricing conduct and such non-price activities should be a relatively reliable guide to the defendant's true goals. Examples of such non-price conduct could include harassing litigation against the prey, intervention before regulatory agencies, interference with the prey's business

relations with its suppliers or customers and otherwise inexplicable shifts to requirements contracts or exclusive dealing arrangements.

This second stage of the inquiry, while potentially broader than a simple price-cost comparison, is narrower than an “all factors” approach suggested by some commentators. There is considerable risk that such an open-ended investigation could bog down, overwhelmed by myriad complex lines of possible inquiry. Price predation may not be the only tactic used by a firm seeking market power. Non-price predation, also known as raising rivals' costs, may also be employed either in conjunction with a price-cutting campaign or independently.... Moreover, an overly restrictive pricing rule could be misused by a non-price predator to restrain or discipline rivals. Because non-price predation is not premised upon present losses by the predator against the possibility of future gains - indeed, the gains may be immediate - the practice may be more pervasive than predatory pricing alone. Further, non-price predation could be employed as an instrument of protectionism by a domestic firm seeking to limit international competition, e.g. by embroiling the would-be importer in costly litigation or by petitioning government agencies to effectively block imports. Note, however, that the notion of non-price predation is not simple and truly pro-competitive activities, e.g. product innovation, could be misconstrued as non-price predation. Thus it is a theory to be applied carefully.

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NOTE DE RÉFÉRENCE

par le Secrétariat

1. Introduction

S'il fut un temps où les fabricants, en particulier les détenteurs de marques très connues, pouvaient considérer les détaillants comme de simples vitrines transparentes sur le marché ou comme des fournisseurs de services complémentaires, ce temps, s'il a jamais existé, semble depuis longtemps révolu. La grande distribution diversifiée a largement dépassé le stade du simple canal de transmission indifférencié vers le consommateur. Elle se présente de plus en plus comme un concurrent des fabricants, en particulier de ceux qui ne disposent pas de marques très connues. Corstjens et Corstjens (1995, 5) font de cette évolution la description suivante :

> ... les détaillants modernes ne sont nullement transparents pour le fabricant et ils s'efforcent de devenir encore plus opaques. Ils ont pris conscience de la valeur que présente leur contact avec le consommateur et de l'importance des variables de commercialisation (prix, présentation, promotion) qu'ils maîtrisent. Lorsqu'ils commencent à manipuler ces variables pour atteindre leurs propres objectifs, ils construisent entre les consommateurs finaux et les fabricants un obstacle aussi bien accueilli par les fabricants qu'une rangée d'hôtels de 10 étages entre leur villa et la plage.

Les organismes chargés de la concurrence reçoivent une liste de plus en plus longue de plaintes invoquant un abus de position dominante des détaillants qui font état de pratiques comme les rabais "injustifiés", les demandes de soutien contre des distributeurs concurrents, les produits d'appel et les attributions de linéaires/redevances d'emplacement/redevances de catalogue. Certains fabricants indiquent qu'ils sont contraints de céder aux exigences des détaillants parce qu'ils craignent que leurs produits ne soient plus acceptés ou qu'ils soient relégués sur le dernier des rayons inférieurs dans des chaînes de distribution importantes. On ne voit pas immédiatement sur quoi repose cette puissance d'achat et surtout si les autorités de la concurrence doivent s'en réjouir ou chercher à la supprimer. La littérature économique n'est pas d'une aide très importante à cet égard parce que, comme le note Steiner (1991, 59):

> Dans l'ensemble, la théorie économique n'a pas sérieusement tenté de comprendre le processus par lequel les biens se déplacent depuis le fabricant jusqu'aux ménages consommateurs à travers les circuits de distribution de gros/détail. Pire encore, la discipline a tendu à se désintéresser totalement de ces marchés d'aval en vertu de l'hypothèse tacite selon laquelle ils sont inertes et parfaitement concurrentiels si bien que leur omission des modèles économiques ne biaise pas les résultats.

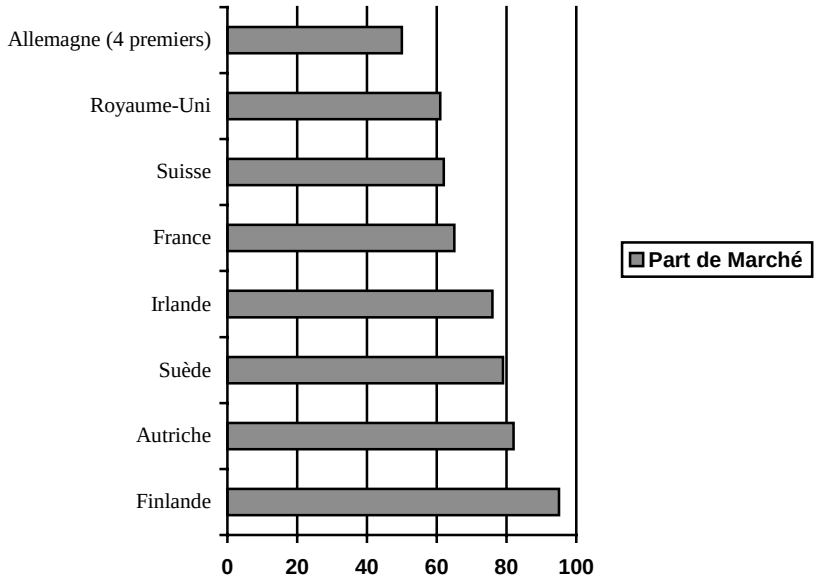
La présente note vise à combler en partie ce vide en proposant une analyse préliminaire de la puissance d'achat que les grands distributeurs diversifiés utilisent ostensiblement. Comme cette notion est sensiblement plus large que celle du pouvoir de monopsone classique, l'étude abordera nécessairement des questions qui font intervenir des effets de bien-être économique assez complexes.

1.1 Concentration accrue du commerce de détail

Si les économistes ne nous ont guère aidés à comprendre la notion générale de puissance d'achat des détaillants, cela ne signifie pas que certains changements significatifs intervenus dans ce domaine soient passés inaperçus. Les deux plus importants sont une croissance générale de la concentration du commerce de détail au sein des marchés nationaux et un accroissement significatif de la part des ventes au détail représentées par les marques de distributeurs (c'est-à-dire les marques détenues et distribuées exclusivement par un ou plusieurs détaillants).

5. Du point de vue de la concentration les cinq premières sociétés de grande distribution représentent actuellement plus de 50 pour cent du marché de l'épicerie dans plusieurs pays de l'OCDE[1]:

Part de Marché des 5 premiers distributeurs



Cotteril (1997, 128) note que la concentration du commerce de détail apparaît considérablement plus faible aux États-Unis où les 20 premières sociétés de grande distribution ne représentent que 38 pour cent des ventes. Il note, toutefois, que si l'on découpe les États-Unis en zones géographiques plus petites "il n'est pas difficile d'obtenir des ratios de concentration de vendeurs élevés voire même supérieurs à ceux des pays européens, y compris le Royaume-Uni "[2]. Le graphique ci-dessus sous estime dans une certaine mesure l'importance de la concentration, ce phénomène étant du au fait que les détaillants les plus importants appartiennent parfois à des groupements d'achats encore plus importants essentiellement internationaux[3] .

Ce niveau élevé de concentration du commerce de détail s'explique probablement par un grand nombre de raisons dont les principales sont certainement les suivantes :

1. évolution des habitudes des consommateurs liée à des facteurs démographiques, de transport et de revenu qui tend à favoriser un approvisionnement hebdomadaire chez un seul commerce de détail notamment pour les biens de grande consommation ;

2. évolution de l'application des techniques informatiques au commerce de détail (en particulier la lecture optique sur le point de vente) qui tend à créer ou à renforcer les économies d'échelle dans ce secteur,

ouvre la voie à des économies très importantes en matière de gestion des stocks (y compris la négociation directe avec les fabricants) et procure aux détaillants un accès exclusif à des données de grande valeur sur les dépenses de consommation (en relation avec les remises de fidélité consenties aux clients) ;

3. évolution des capacités et de la sophistication de la grande distribution en matière de marketing qui se traduit par un développement de la vente des marques de distributeur.

En dehors de la constatation que certains distributeurs ont atteint une taille considérable, on ne peut guère tirer de conclusion directe du point de vue de la position dominante sur le marché de la forte concentration du commerce de détail. Cette dernière doit, au minimum, être interprétée par comparaison avec les niveaux de concentration que l'on trouve dans le secteur de la production.

En ce qui concerne les marques de distributeurs, leur part dans les ventes au détail a atteint dans certains pays de l'OCDE des niveaux suffisamment élevés pour remettre en cause l'idée selon laquelle la grande distribution est uniquement ou principalement un canal pour les fabricants. Cullen et Whelan (1997, 910) s'appuyant sur des données (concernant probablement l'année 1994) de l'Oxford Institute of Retail Management indiquent les parts de marché combinées pour l'alimentation, les produits ménagers et l'habillement (en valeur) des marques de distributeurs dans 15 pays européens. Les pays qui enregistrent les parts les plus élevées sont la Suisse (41,2 pour cent), le Royaume-Uni (37,1 pour cent), la Belgique (19,8 pour cent), la France (16,4 pour cent) et les Pays-Bas (16,3 pour cent). Les parts les plus faibles se trouvaient en Irlande, en Grèce et au Portugal avec moins de 4 pour cent[4]. Tat Keh et Park (1997, 842) notaient que la part des marques de distributeurs, qui ne représentait que 15,2 pour cent des ventes de produits alimentaires en dollars aux États-Unis en 1996, progressait à un rythme même beaucoup plus rapide que celle des fabricants de premier plan[5].

Dans une section suivante, on examinera de manière approfondie le phénomène des marques de distributeurs. On se bornera à noter à ce stade qu'il existe des raisons de penser que ce phénomène peut renforcer la puissance d'achat mais que ce facteur est loin d'être la seule raison de leur croissance rapide au cours des années récentes.

Certains experts estiment qu'en dehors de son rôle dans la concentration forte et croissante du commerce de détail et dans l'importance de plus en plus grande des marques de distributeurs, le renforcement de la puissance d'achat est également lié en partie au recours croissant des fabricants à la promotion commerciale (essentiellement par l'octroi d'une aide à la promotion effectuée par le détaillant) aux dépens de la publicité directe du fabricant[6]. Une autre explication de ce phénomène débute par l'observation par Bell et al (1997, 856) selon laquelle les consommateurs effectuent de plus en plus le choix des marques lorsqu'ils sont à l'intérieur du magasin. S'il en est bien ainsi, les activités de promotion des détaillants ont probablement gagné en efficience par rapport à la publicité directe des fabricants. Un autre élément quelque peu contestable qui témoigne du renforcement de la position dominante des acheteurs est la pression croissante que subissent les marques de "deuxième rang"[7].

1.2 Preuves empiriques de la puissance d'achat

Bien que les experts du commerce de détail s'accordent généralement à penser que la puissance d'achat se renforce et devient préoccupante, cette opinion est quelque peu mise en doute par deux études empiriques récentes. Ces deux travaux ont tenté de vérifier l'hypothèse selon laquelle le transfert de pouvoir qui s'est opéré entre le producteur et le distributeur aurait dû entraîner une baisse relative de la rentabilité des fabricants par rapport à celle des distributeurs. A partir des données concernant les

producteurs et les distributeurs de produits alimentaires des États-Unis pour les années 1972 - 1990, Farris et Ailawadi (1992, 354) constatent au contraire :

> Les indices de rentabilité ne font pas apparaître une amélioration relative de la rentabilité des distributeurs. Au contraire, s'il y a eu une évolution de la rentabilité relative, elle semble avoir été favorable aux fabricants. Même l'accroissement des marges brutes a été plus sensible pour les fabricants que pour les détaillants bien que ces derniers aient également bénéficié en moyenne d'une croissance de leurs marges...

Il est à noter, toutefois, que ces tendances divergentes étaient dues apparemment à une augmentation de la rentabilité des producteurs les plus importants. L'évolution des bénéfices des petits fabricants a en fait été négative.

Farris et Ailawadi (1992, 361) ont proposé trois explications possibles des résultats observés: la position de force sur le marché ne s'est pas déplacée en faveur des détaillants; elle s'est déplacée mais les détaillants n'ont pas été en mesure d'en tirer profit "...en raison d'une combinaison d'incapacité des gestionnaires, de contraintes de marché et d'âpreté de la concurrence entre distributeurs..." ou bien "...il faut peut-être revoir totalement la notion de mesure de la position de force des fabricants par rapport aux détaillants".

Les constatations de Farris et Ailawadi ont été confirmées par une étude approfondie plus récente portant sur la production et le commerce de détail des produits alimentaires aux États-Unis et concentrée sur les années 70 et 80. Messinger et Narasimhan (1995, 217 - 218) observent que :

> .. ni les données comptables ni les données boursières n'indiquent clairement un déplacement de la rentabilité des producteurs vers les détaillants. La rentabilité a diminué à la fois pour les fabricants et pour les détaillants si on la mesure par le rendement d'exploitation sur actifs, bien qu'il existe des variations un peu plus fortes pour les détaillants et des différences selon les branches de l'alimentation. L'évolution des cours des actions montre que les entreprises exerçant une activité de production et de vente au détail de produits préemballés ont réalisé une meilleure performance que le marché dans son ensemble dans les années 80 en raison de la vague de fusions qui a eu lieu à cette période mais il n'existe pas de preuves concluantes que les détaillants aient obtenu de meilleurs résultats que les fabricants.

Ils tirent aussi une conclusion importante :

> Si la rentabilité des fabricants et des détaillants a diminué légèrement au cours des années récentes, les consommateurs ont pu en tirer profit. Un réexamen des données confirme ce sentiment. Tandis que la rentabilité des fabricants comme des détaillants a diminué modestement entre 1981 et 1991, la hausse des prix des produits alimentaires consommés à la maison a été plus faible que le taux d'inflation... Plus importants, peut-être, sont les autres avantages que les consommateurs ont pu obtenir en raison de nouvelles formes de compétition entre canaux, notamment un plus grand choix de produits, une augmentation de la surface des supermarchés, une présence accrue des nouveaux formats de magasins, un développement des services offerts à l'intérieur de ceux-ci et une multiplication des promotions... De ce point de vue, on pourrait se demander si la position de force ne se déplace pas vers le consommateur et si les détaillants et les fabricants ne devraient pas travailler ensemble (p. 219).

Il faut signaler que les résultats des travaux tant de Farris/Ailawadi que de Messinger/Narasimhan ne peuvent sans doute pas être généralisés au delà des Etats-Unis à des pays où comme on l'a déjà noté les marques de distributeurs représentent une part beaucoup plus importante du

chiffre d'affaires du commerce de détail. Plus précisément, il semblerait qu'au Royaume-Uni où le phénomène des marques de distributeurs est particulièrement important, le grand commerce d'alimentation au détail réalise des performances considérablement meilleures que ses homologues étrangers[8].

Nous avons montré que les plaintes relatives à la puissance d'achat des détaillants se manifestent dans le contexte de marchés au détail qui sont devenus assez concentrés dans un grand nombre de pays et dans lesquels les marques de distributeurs jouent un rôle important. Nous avons mentionné aussi certaines modifications des habitudes des consommateurs qui y sont associées, l'application de la technologie informatique et la capacité et la sophistication du commerce de détail dans le domaine du marketing. Par ailleurs, l'introduction a abordé certains travaux statistiques qui semblent jeter un doute sur l'idée selon laquelle la position de force sur le marché s'est déplacée des fabricants aux distributeurs et ce dans une certaine mesure au détriment des consommateurs. La présente note examine certains des changements mentionnés afin de faire apparaître plus clairement les sources de la position de force sur le marché et ses effets possibles sur le bien-être économique. Après avoir établi ces bases, notamment en examinant de plus près la question des marques propres, elle étudie diverses interdictions légales qui sont ou pourraient être utilisées pour traiter des problèmes de puissance d'achat qui sont soulevés. La note se termine par quelques remarques sur le bien-fondé de l'attitude qui consiste à traiter les symptômes plutôt que les causes de ce problème.

2. Définition et analyse préliminaire des effets économiques initiaux de la puissance d'achat du distributeur diversifié

Dans le développement qui suit la mention "détaillant" désigne, sauf indication contraire, un revendeur de produits diversifiés achetés auprès de fournisseurs et la puissance d'achat se réfère toujours à une telle puissance entre les mains des détaillants. Dans la présente note la puissance d'achat est envisagée sous divers angles, mais elle est globalement définie comme *la capacité qu'a l'acheteur d'influencer les conditions auxquelles il acquiert des biens.* Nous préciserons cette définition à mesure que nous examinerons les différents types de puissance d'achat.

L'analyse présentée dans cette section est préliminaire à deux égards. Premièrement elle n'applique pas de façon rigoureuse la théorie des jeux à la puissance d'achat. Cette lacune est particulièrement regrettable pour l'étude de situations dont l'issue dépend du pouvoir de négociation relatif; or c'est précisément sur ces cas que la note se concentre. Deuxièmement certains points abordés sont repris de façon détaillée par la suite.

La puissance d'achat est souvent étudiée dans le cadre du pouvoir de "monopsone" défini, par exemple par Carlton et Perloff (1989, 116) comme " la capacité de fixer avec profit les salaires (ou le prix de tout autre moyen de production) au-dessous du niveau concurrentiel". Les illustrations habituelles du pouvoir de monopsone présentent un secteur d'offre concurrentiel vendant à un acheteur unique qui, à cause de son importance et de la présence de barrières à l'entrée sur son marché, est exposé à une pente ascendante de la courbe de l'offre à long terme pour un moyen de production (biens à revendre dans le cas du détaillant). Un tel acheteur a un motif de profit pour réduire ses achats afin de faire baisser le prix de marché des biens acquis. Le même pouvoir pourrait être exercé à une échelle moindre par chaque membre d'un petit groupe de gros acheteurs, c'est-à-dire d'oligopsonistes. Les effets sur le bien-être de ces réductions de la production et des prix de marché correspondants varient beaucoup selon le degré de puissance de vente dont disposent l'acheteur ou les acheteurs.

Avant de commencer à analyser les effets de la puissance d'achat dans diverses conditions, nous devons souligner qu'elle ne peut pas exister en l'absence de barrières à l'entrée dans le commerce de détail. S'il n'y en avait aucune, les fournisseurs exposés à des baisses de prix (surtout si ces derniers tombent au-

dessous du coût total moyen) pourraient réagir en créant leur propre canal de distribution ou en transférant leurs ventes à de nouveaux entrants, qui apparaîtraient rapidement quand les possibilités de superprofits pour l'acheteur se concrétiseraient. Les principales barrières à l'entrée dans ce secteur sont les contraintes juridiques qui restreignent l'ouverture de magasins de grande distribution. Une étude détaillée de l'ampleur et de l'effet de ces obstacles sortirait du cadre de la présente étude, mais certains seront mentionnés brièvement[9].

L'Annexe I analyse quatre cas extrêmes afin d'éclairer les effets éventuels de la puissance d'achat sur le bien-être économique. Les deux premiers cas sont centrés sur l'exercice de ce pouvoir dans le contexte d'une industrie concurrentielle en amont et donnent les hypothèses suivantes quant à ses effets sur le bien-être économique:

1. lorsqu'il n'existe pas de puissance de vente du côté de l'acheteur (des acheteurs) - il n'y a aucun effet sur le surplus des consommateurs mais il y a une perte nette du surplus des producteurs [c'est-à-dire que la perte des fournisseurs est supérieure au gain de l'acheteur (des acheteurs)] ;

2. lorsqu'il existe une telle puissance de vente - il y a une perte nette du surplus des producteurs et une réduction supplémentaire de celui des consommateurs (en plus de celle qui résulte uniquement de la puissance de vente en aval). C'est une forme du phénomène de double marginalisation.

Plus le nombre d'acheteurs exerçant leur puissance d'achat sera réduit et plus ces effets sur le bien-être seront grands, à moins que certains oligopsonistes apprennent à coordonner leurs achats et leurs activités connexes[10]. Ils seront aussi d'autant plus intenses que la courbe d'offre industrielle à long terme des fournisseurs sera moins élastique.

Du point de vue de la politique de la concurrence, la première conclusion à retenir est que dans ce contexte la puissance d'achat n'a rien de préoccupant s'il existe de bonnes raisons de croire que les courbes de l'offre sectorielle en amont sont très élastiques. Chose intéressante, il existe au moins quelques données montrant que dans l'industrie manufacturière elles le sont justement[11]. La seconde conclusion pour la politique de la concurrence est la suivante: lorsque les courbes de l'offre industrielle en amont sont en pente nettement ascendante, la puissance d'achat a un effet beaucoup plus négatif dans le cas où les acheteurs ont aussi une puissance de vente. Si les organismes chargés de la concurrence sont placées devant de tels cas, elles devraient envisager de prendre des mesures pour réduire la puissance d'achat et celle de vente des détaillants étant donné que leur effet combiné diminue le bien-être économique.

Il faut souligner que, si l'industrie d'amont est concurrentielle, la puissance d'achat réussit à faire baisser les prix de marché en amont uniquement parce que la diminution de la production dans tout le secteur provoque une réduction des coûts unitaires à long terme des fournisseurs. Cela résulte directement de l'hypothèse selon laquelle les fournisseurs sont et restent parfaitement concurrentiels, c'est-à-dire ne font pas de bénéfice supra-concurrentiels.

Une forme particulière de puissance d'achat apparaît quand les coûts irrécupérables, les coûts de changement, les coûts de transaction et autres frictions suscitent un "fournisseur captif". Un fournisseur de ce type n'a pas de puissance de vente, et de plus il peut être obligé de vendre une partie, ou même la totalité de sa production à un prix supérieur au coût variable moyen mais inférieur au coût total moyen. A la longue, un fournisseur captif ainsi "exploité" se voit forcé de sortir du secteur.

Même si les organismes chargés de la concurrence sont probablement sensibles à l'exploitation des fournisseurs captifs, ils pourraient être incapables ou peu désireux d'intervenir pour les protéger. Cela

est dû au fait que le traitement subi par ceux-ci entraîne un changement de prix purement provisoire pour un seul acheteur ou quelques-uns. Il n'exerce pas d'effet marqué et durable sur les prix à la consommation ni sur le surplus total des producteurs[12].La présente note ne reviendra pas sur les cas de ce type.

Passons maintenant aux cas où la puissance d'achat s'exerce contre une industrie concentrée en amont - c'est-à-dire une industrie qui dispose d'une certaine puissance de vente. Comme l'indique l'Annexe I (cas C et D), il est difficile de prédire avec précision ce qui peut arriver quand la puissance d'achat intervient dans des situations où les fournisseurs exerçaient jusque-là une puissance de vente. Les effets sur les prix et les quantités dépendront beaucoup du pouvoir relatif de négociation des parties. Comme les fournisseurs d'amont font initialement des bénéfices supra-concurrentiels, il y aura une gamme de prix sur laquelle les parties pourront s'accorder, et qui pourra s'élargir si les fournisseurs modifient leur production. En ce qui concerne le niveau de cette production, on peut affirmer sans gros risque qu'il sera augmenté ou restera inchangé quand la puissance d'achat interviendra. En d'autres termes, elle n'aura aucun effet sur les consommateurs, ou même elle accroîtra leur bien-être. Quand au surplus des producteurs, la puissance d'achat le laissera inchangé (par exemple quand la quantité produite n'est pas modifiée et que la rente est simplement transférée des fournisseurs aux détaillants), ou peut-être l'augmentera (si, comme il est raisonnable de le penser, la puissance d'achat fait évoluer la quantité produite vers le niveau où celle-ci maximise le bénéfice commun au lieu de l'en éloigner davantage).

Avant de conclure simplement que dans ce contexte la puissance d'achat peut être décrite comme un pouvoir compensateur qui accroît le bien-être économique, ou du moins ne le diminue pas, il convient de garder présents à l'esprit trois points importants qui nuancent ce qui vient d'être dit. Premièrement, même si l'intervention de la puissance d'achat accroît le bien-être, cette amélioration sera très inférieure à celle que l'on aurait pu obtenir avec une concurrence parfaite dans tous les marchés. Deuxièmement, comme on l'a vu plus haut, une étude approfondie de ce sujet devrait se fonder sur une utilisation de la théorie des jeux qui sortirait du champ de la présente note. Tant que ce travail n'a pas été fait, il semble raisonnable de considérer avec une bonne dose de scepticisme la réponse à la question de savoir si la puissance d'achat entraîne une amélioration de l'efficience[13]. Si cette note ne prétend pas fournir ce cadre théorique, elle voudrait au moins poser les bases nécessaires pour permettre de cerner les questions fondamentales et de proposer des réponses . Enfin, l'analyse présentée dans l'Annexe I ne traite pas une question importante: quel effet les tentatives en vue d'acquérir et de compenser la puissance d'achat, ainsi que son exercice lui-même, peut-il avoir sur la puissance et l'efficience de *vente* au niveau du fournisseur et du détaillant ?

On ne peut se contenter d'affirmer que la puissance d'achat laisse inchangées la puissance et l'efficience de vente en amont et en aval. La position de force du vendeur se manifeste par exemple dans le phénomène de plus en plus fréquent des marques de distributeurs. Le désir d'acquérir ou d'accroître la puissance de vente est l'une des raisons qui peuvent expliquer ce phénomène. Malheureusement les marques de distributeurs, en plus d'augmenter la puissance d'achat, pourraient contribuer à une différenciation des produits qui est susceptible d'avoir des effets anticoncurrentiels. Ces points sont développés dans la Section IV de la note. Pour donner un exemple des effets sur l'efficience, il se pourrait que la puissance d'achat encourage les fournisseurs à s'engager dans des fusions conglomérales qui sont socialement inefficientes (voir la Section V).

L'utilisation de la puissance d'achat peut aussi engendrer par elle-même des effets anticoncurrentiels. En effet, faute d'un vaste réseau de "clauses de la nation la plus favorisée", ce pouvoir est susceptible de donner lieu à des différences de traitement en fonction de l'acheteur qui ne seraient pas justifiées par des facteurs de coût, donc à une discrimination[14]. Fait intéressant, certains auteurs définissent en fait la puissance d'achat en se fondant uniquement ou partiellement sur la discrimination[15]. La Section V de l'étude commence par un examen détaillé de la puissance d'achat et de la discrimination. Nous y montrons que celle-ci peut avoir un impact négatif sur la concurrence et l'efficience au niveau de la vente

au détail, en affaiblissant le lien existant entre efficience relative et part de marché. Ce risque est particulièrement élevé si les acheteurs puissants ne se contentent pas d'exiger de meilleures conditions, mais ont un pouvoir suffisant pour intervenir dans les relations des fournisseurs avec les détaillants concurrents.

Malgré les risques qui l'accompagnent, la discrimination par les prix, qu'elle soit ou non liée à la puissance d'achat, est généralement, et doit être, soumise à une règle de raison dans le cadre de la législation sur la concurrence. En effet, à moins qu'elle ne soit exclue par contrat, elle peut susciter un processus par lequel les clients peu puissants d'un fournisseur peuvent obtenir à peu près le même traitement que l'acheteur favorisé. De plus, la discrimination par les prix peut déstabiliser les cartels de vendeurs.

La puissance d'achat pourrait aussi entraîner une inefficience en amont. Les fournisseurs importants peuvent en principe mieux résister à la puissance d'achat, c'est-à-dire mieux protéger leur rente économique. Cette capacité peut être particulièrement importante en ce qui concerne l'innovation. ;en d'autres termes, la puissance d'achat peut avoir pour résultat que les gros fournisseurs peuvent prendre dans les activités d'innovation une part plus grande que ne le justifierait leur efficience relative dans ce domaine[16].

3. La puissance d'achat du détaillant : une étude plus approfondie

Nous allons maintenant examiner de plus près l'exercice de la puissance d'achat contre une entreprise disposant d'un pouvoir de marché en amont. Comme il a été indiqué plus haut, nous pouvons considérer cette interaction comme une forme de négociation. La théorie économique ne donne pas de prédictions concrètes quant à l'issue de ces jeux de négociation. Toutefois, on suppose généralement qu'elle dépend, au moins en partie, des "points de menace" des parties - c'est-à-dire du mal qu'elles peuvent s'infliger mutuellement en cas de désaccord. Comme nous le verrons, le dommage relatif encouru par le fabricant et le détaillant dans ce cas dépend d'une série de facteurs, principalement de la réaction des consommateurs quand ils découvrent qu'un produit donné n'est plus disponible dans un point de vente. Si les consommateurs décident simplement de substituer une autre marque dans le même magasin, le détaillant ne subira peut-être aucun dommage, tandis que le fabricant risque de perdre une bonne partie de ses ventes. A l'inverse, si le consommateur change d'enseigne pour trouver le produit manquant, le détaillant subira une perte importante et le fabricant ne perdra peut-être rien. Nous commencerons donc par examiner les habitudes d'achat des consommateurs.

3.1 Les Habitudes d'achat

Bien qu'il soit difficile d'être précis à ce sujet, il semble qu'il existe des possibilités significatives d'économies (notamment de coûts de transport et d'attente). C'est pourquoi, un grand nombre de consommateurs sont très favorables à un approvisionnement hebdomadaire ou bihebdomadaire dans un seul magasin au moins pour les biens de consommation courante[17]. Le phénomène de l'approvisionnement chez un seul détaillant ne signifie pas nécessairement que les acheteurs soient d'une fidélité à toute épreuve à l'égard d'une seule enseigne. La solidité de leur attachement dépendra probablement des coûts de changement de magasin pour les consommateurs, qui sont dus principalement au coût d'apprentissage ainsi qu'à la différenciation des produits et du service selon les détaillants. Corstjens et Corstjens (1995, 201) citent les données d'une enquête effectuée aux États-Unis qui remontent probablement à 1993 et selon lesquelles 73 pour cent des clients de supermarchés visitent deux enseignes ou plus chaque semaine tandis que 27 pour cent seulement n'en visitent qu'une. Pour la France, les données recueillies en avril 1998 montrent que les clients de grandes surfaces ont peut-être davantage tendance à limiter le nombre d'enseignes qu'ils fréquentent: 35 pour cent n'en visitent régulièrement qu'une seule, 40 pour cent deux, et

25 pour cent trois ou plus[18]. Quel que soit l'attachement à un approvisionnement unique et peut-être à une seule enseigne, les détaillants qui vendent des produits de grande consommation semblent encore être fortement incités à représenter un point unique de vente attractif même s'ils doivent partager la clientèle avec des concurrents.

En raison de leur préférence pour des approvisionnement peu fréquents dans un seul lieu, les consommateurs ne vont pas nécessairement changer d'enseigne parce que leur magasin favori va retirer de la vente une de leur marques préférées ou un petit nombre d'entre elles. Ils ne changeront pas non plus nécessairement de magasin ou ne visiteront pas un grand nombre d'enseignes uniquement pour tirer partie de prix particulièrement bas sur un petit nombre d'articles. On peut trouver la preuve de ces points dans la modification constante des produits offerts en promotion chaque semaine dans les grandes surfaces, c'est-à-dire la pratique de "combinaison de prix bas et élevés". Comme il semble peu probable que les prix promotionnels soient entièrement liés à des rabais obtenus auprès des fabricants (en particulier dans les pays où existe une réglementation interdisant la discrimination en matière de prix) il s'ensuit que la plupart des consommateurs ne cherchent pas à constituer le panier hebdomadaire de produits de grande consommation le meilleur marché en se rendant dans plusieurs enseignes de distribution. Si tel était le cas, les distributeurs cesseraient probablement de pratiquer les prix à la fois élevés et bas.

Le fait qu'ils refusent de faire leurs courses dans plusieurs magasins pour réduire le coût total de leurs achats ne signifie pas que les consommateurs ne se préoccupent pas du prix total payé. A cet égard, il est à noter que la stratégie de combinaison de prix à la fois élevés et bas semble viser deux objectifs: attirer les consommateurs instables qui recherchent particulièrement les produits en promotion, en espérant les familiariser avec le magasin et peut être acquérir leur clientèle hebdomadaire régulière; convaincre les clients fidèles que leur magasin pratique réellement des prix bas[19]. Selon Cortsjens et Corstjens (1995, 157) un détaillant qui ne pratique pas le "hard discount" :

> ...doit créer son image en matière de prix par une stratégie de promotions continuelles mais imprévisibles. La combinaison de prix à la fois élevés et bas est destinée à opérer une discrimination à la fois entre les consommateurs et entre les lignes de produits. Elle donne la possibilité d'améliorer les marges en pratiquant des marges plus élevées à l'égard des consommateurs qui sont peu sensibles aux prix ainsi que sur des lignes de produits moins essentiels. Les prix réduits sont appropriés sur des lignes de produits connues pour être sensibles aux prix et/ou qui sont faciles à comparer. Il ne s'agit pas de prix bas quotidiens sur une gamme de produits limités mais de la moitié inférieur du système de prix . Les promotions et les vraies bonnes affaires occasionnelles sont utilisées pour impressionner l'acheteur et appuyées par des prix compétitifs sur les articles faciles à comparer.

Toujours selon Corstjens et Corstjens (1995, 163):

> Il n'existe que deux stratégies de prix en matière de commerce de détail: les réductions permanentes et les prix à la fois bas et élevés. Seuls les détaillants qui pratiquent réellement le hard discount peuvent adopter les réductions permanentes. Chaque détaillant doit être compétitif sur des lignes de produits faciles à comparer faisant l'objet d'achats réguliers et doit gérer en permanence son image de compétitivité en termes de prix. Cet impératif du marketing du commerce de détail est différent de celui pratiqué pour les produits de grande consommation vendus dans les supermarchés: les marques qui sont perçues comme avantageuses en termes de prix peuvent être très performantes, les supermachés ne le peuvent pas.

La stratégie des réductions permanentes tend à être adoptée par des détaillants dont l'arme principale vis-à-vis de la concurrence est la maîtrise des coûts et qui y parviennent en partie en offrant un choix réduit de produits et un ensemble limité de services à l'intérieur du magasin. Les commerçants qui

choisissent de se maintenir dans des emplacements plus commodes et d'offrir une gamme de produits et de services plus large ne peuvent pas concurrencer directement les 'discounters' sur les prix. Ils doivent néanmoins éviter d'apparaître trop peu compétitifs en ce qui concerne les prix d'un panier d'articles qui représentent une proportion importante du budget total du consommateur type. La combinaison de prix élevés et bas semble constituer le meilleur moyen d'atteindre ce résultat : non seulement cette stratégie met le détaillant à l'abri des enseignes de hard discount mais elle isole les autres grandes surfaces de la concurrence sur les prix qu'elles peuvent se faire entre elles. La stratégie de prix à la fois bas et élevés parvient à ce résultat en compliquant considérablement la détermination, parmi un certain nombre de grandes surfaces, de celle qui offre les meilleurs prix à un moment donné[20].

3.2 Conséquences pour la puissance d'achat

Comme on l'a vu plus haut, l'issue de la négociation entre détaillant et fabricant dépendra en partie :

1. de la possibilité pour le fabricant de trouver rapidement d'autres débouchés pour ses lignes de produits actuelles et des conditions qu'il obtiendra, ou bien de la possibilité de produire rapidement une ligne de produits différente ;

2. de la réaction de la clientèle du détaillant à l'impossibilité d'acheter un certain produit.

La réponse à la seconde question détermine largement la réponse à la première partie de la première. Quelles sont les options offertes au consommateur qui découvre tout-à-coup qu'une marque favorite n'est pas disponible cette semaine dans son magasin préféré? Il dispose essentiellement de quatre solutions possibles[21]. Nous les examinerons successivement en étudiant brièvement les conséquences qu'elles ont sur les bénéfices à la fois du fabricant et du détaillant. Dans la présente partie du texte, les "bénéfices" comprennent un retour normal sur investissement.

1. Le consommateur renonce purement et simplement à son achat; autrement dit, il s'agit pour lui d'un achat d'impulsion sans solution de rechange).

Si tous les consommateurs, ou la plupart, réagissent ainsi, le fabricant et le détaillant perdent les bénéfices qu'ils réalisaient habituellement du fait des ventes chez le détaillant qui a retiré le produit de ses rayons. L'incidence relative sur l'un et l'autre dépend de l'importance de la marge bénéficiaire et de la taille relative des deux entreprises. A partir des données limitées figurant dans Farris et Ailawadi (1992, 355) et Messinger et Narasimhan (1995, 206), il semble que les marges des fabricants sont généralement plus importantes. Cette différence s'ajoutant au fait que les grandes enseignes de distribution sont actuellement de plus grande dimension que la plupart des fabricants implique que si le retrait du produit se traduit par l'annulation des achats, le fabricant sera proportionnellement plus touché. Le plus probable est toutefois que la puissance d'achat existerait mais ne serait pas particulièrement forte si le fabricant et le détaillant étaient convaincus l'un et l'autre que les consommateurs annuleraient leurs achats en cas de retrait du produit.

2. Le consommateur diffère son achat des produits non disponibles; autrement dit, il modifie temporairement ses habitudes d'approvisionnement dans un même point de vente pour trouver le produit ailleurs.

Dans ce cas, le fabricant est privé des bénéfices qu'il aurait réalisés sur les unités de produits qui auraient été consommées pendant la période où l'achat est différé. Les bénéfices à long terme du fabricant sur les ventes aux consommateurs qui ont opté pour cette solution seront plus ou moins importants selon que ses marges sur les ventes au détaillant de substitution sont plus ou moins élevées que l'étaient celles

sur les ventes au magasin qui a retiré le produit de la vente. Le détaillant qui a opéré ce retrait perd beaucoup plus. En effet, non seulement il est privé des bénéfices qu'il aurait réalisés sur les produits désormais achetés ailleurs, mais il prend le risque de provoquer la réaction suivante.

3. A long terme, le consommateur change d'enseigne de distribution.

Pour le fabricant cette solution a les mêmes effets que l'achat différé. En revanche le détaillant s'en sort beaucoup plus mal. Pour chaque consommateur disparu il finit par perdre les bénéfices qu'il réalisait sur tout un panier de produits pendant le nombre de semaines qui lui sont nécessaires pour récupérer le client, s'il y parvient.

4. Le consommateur change de marque, autrement dit il modifie ses habitudes de consommation à long terme en substituant un produit en stock à celui qui a été retiré des rayons.

Cette fois le grand perdant est le fabricant qui est privé des bénéfices qu'il réalisait sur le volume vendu auparavant par le magasin qui a retiré l'article de la vente. Les bénéfices du détaillant peuvent en fait augmenter si le produit de substitution comporte une marge bénéficiaire plus élevée, ce qui peut être le cas si le consommateur achète une marque de distributeur à la place du produit de grande marque retiré de la vente.

Dans la plupart des cas où un produit unique est retiré des rayons, les solutions qui ont le plus de chances d'être choisies sont l'annulation de l'achat ou le changement de marque. Selon Corstjens et Corstjens, (1995, 197-198).

> Les achats de produits courants effectués dans les grandes surfaces figurent parmi les décisions les moins importantes que nous prenons au cours de notre existence. Selon une enquête menée aux États-Unis, 69 pour cent des gens n'utilisent pas de liste d'achats et 66 pour cent des achats ne sont pas programmés, de même d'ailleurs qu'un grand nombre de visites dans les magasins. Il semble raisonnable de supposer que lorsque les acheteurs n'ont pas programmé leurs courses, le choix de marques offert tend à déterminer les décisions d'achat, l'acquisition de marques non offertes n'étant même pas envisagé. Faire venir les acheteurs dans le magasin tend à prendre de l'importance par rapport à la priorité traditionnelle du fabricant qui est de gagner la préférence du consommateur.

Certaines données statistiques confirment cette hypothèse. Dans une récente enquête on a demandé aux consommateurs français ce qu'ils feraient s'ils ne trouvaient pas leur marque habituelle dans leur supermarché primaire. 56 pour cent ont répondu qu'ils achèteraient un produit de marque équivalent, 20 pour cent qu'ils iraient dans un autre magasin et 24 pour cent qu'ils différeraient leur achat jusqu'à leur prochaine visite à leur supermarché primaire[22].

Les risques découlant du retrait des produits augmentent considérablement avec le nombre des produits retirés des rayons. Malheureusement pour le fabricant, le détaillant est beaucoup mieux à même de savoir à quelle distance il se situe du "bord du gouffre" c'est-à-dire à quel point le retrait d'un produit supplémentaire amènerait un nombre significatif de ses clients à décider que les "coûts liés au changement d'enseigne" (CCE) au sens large sont inférieurs aux "coûts de changement de marque"(CCM) cumulés[23].

En résumé, dans les négociations entre fabricants et détaillants dans des situations où les consommateurs manifestent de fortes préférences pour le lieu d'approvisionnement unique, les deux parties doivent estimer :

1. l'importance du produit en question pour les consommateurs (autrement dit, est-il d'une importance suffisante pour justifier une visite dans un magasin supplémentaire lors des courses hebdomadaires plutôt que de s'en passer ou d'acheter une autre marque) ;

2. au cas où les consommateurs ne réagiraient pas à l'absence du produit en assouplissant leur préférence pour un approvisionnement dans un magasin unique, la probabilité que les consommateurs estiment que les CCM sont supérieurs aux CCE.

Il est tout à fait possible qu'en dehors du cas des plus grandes marques de fabrication, ces estimations soient favorables au détaillant, c'est-à-dire qu'elles lui attribuent une puissance d'achat. Un bon exemple de cette puissance d'achat est fourni par le cas récent de la société américaine TOYS "R"Us (TRU)[24]. Michael Antalics, un agent de la Federal Trade Commission des États-Unis (FTC) a décrit comme suit les faits essentiels concernant la puissance d'achat dans l'affaire TRU :

> En tant qu'acheteur, TRU représente approximativement 30 pour cent des ventes des dix premiers fabricants de jouets. Il serait très difficile pour les fabricants de remplacer ces 30 pour cent, étant donné en particulier qu'ils ont déjà une large distribution et vendent autant qu'ils le peuvent par l'intermédiaire d'autres détaillants. En raison des économies de coût de transaction qui résulte du recours à un distributeur détenant une part de marché aussi élevée, les fabricants devraient supporter des coûts beaucoup plus élevés même s'ils étaient en mesure de remplacer le volume de TRU par des ventes à des détaillants plus petits. En conséquence, la décision de TRU de ne pas proposer un jouet pourrait avoir de graves conséquences financières pour le fabricant [Antalics (1997, 7)].

Une étude plus générale du type de puissance d'achat que nous avons examinée est présentée dans la contribution du Tribunal de première instance espagnol à la section sur la dépendance économique du Forum sur la Concurrence de la Commission Européenne d'avril 1995 ("Forum de la CE"). Notant qu'après la 2ème guerre mondiale, les fabricants étaient en position de force, la contribution poursuit en indiquant que la situation a connu un changement spectaculaire en raison de la concentration des distributeurs de produits de grande consommation et de la création des marques de distributeurs:

> Les grands distributeurs absorbent une part substantielle du chiffre d'affaires de leurs fournisseurs : entre dix et 20 pour cent en ce qui concerne les grandes entreprises de production et beaucoup plus pour les entreprises petites ou moyennes. En revanche le principal fabricant représente moins de un pour cent du chiffre d'affaires des grands distributeurs qui sont en mesure de remplacer les produits de n'importe quel fournisseur par des marques présentant des caractéristiques similaires.
>
> En conséquence, le détaillant a la possibilité de changer sa source d'approvisionnement pour choisir un fabricant quelconque tandis que le fabricant n'a pas de client de remplacement pour compenser la chute de ses ventes. L'attraction qu'exercent les hypermarchés et les autres grandes surfaces dans leur zone géographique d'influence évince progressivement les commerces de détail concurrents créant des couloirs coupés les uns des autres par les coûts de transport, le manque d'information et les habitudes des consommateurs... Lorsqu'un fabricant perd la clientèle d'un distributeur, il est incapable de trouver un autre détaillant dans la zone d'influence concernée (parce qu'il n'en existe pas). Il perd donc le chiffre d'affaires généré par les consommateurs captifs de cette zone.
>
> Ce nouvel équilibre de pouvoir de marché rend compte de l'apparition de pratiques déloyales : fabricants obligés d'accepter des garanties, des rabais et autres coûts sans obtenir aucun avantage en contrepartie de la part des distributeurs, interruption ou réduction des commandes aux

> fabricants pour les amener à accepter des conditions inéquitables, délais de paiement des marchandises d'une longueur déraisonnable, financement obligé par les fournisseurs des stocks détenus par les détaillants, entente entre entreprises de distribution vis-à-vis d'un fournisseur etc.[25]

Le tribunal de la concurrence espagnol est probablement très au fait de tout ce qui précède ; néanmoins son représentant au Forum de la CE a fait connaître son opposition :

> .. à l'adoption d'une directive ou de lignes directrices communautaires [destinées à lutter contre la puissance d'achat] ou à l'élaboration d'instructions sur les problèmes de ce type. La pression des producteurs espagnols est déjà suffisamment forte et il ne serait pas souhaitable de légiférer actuellement pour limiter la position des grandes surface commerciales. L'existence d'entreprises de grande distribution se traduit par une amélioration de l'efficience dont les effets sont répercutés sur les consommateurs sous la forme de baisses de prix. Le tribunal de la concurrence espagnol soutient donc qu'il serait désastreux que la pression des instructions dérivées de directives ou de lignes directrices communautaires s'ajoute aux pressions politiques[26].

On a montré dans la présente section les raisons pour lesquelles les grands détaillants traitant avec des fournisseurs qui possèdent une puissance d'achat peuvent avoir eux-mêmes le pouvoir d'obtenir des réductions de prix ou de faire pression pour obtenir des avantages équivalents sans réduire les quantités achetées. En fait, certains détaillants en position de force seront en mesure d'obtenir des réductions de prix tout en augmentant le volume de leurs achats même s'il n'en résulte pas une diminution des prix de revient unitaires des fabricants. Les grands distributeurs peuvent disposer de ce pouvoir sans avoir une grande puissance d'achat. En un sens, ce phénomène est rassurant dans la mesure où il confère une crédibilité à l'opinion selon laquelle lorsqu'il existe une puissance de vente en amont, elle peut être contrebalancée par la puissance d'achat agissant en faveur des consommateurs. Comme on l'a vu, il ne s'agit toutefois que d'une conclusion provisoire: nous devons aussi examiner comment l'exercice de la puissance d'achat ou les efforts déployés pour l'établir en aval et l'assurer peuvent affecter l'efficience en amont et le degré de concurrence existant en aval. En outre cette conclusion est par ailleurs incomplète dans la mesure où il faut souligner une fois encore qu'il est préférable de réduire ou d'éliminer la position de force sur le marché en amont que de s'en remettre aux effets positifs espérés de l'exercice d'un pouvoir compensateur.

Avant de passer à l'étude des marques de distributeurs et aux conséquences pour l'action des autorités du fait que les acheteurs possèdent un pouvoir de négociation et l'exercent, il faut noter que la possession d'un tel pouvoir n'implique pas que son utilisation entraîne nécessairement le retrait d'un produit (cette décision ne s'impose évidemment pas si la seule menace suffit à obtenir les conditions plus avantageuses souhaitées). Il est vrai également qu'un retrait peut se produire en l'absence de pouvoir de négociation relatif , donc qu'il ne constitue pas en soi une action à laquelle les autorités de la concurrence devraient s'opposer.

Sur la base de l'analyse de la présente section, nous utiliserons par la suite l'expression "puissance d'achat" pour désigner celle qui est fondée sur un pouvoir relatif de négociation et exercée contre un fournisseur ou plusieurs disposant d'une puissance de vente.

4. Les marques de distributeurs

> "Le développement des marques propres a constitué l'un des changements les plus importants qui sont intervenus dans le commerce de détail au cours de ce siècle. Il a modifié la nature de la concurrence entre détaillants, conféré une puissance d'achat considérable aux distributeurs et évincé les marques d'importance secondaire". Dobson (1998, 34)

Le développement des marques de distributeurs (celles qui appartiennent à un seul détaillant ou à un groupe de détaillants et sont vendues exclusivement par lui ou par eux) mérite un examen détaillé dans la mesure où le débat sur les effets de la puissance d'achat concerne pour une large part les liens entre ces deux phénomènes. Les marques de distributeurs présentent aussi un intérêt direct pour les autorités de la concurrence qui sont chargées d'examiner les fusions verticales ou les accords plus souples entre détaillants et fabricants. Ces deux mécanismes constituent en fait des méthodes substituables permettant à un distributeur d'obtenir des produits qui sont revendus non pas sous la marque du fabricant mais plutôt sous une marque détenue et généralement distribuée en exclusivité par un ou plusieurs détaillants. Les produits sous marque de distributeurs sont, semble-t-il, rarement fournis sous la forme d'une vente simple de marchandises sous un emballage spécial choisi par le distributeur. La London Economics (1997, 41) a judicieusement noté :

> .. la ligne qui sépare l'intervention verticale et l'intégration verticale a perdu de sa netteté; si un distributeur prend la majorité des décisions d'investissement et de production à la place du fabricant, il agit en fait comme s'il était propriétaire de ce dernier. Du point de vue des implications pour la politique de la concurrence, il n'existe pas de différence évidente entre ce comportement et l'intégration verticale intégrale.

Les raisons pour lesquelles les distributeurs peuvent juger rentable de vendre des marques de distributeurs à titre exclusif ou parmi plusieurs autres marques pour une catégorie donnée de produits sont complexes et entremêlées; elles se résument en gros à des considérations d'efficience et de puissance d'achat. Nous examinerons ces deux rubriques avant de tenter de rassembler les effets en amont et en aval des marques privées sur la concurrence.

4.1 Les considérations d'efficience

Le recours aux marques propres peut être motivé par le souci d'éviter les pertes en termes d'efficience résultant de la double marginalisation ou de réduire les coûts de transaction et les incertitudes associés au monopole bilatéral. Comme on l'a déjà noté, lorsqu'on se trouve dans une situation de double marginalisation ou de monopole bilatéral, les fabricants et les détaillants ont intérêt à rechercher un niveau de production qui procure le bénéfice maximum. Aboutir à ce résultat et donc marchander le prix du fabricant implique des coûts de négociation et de coordination considérables qui devront être supportés à nouveau à chaque changement notable des conditions du marché. Un fabricant et un détaillant peuvent utiliser un certain nombre de mécanismes impliquant différents degrés d'intégration verticale pour réduire ces coûts et ces incertitudes[27.27]. Si le choix se porte sur l'intégration verticale pure et simple, il est très probable que le détaillant va devenir le distributeur exclusif des produits du fabricant dès lors que les détaillants concurrents vont être très réticents à s'approvisionner auprès d'un concurrent, ce qui se comprend aisément. Il est probable aussi que la distribution exclusive sera adoptée si le détaillant communique des informations sensibles au fabricant ou lui apporte son aide pour améliorer son produit ou sa logistique de vente. Cette solution est encore plus probable si le distributeur est sollicité d'effectuer des investissements à fonds perdus pour cimenter sa relation avec le fabricant. Dans de telles circonstances, il est facile de comprendre les raisons qui conduisent le détaillant à exiger au moins la garantie partielle qu'offre la marque de distributeur contre des comportements opportunistes postérieurs au contrat ou contre des tentatives d'autres détaillants pour profiter de la situation.

Il existe d'autres considérations d'efficience qui peuvent s'ajouter à celles qui sont mentionnées ci-dessus. La première est que le distributeur peut être en mesure de gérer une marque de manière plus économique qu'un fabricant en raison de la synergie qui s'établit entre la réputation d'une enseigne de distribution et celle des produits qu'elle offre. Une amélioration de la réputation de qualité de l'enseigne profite aux produits qu'elle vend et vice versa. Un distributeur peut dans une certaine mesure améliorer sa

réputation et renforcer sa capacité à pratiquer des prix généralement plus élevés en offrant des marques nationales bénéficiant déjà d'une réputation de grande qualité auprès des consommateurs. Toutefois, il devra probablement verser au fabricant de ces marques une partie des rentes acquises du fait de cette stratégie. Par ailleurs, le détaillant peut être en mesure de faire payer une redevance pour amélioration de la qualité aux fabricants dont les marques n'ont pas une très bonne réputation à cet égard. Il serait considérablement plus efficient d'internaliser ce système de paiement et d'encaissement de la rente au moyen des marques de distributeurs en particulier du fait que ces marques bénéficient d'économies de gamme supplémentaires. La réputation de qualité d'un produit portant cette marque pourrait bénéficier à tous les autres produits de la même marque. Cette économie de gamme est la même que celle dont bénéficient les fabricants de plusieurs produits de marques nationales réputées mais elle peut être beaucoup plus large et couvrir un grand nombre des marchandises vendues par le détaillant[28]. Il est particulièrement nécessaire d'utiliser le terme "un grand nombre" parce que les marques de distributeurs fonctionnent beaucoup mieux pour les produits que la marque sert seulement à identifier et à assurer que pour ceux auxquels elle confère une image positive[29].

La stratégie de marque de distributeur présente des coûts potentiels. En premier lieu, le détaillant va peut-être devoir se doter de moyens propres de contrôle de la qualité car il a plus à perdre en cas de défaut de qualité que ses fournisseurs. Un autre "coût" tient au fait qu'une utilisation excessive des marques de distributeurs risque de produire chez le consommateur le sentiment que le magasin offre un choix insuffisant[30]. En troisième lieu, si le distributeur souhaite ouvrir de nouveaux magasins dans des zones nouvelles, il sera obligé, du fait du petit nombre de marques nationales qu'il offre, de convaincre les consommateurs non seulement de changer d'enseigne mais aussi et simultanément de changer de marques. Enfin, il pourrait exister certaines déséconomies de gamme, en particulier si le recours aux marques de distributeurs est réalisé par intégration verticale. Comme l'ont exprimé Steenkamp et Dekimpe (1997, 928) :

> Les fabricants des grandes marques connaissent probablement mieux les besoins des consommateurs à l'égard de leur catégorie de produits (après tout une chaîne de supermarchés doit répartir son attention sur de nombreuses catégories) et ont une meilleure connaissance des procédés de fabrication et des changements technologiques, ce qui fournit une base viable pour l'amélioration de la qualité et l'innovation... Rares sont les marques de distributeurs qui ont les moyens de supporter les dépenses de recherche-développement nécessaires pour élaborer des produits réellement nouveaux ou améliorés et ceci peut représenter un avantage pour les marques nationales[31].

Quoi qu'il en soit, il existe des preuves de l'efficacité par rapport aux coûts des marques de distributeurs. Bell et Al (1997, 855) notent que "les recherches de l'OXIRM suggèrent que les économies réalisées par les produits de distributeurs sur les coûts de publicité, de recherche, de vente et de distribution représentent 25 pour cent du prix de la marque".

4.2 Effets sur la puissance d'achat

Les marques de distributeurs peuvent sans doute permettre certaines améliorations importantes de l'efficience ce qui n'interdit pas qu'elles répondent à d'autres motivations y compris le désir de renforcer la position de l'acheteur. Dans la mesure où elles aident le détaillant à se différencier de ses concurrents, les marques de distributeurs renforcent la position de l'acheteur en augmentant le coût du changement d'enseigne[32]. Elles peuvent aussi renforcer la position de l'acheteur en réduisant le coût du changement de marque. Lorsqu'un distributeur s'approvisionne en produits de sa marque auprès de fournisseurs indépendants, il pourrait, moyennant un contrôle de qualité suffisant, changer de fournisseur sans que les consommateurs s'en aperçoivent. Dans ce cas, le facteur tenant au coût du changement de marque qui favorise un fournisseur est pratiquement éliminé. Il peut également exister des cas où la marque privée

représente une meilleure solution de rechange que les marques nationales concurrentes pour un produit que le distributeur menace de retirer de ses rayons, ce qui réduit également le coût du changement de marque.

Dès lors que les distributeurs offrent à la fois des marchandises de grandes marques et de marques propres dans chaque catégorie de produits, la marque de distributeur équivaut habituellement à une intégration verticale "rétrécie" ce qui offre les avantages de négociation habituels de cette stratégie c'est-à-dire des choix élargis et une meilleure information sur les coûts, en particulier lorsque le distributeur est propriétaire de son fournisseur. Naturellement, dans la mesure où la marque propre est produite dans l'usine appartenant au détaillant (ce qui implique sans doute certains investissements à fonds perdus) les avantages en termes de négociation de l'intégration verticale rétrécie sont compensés par l'abandon de ceux qui découlent de la plus grande facilité de changer de fournisseurs.

4.3 Effets des marques de distributeurs sur la concurrence en amont

Certaines données montrent que les marques de distributeurs renforcent la pression sur les marques nationales "secondaires" qui perdaient déjà du terrain par rapport aux marques "primaires" qui connaissent une meilleure réussite[33]. Ces données n'établissent pas, cependant, que les marques de distributeurs vont entraîner une augmentation de la concentration dans l'industrie manufacturière et peut-être une réduction de l'efficience économique. On peut soutenir la thèse inverse. Les marques de distributeurs combinent les effets de la base de données sans cesse croissante que les grands distributeurs accumulent sur les dépenses des consommateurs, de la promotion plus efficiente que ces détaillants peuvent offrir et de la pression accrue pour produire des articles de qualité à de faibles coûts unitaires (c'est-à-dire que les fournisseurs sont choisis principalement en fonction leurs compétences de production). Ceci se traduit par l'apparition de nouveaux concurrents vigoureux pour les industriels existants[34]. Qui plus est, dans la mesure où les distributeurs prennent en charge la fonction de commercialisation, ils abaissent les barrières à l'entrée dans l'industrie manufacturière. Tout ceci peut déboucher sur un renforcement considérable de la concurrence sur les marchés industriels et une amélioration du sort des consommateurs. Dobson (1998, 20) cite des données intéressantes extraites de Hoch (1996) et Wills et Mueller (1989) qui suggèrent, semble-t-il, que les prix des marques de distributeurs sont sensiblement inférieurs à ceux des marques nationales et que leur part de marché exerce une influence à la baisse sur les prix de celles-ci.

Dobson (1998, 27) suggère aussi un certain nombre de possibilités qui ne sont pas aussi favorables à la concurrence. La principale qui affecte les marchés d'amont concerne un effet négatif supposé sur l'innovation en matière de produits qui résulterait d'une diminution de la rentabilité préalable à l'innovation en amont, une imitation plus rapide et plus efficace par les marques de distributeurs des innovations réellement importantes et une diminution des échanges d'informations avec les fabricants de grandes marques. Le premier point repose sur l'hypothèse que certaines imperfections significatives des marchés des capitaux font que les dépenses de RD sont étroitement liées au niveau de la rentabilité courante. S'agissant du deuxième point, on peut se demander pourquoi les détenteurs de marques de distributeurs devraient se concentrer sur l'innovation secondaire plutôt que primaire, raccourcissant ainsi le délai laissé aux innovations pour procurer des bénéfices avant que leur avantage soit érodé par les produits d'imitation[35]. Il est cependant juste de supposer que les informations que les fabricants doivent échanger très en avance avec les distributeurs sur leurs projets de nouveaux produits peuvent aller dans le sens d'une réduction du délai nécessaire aux marques de distributeurs pour imiter les innovations prometteuses. Il est vraisemblable aussi que les distributeurs seront moins disposés, lorsqu'ils vendent des marques propres, à échanger des informations avec les fabricants de grandes marques. Cette attitude pourrait bien avoir un effet négatif sur l'innovation mais sa portée est difficile à apprécier dans la mesure où les fabricants sont encore en mesure, semble-t-il, d'acquérir des informations électroniques sur les points de vente auprès de sociétés privées comme Neilson.

Borghesani et al (1997) ont exprimé des préoccupations similaires à propos des effets sur l'innovation de la tendance des marques de distributeurs à imiter les marques nationales et l'ont reliée à ce qu'ils considèrent comme une tendance préoccupante de la structure du marché des États-Unis :

> Les marchés des produits de grande consommation ont été généralement constitués de plusieurs fabricants disposant de grandes marques et de capacités de RD, d'un certain nombre de fabricants plus petits ayant leur propre marque (marques secondaires) et de producteurs de marques de distributeurs (qui n'ont pas une activité de développement de produits mais qui copient ou modifient avec succès les produits de marque commercialisés). Un changement de structure se produit dans certains secteurs où deux groupes contrôlent les trois quarts du marché: un fabricant opérant sous une seule marque et doté de capacités de RD et plusieurs distributeurs vendant des marques propres. Les autres sociétés détiennent des parts de marché très faibles et n'exercent guère d'influence sur l'évolution du marché. L'incidence sur la santé à long terme du marché reste incertaine mais le manque de concurrence au niveau des marques primaires est fort troublant.

Un autre aspect des échanges d'informations mérite d'être noté. Selon Borghesani et al (1997, 20) :

> Du fait que la nécessité de la coordination et les besoins du calendrier obligent les industriels à communiquer aux détaillants leurs programmes de promotion et leurs informations sur les prix plusieurs mois à l'avance, les distributeurs qui utilisent leurs propres marques sont en mesure de planifier leurs activités de "protection" ce qui leur confère un avantage compétitif déloyal sur les autres fabricants.

Ce facteur explique peut-être pourquoi certains fabricants de grandes marques ont abandonné les promotions périodiques en faveur d'une stratégie de rabais permanents. Il est possible que ce changement ait pu avoir comme effet secondaire une diminution générale de la vigueur de la concurrence entre les fabricants ,surtout en ce qui concerne l'innovation.

4.4 Effets sur la concurrence en aval

Les marques de distributeurs représentent une menace beaucoup plus forte pour la concurrence d'aval que pour celle d'amont notamment parce qu'elles peuvent constituer un puissant moyen de différenciation des distributeurs. L'effet de ce phénomène sur le bien-être des consommateurs est toutefois assez ambigu dans la mesure où il peut léser certains consommateurs et en avantager d'autres. Moins ambigus, toutefois, sont les effets potentiels d'exclusion. Si l'ensemble des grandes enseignes de distribution s'engagent dans un recours aux marques propres par intégration verticale, il peut se produire un effet d'exclusion dont le potentiel anticoncurrentiel dépendra de l'importance des obstacles à l'entrée résultant de l'obligation faite aux nouveaux entrants d'entrer à deux niveaux en même temps. Il peut exister aussi une incidence en termes d'aggravation des coûts des concurrents non intégrés si le nombre de fabricants non affiliés devient suffisamment faible. Il s'agit du scénario le plus défavorable. Dans la réalité la production de marques de distributeurs ne nécessite pas une intégration verticale. En fait Corstjens et Corstjens (1995, 265) indiquent que la majorité des fabricants de produits de grande consommation fournissent des marques de distributeurs[36].

4.5 Conclusion concernant les marques de distributeurs

Bien que le désir de renforcer leur puissance d'achat puisse pousser les détaillants à faire davantage appel aux marques de distributeurs, d'autres forces plus puissantes agissent probablement dans

le même sens. Il s'ensuit que les mesures visant à réduire la puissance d'achat ne devraient certainement pas reposer uniquement ou fortement sur le désir de réduire le recours aux marques propres dès lors qu'il y a peu de raison de se montrer préoccupé de ce phénomène.

Il existe de bonnes raisons de penser que les marques de distributeurs peuvent améliorer la concurrence en amont. Certaines raisons moins convaincantes peuvent amener à penser qu'elles peuvent diminuer l'innovation en amont. Les effets en aval des marques de distributeurs pourraient être négatifs mais seulement si elle contribuent peu à accroître le choix des produits, si elles sont très largement répandues et si elles résultent principalement d'une intégration verticale. Au total, l'argument selon lequel les marques de distributeurs ont un effet net négatif sur l'efficience économique est loin d'être convaincant. Les effets négatifs de ces marques sur les fabricants plus fragiles de marques secondaires sont, toutefois, plus plausibles. Ces fabricants risquent d'être confrontés au choix difficile entre la faillite ou une survie reposant uniquement sur leur capacité à produire aux coûts unitaires les plus bas possibles. Cette situation est certainement désagréable mais la concurrence en matière de prix qui bénéficie aux consommateurs est rarement agréable pour les vendeurs.

5. Examen de solutions juridiques possibles pour remédier aux problèmes liés à la puissance d'achat

5.1 Discrimination par les prix et par d'autres facteurs à l'instigation de l'acheteur

La discrimination par les prix et par d'autres facteurs que les prix consiste à conférer à certains acheteurs des avantages non justifiés par des différences de coûts. L'existence, la source et les effets de ces avantages sont au cœur d'un grand nombre de traitements de la puissance d'achat. Cette dernière est en fait, ainsi qu'on l'a vu, souvent définie comme une certaine forme de discrimination[37].

5.1.1 Analyse

Nous commencerons par analyser les conditions préalables à la discrimination par les prix et d'autres facteurs. Elles sont les suivantes: la puissance de vente sur le marché (faute de quoi tous les acheteurs seraient en mesure d'obtenir les mêmes conditions compétitives), un facteur empêchant efficacement la revente entre les clients et des élasticités-prix de la demande différentes selon les acheteurs. Toutes ces exigences seront vraisemblablement satisfaites dans le cas de fournisseurs vendant à un ensemble de détaillants rivaux qui ont une puissance d'achat. Celle-ci n'existerait pas par définition en l'absence de puissance de vente en amont. De plus, il y a peu de chance que les détaillants en concurrence se mettent à revendre les biens pour annuler les effets de la discrimination des fournisseurs. Quant à la présence d'élasticités-prix différentes du côté de la demande, elle semble à première vue problématique. En effet les détaillants vendent probablement au même ensemble de consommateurs, donc leurs courbes de la demande dérivée de biens en amont devraient être les mêmes. Toutefois le problème est plus complexe: les différences de puissance d'achat pratiquement certaines si les détaillants sont de tailles très diverses, pourraient jouer le même rôle que des élasticités-prix de la demande dissemblables. On pourrait même dire qu'en l'absence de différences de puissance d'achat il ne devrait pas exister de discrimination en matière de prix.

Les économistes ont généralement une opinion favorable de la discrimination en matière de prix si elle permet d'accroître le volume des produits vendus ou si elle a pour effet de déstabiliser les ententes de producteurs et les autres formes de discipline des prix en amont. Ils reconnaissent toutefois que la discrimination en matière de prix peut aussi avoir des effets négatifs lorsqu'elle est utilisée au détriment de l'entrée sur le marché (par exemple un type de prix d'éviction sélectif - voir l'annexe II)[38]. Un risque parallèle existe lorsque la discrimination sur les prix induite par l'acheteur fausse la concurrence en aval en

conférant aux grands distributeurs établis un avantage sans relation avec une meilleure efficience. Ceci peut conduire au maintien à un niveau artificiellement bas des parts de marché de détaillants plus efficients mais dont le volume des ventes est initialement plus faible. Sur ce point, Dobson et al (1998, 37) remarquent que le problème de la puissance d'achat :

> ...revêt une importance plus grande actuellement pour certaines raisons dont la moindre n'est pas que la puissance d'achat et la puissance de vente ont tendance à se combiner de telle sorte qu'une position dominante sur le marché peut offrir à un entreprise une puissance d'achat qui lui permet d'obtenir des conditions plus favorables que ses concurrents ce qui lui procure un avantage concurrentiel sur le marché d'aval et la possibilité d'exploiter sa puissance de vente. Dans ce sens, l'avantage d'échelle sur ses concurrents permet à l'entreprise d'entrer dans un cercle vertueux grâce auquel elle opère avec des coûts unitaires inférieurs à ceux de ses concurrents, ce qui lui donne la possibilité d'accroître ses bénéfices afin d'investir dans la RD et dans la qualité/les marques des produits et de ce fait d'accroître ses ventes obtenant ainsi des remises encore plus fortes de ses fournisseurs et renforçant son avantage en termes de coûts sur ses concurrents etc.

Même lorsque ce "cercle vertueux" s'enclenche effectivement, il ne s'ensuit pas nécessairement que la discrimination en faveur des détaillants détenant une puissance d'achat soit défavorable à la concurrence. Si le nombre de détaillants existants ou entrants potentiels sur le marché qui jouissent d'un degré équivalent de puissance d'achat est suffisant, la concurrence en aval peut être vigoureuse et efficiente, même si de nouveaux entrants dépourvus de puissance d'achat sont effectivement exclus du marché. Des pertes significatives d'efficience peuvent, toutefois, être enregistrées si les différences de puissance d'achat agissent dans le sens de l'exclusion d'un nouvel entrant plus efficient.

Il semble, toutefois, peu probable que la puissance d'achat soit capable de bloquer un ou plusieurs nouveaux entrants efficients. Si ces entreprises disposent d'un avantage suffisant en termes d'efficience, elles seront en mesure de pratiquer les mêmes prix ou des prix plus faibles que les firmes en place, même si elles ne disposent pas d'une puissance d'achat. Même si leur niveau d'efficience n'atteint pas ce seuil, les nouveaux entrants pourraient encore atteindre finalement une taille suffisante pour éliminer ou égaler la puissance d'achat des entreprises établies, mais ils devront bénéficier de l'appui soit d'un marché des capitaux efficient soit d'un ou plusieurs fabricants clairvoyants[39]. Cet appui sera plus facilement obtenu si les nouveaux entrants font la preuve de leur plus grande efficience. Les fabricants devraient être les alliés naturels des détaillants les plus efficients. Sauf s'ils jouissent d'une partie des rentes totales prélevées par la puissance de vente d'aval (ce qui serait difficile à concilier avec le fait qu'ils soient victimes de la puissance d'achat) les fabricants ont un intérêt à long terme à ce que les prix et les marges bénéficiaires nettes des détaillants soient aussi faibles que possible[40]. L'amélioration de l'efficience des détaillants devrait être favorable aux bénéfices des fabricants surtout si elle est obtenue par des moyens qui se traduiront en définitive par une réduction de la puissance d'achat.

Il faut mentionner un autre point en ce qui concerne les inefficiences potentielles provoquées par une discrimination découlant de la puissance d'achat. On pourrait considérer que les détaillants "vendent" des services de distribution à leurs fournisseurs. Ces détaillants sont donc en bonne position pour différencier les conditions qu'ils offrent (c'est-à-dire les marges bénéficiaires qu'ils exigent). Plus précisément, ils vont vraisemblablement favoriser les fournisseurs les plus importants et surtout les plus diversifiés (on trouvera plus de détails sur les questions de diversification dans la section consacrée aux fusions). On pourrait d'abord supposer que cette discrimination ne doit pas entraîner des pertes de bien-être. Après tout, le pire qui puisse arriver à un fournisseur, sauf s'il est captif, est de couvrir entièrement ses coûts unitaires. Les problèmes se trouvent plutôt du côté des incitations à l'innovation. Plus un fournisseur est grand et diversifié, plus il est encouragé à innover puisqu'il a plus de chances de garder une bonne partie de la rente économique ainsi dégagée. Malheureusement il n'est pas toujours vrai que les fournisseurs de ce type sont *actuellement* les plus innovants. Il faut toutefois ajouter qu'il doit exister une

corrélation lâche entre la réussite passée et future en matière d'innovation, ainsi qu'entre les succès antérieurs dans ce domaine et la taille actuelle de l'entreprise. En outre, on pourrait considérer que ce problème est autant dû aux imperfections du marché des capitaux qu'à la puissance d'achat.

5.1.2 Implications pour l'action des autorités publiques (avec une brève mention des ententes horizontales)

L'analyse ci-dessus a été formulée en termes de "discrimination" plutôt que de discrimination en matière de prix parce que les acheteurs en position de force peuvent choisir des arrangements qui leur sont favorables et qui prennent de nombreuses autres formes qu'une réduction des prix. On peut en trouver un bon exemple dans le cas d'Australian Safeway Stores[41]. La division Woolworth de cette entreprise est le plus grand distributeur d'alimentation d'Australie. Elle faisait elle-même du pain mais revendait aussi celui d'une boulangerie indépendante, Tip Top. Quand un autre détaillant s'est mis à vendre au rabais le pain Tip Top, Woolworth aurait fait pression sur la boulangerie pour qu'elle instaure des prix imposés afin d'arrêter cette pratique. Après avoir gagné un procès contre Tip Top pour pratique illégale de prix imposés, la Competition and Consumer Protection Commission d'Australie mène actuellement une action contre Woolworth. Un autre bon exemple du même type est fourni par l'affaire Toys "R"Us (TRU) déjà mentionnée qui a été soulevée par la FTC américaine .

Dans l'affaire TRU le distributeur de jouets bien connu qui détient environ 20 pour cent du marché des États-Unis (et plus de 30 pour cent en moyenne dans les autres pays où il est implanté , voir Antalics 1993, 6) avait menacé de ne plus fournir les fabricants qui vendaient à la fois à TRU et à des halles aux jouets qui lui prenaient de plus en plus de parts de marché. Plus précisément, il exigeait des fabricants d'un jouet particulier qu'il offre aux halles une variante légèrement différente de celle vendue aux points de vente de TRU. A titre d'exemple un fabricant vendant une poupée à TRU n'était autorisé à vendre la même à une halle aux jouets qu'avec une série d'accessoires. Ce traitement discriminatoire tendait à réduire la concurrence sur le marché du jouet au détail de deux manières différentes. Il rendait les comparaisons de prix plus difficiles et il tendait à augmenter le coût des jouets fournis aux halles en raison de leur conditionnement plus coûteux. Les fabricants n'auraient apparemment pas coopéré avec TRU s'ils n'avaient pas été convaincus que tous leurs concurrents seraient soumis à la même sanction de retrait du produit s'ils refusaient d'accepter les conditions du distributeur. Cette affaire dépasse donc la simple utilisation de la puissance d'achat pour protéger la part de marché d'un acheteur. Elle montre aussi l'utilisation qui peut être faite de la puissance d'achat pour faciliter les ententes entre fabricants concurrents pour traiter de la même manière anticoncurrentielle avec certains détaillants[42].

Comme indiqué dans le communiqué de presse de la FTC, la décision d'interdire la pratique décrite ci-dessus a été fondée sur des motifs à la fois verticaux et horizontaux (à savoir un boycott des producteurs). L'aspect horizontal de l'affaire pouvait prêter à controverse[43]. . L'aspect vertical a fait l'objet de l'intéressant commentaire suivant attribué dans le communiqué de presse à l'auteur de la décision, le président Pitofsky :

> "Toys "R" Us est parvenu à sa position actuelle de principal distributeur de jouets des États-Unis en offrant un choix de jouets plus large que tout autre distributeur aux prix les plus bas" a déclaré le président Pitofsky. En fait l'ironie remarquable de cette affaire est que si la législation était telle que le prétend Toys "R" Us, c'est-à-dire si un grand distributeur avait la possibilité de couper ou d'entraver la source d'approvisionnement d'une société nouvelle ou innovante en faisant usage de sa position de force sur le marché à l'encontre des fournisseurs, Toys "R" Us lui même qui était il y a une génération un vendeur innovant qui suscitait l'hostilité des sociétés plus importantes et moins dynamiques aurait pu se voir refuser la possibilité de participer à la

> concurrence et de gagner des parts de marché" (United States Federal Trade Commission, 1998, 1).

La forme de discrimination utilisée par Toys "R" Us a peut-être été influencée par la rigueur particulière des dispositions de la loi visant la discrimination en termes de *prix* aux États-Unis. Il est possible que cette loi, le Robinson-Patman Act, ait dissuadé Toys "R" Us d'utiliser sa puissance d'achat de manière plus directe, c'est-à-dire pour obtenir des prix plus faibles que ses concurrents des halles à jouets. Si tel est le cas, toutefois, ce n'est probablement pas par crainte de poursuites. Le Robinson-Patman Act n'a fait l'objet que de très rares actions publiques en plus de dix ans aux États-Unis. La citation suivante extraite de Scherer (1990, 510) explique pourquoi la loi est tombée en défaveur auprès des organismes chargés de la concurrence :

> Le cœur de la loi Robinson Patman est constitué des articles 2(a) et 2(b) qui interdisent l'application de prix différents à des acheteurs de "produits de qualité et de catégorie similaires" lorsqu'elle "aurait pour effet de réduire substantiellement la concurrence ou qu'elle tendrait à créer un monopole dans une branche quelconque du commerce ou à affaiblir, détruire ou empêcher la concurrence avec toute personne qui accorde ou reçoit en connaissance de cause le bénéfice de cette discrimination ou avec les clients de l'une quelconque d'entre elles". Trois échappatoires possibles sont alors spécifiées. La discrimination peut être justifiée s'il est prouvé (1) qu'elle est destinée à céder des produits périssables ou obsolètes ou qu'elle est effectuée dans le cadre d'une vente en cas de liquidation ou faillite (2) qu'elle se borne à tenir dûment compte des différences "de coûts de fabrication, de vente ou de livraison résultant de méthodes ou de quantités différentes" dans les modes de vente ou de livraison de la marchandise ou (3) qu'elle est effectuée "de bonne foi pour s'aligner sur le prix également bas d'un concurrent".

La loi vise les acheteurs ainsi que les vendeurs. Les travaux préparatoires du Robinson-Patman Act montrent clairement que ce texte était destiné à protéger durant la période de dépression les petits détaillants confrontés aux pressions de la concurrence venant du développement de chaînes de grande distribution plus efficientes.

Le verdict de la plupart des économistes est que le Robinson-Patman Act n'a pas été favorable à la concurrence et qu'il n'a pas réellement offert beaucoup de protection à ceux qui devaient en être les bénéficiaires, c'est-à-dire les petits détaillants. Il est probable également qu'il s'est traduit par des prix plus élevés pour les consommateurs[44]. Selon Dobson et al (1998, 29):

> L'association américaine des avocats (1980, 27-37) a formulé cinq critiques majeures à l'égard de la loi à savoir : elle contribue à la rigidité des prix (en particulier entre différents sous-marchés géographiques), elle contribue à une discipline oligopolistique en matière de prix (en décourageant les réductions de prix sélectives), elle décourage l'entrée de firmes établies sur d'autres marchés (en empêchant la fixation de prix différenciés de "pénétration" pour cette forme de nouvelle entrée), elle entraîne une différenciation inefficiente des produits (en encourageant la production de variétés différentes permettant de pratiquer des prix différents) enfin, elle impose une charge réglementaire indue (liée aux dépenses encourues par les entreprises pour justifier les différences de prix auprès de l'administration et aux coûts de distribution élevés découlant du choix par les entreprises de méthodes de distribution inefficientes en raison du coût supporté pour justifier l'offre de prix différents à des catégories différentes de distributeurs).

Cette liste devrait, peut-être, être complétée par le fait que les législations contre la différenciation en matière de prix sont inefficaces par nature parce qu'elles n'interdisent pas les nombreux autres modes d'utilisation de la puissance d'achat pour obtenir des avantages. Le fait que le Robinson-

Patman Act ait été, semble-t-il, de moins en moins appliqué au cours des années récentes constitue une évolution positive.

Les États-Unis sont loin d'être le seul pays qui dispose d'une législation contre la discrimination en matière de prix et l'essentiel des critiques de l'Association américaine des avocats s'appliquerait probablement aussi à ces dispositions[45].

Compte tenu des problèmes que pose l'interdiction de la discrimination en matière de prix et étant donné le fait qu'il sera difficile dans un grand nombre de cas d'attribuer cette discrimination à la puissance d'achat, il serait peut-être sage d'utiliser d'autres instruments pour traiter les atteintes à la concurrence sur le marché du détail liées de manière évidente à la puissance d'achat. Dans le même ordre d'idées, il serait logique de limiter les interdictions légales aux cas où il est prouvé que la discrimination en matière de prix ou dans d'autres domaines affaiblit sensiblement la concurrence entre détaillants, c'est-à-dire appliquer la loi non pas automatiquement mais seulement dans le cas où la discrimination a des effets déraisonnables. Une telle approche permettrait de faire une distinction importante, c'est-à-dire qu'elle faciliterait l'application de règles plus strictes aux cas dans lesquels la puissance d'achat est utilisée pour opérer une discrimination directe et non pas seulement indirecte. Le risque d'atteinte à la concurrence semble être plus grand lorsqu'un acheteur en position de force insiste pour obtenir des conditions plus favorables par rapport à celles accordées à ses concurrents que lorsqu'il se borne à exiger et à obtenir de meilleures conditions pour lui- même sans se référer au traitement réservé aux autres acheteurs.

En examinant les interdictions de la discrimination en matière de prix et dans d'autres domaines, les pays pourraient aussi prendre en considération les effets de leur législation de la concurrence sur les petits détaillants qui cherchent à mettre en commun leur puissance d'achat afin d'égaler celle de leurs concurrents plus importants. Une grande sensibilité dans l'application du droit de la concurrence est requise pour évaluer l'incidence de ces groupements sur la concurrence du fait qu'une puissance d'achat égale n'est peut être pas suffisante à elle seule pour combler l'écart de compétitivité. Les accords en matière d'achats entre petits détaillants devront, peut-être, être complétés par des actions visant à obtenir les mêmes économies d'échelle dans le domaine de la promotion ce qui peut exiger la fixation commune de prix promotionnels qui constituerait une atteinte à la concurrence.

Les grandes entreprises de distribution constituent aussi des groupements qui ne vont pas jusqu'à la fusion, apparemment pour renforcer leur puissance d'achat en égalant la présence d'un grand nombre de leurs fournisseurs au niveau mondial[46]. Une sensibilité dans l'application de la législation contre les ententes horizontales est également requise dans ce cas et il en est de même en ce qui concerne l'apparition de groupements de producteurs qui semble motivée en partie par le désir de mieux se défendre contre la puissance d'achat[47].

C'est le lieu de citer un autre cas intéressant décrit dans la contribution de l'Australie à la table ronde. Il s'agit de l'affaire Carlton and United Breweries (CUB) qui impliquait l'exercice de la puissance d'achat sur un marché pour limiter la concurrence horizontale sur un autre[48]. A l'origine la South Australia Brewing Company (SABC) avait accepté de brasser une marque de bière privée pour la vendre à un petit groupe de supermarchés. CUB, premier brasseur d'Australie, a demandé à son petit concurrent de mettre fin à l'accord en le menaçant de ne plus acheter les boîtes de bière à une filiale de SABC. Or CUB achetait environ 70 pour cent de ses boîtes à cette société ,ce qui représentait pour celle-ci quelque 50 pour cent de ses ventes totales de canettes. SABC a donc renoncé à fournir la marque privée de bière. En d'autres termes, la CUB a utilisé sa puissance d'achat pour limiter la concurrence sur le marché de la bière. Elle a reconnu les faits devant la Competition and Consumer Protection Commission d'Australie qui lui a infligé des sanctions.

5.2 Produits d'appel/vente en dessous des prix de revient

Scherer (1980, 592) définit comme suit les produits d'appel "articles vendus par un détaillant à des prix très réduits, parfois même en dessous du prix de revient, afin d'attirer des clients qui lorsqu'ils seront entrés dans le magasin achèteront d'autres produits à des prix normaux ". Peut-être faut-il élargir cette définition et dire que le produit d'appel est fondamentalement une technique publicitaire consistant à appliquer des prix exceptionnellement bas à un sous-ensemble de produits vendus par un détaillant.

Il est difficile de tracer la frontière entre la stratégie de prix élevés et de prix bas, examinée plus haut et utilisée par un grand nombre de grands distributeurs aux États-Unis, et les produits d'appel. Selon la London Economics (1997, 29) :

> Lorsqu'ils choisissent entre des détaillants diversifiés, les consommateurs n'ont souvent qu'une idée très vague des prix et qualités relatifs des différents produits. Dans ce cas ils tendent à faire leur choix entre les distributeurs sur la base de la *réputation* qu'ils ont d'offrir une bonne gamme de produits et un niveau général de prix bas. Les produits d'appel sont une méthode permettant d'acquérir la réputation de pratiquer des prix bas. En fixant des prix bas sur un certain nombre de produits essentiels et en faisant ensuite la promotion de ces produits et de leurs prix, les distributeurs incitent les consommateurs à se référer à ces prix pour comparer les enseignes.

5.2.1 Analyse

Bien que les consommateurs soient certainement appelés à bénéficier des produits d'appel, au moins à court terme, ces produits peuvent susciter des plaintes de deux côtés. Les petits détaillants dont les produits utilisés comme appel représentent une part importante de l'activité vont évidemment pâtir de cette pratique. Un bon exemple est celui des boulangeries indépendantes dont l'existence peut être compromise si les grandes surfaces utilisent le pain comme produit d'appel. Il convient de noter, toutefois, que même si les produits d'appel entraînent la cessation d'activité de certains détaillants spécialisés, les consommateurs ne seront pas affectés sauf si le produit est ensuite vendu à des prix supérieurs à ceux des concurrents. Dans ce cas, le produit d'appel vendu à perte s'analyse en fait comme un prix d'éviction, stratégie qui a peu de chance de s'avérer rentable compte tenu de la faiblesse des obstacles à l'entrée que l'on peut s'attendre à trouver dans le commerce de détail spécialisé[49].

L'autre catégorie qui pourrait avoir à se plaindre de la pratique des produits d'appel est celle des fabricants. A première vue, on pourrait penser que les fabricants de produits d'appel seraient avantagés par la réduction des prix au détail de leurs produits, ou du moins que, s'ils devaient en fait pâtir de cette pratique, ils seraient en mesure de cesser de les produire. La réponse est sans doute négative même si cela peut surprendre. Les fabricants peuvent être dépourvus de ce moyen de défense soit en raison de la législation interdisant les prix imposés soit parce que les détaillants qui recourent aux produits d'appel sont en position de force (autrement dit, le fabricant perdrait davantage s'il cessait de produire qu'en continuant de fabriquer les produits d'appel). Le problème de l'application des dispositions interdisant les prix imposés semble suffisamment éloigné du sujet pour mériter une analyse supplémentaire, mais nous reviendrons sur ce sujet brièvement lors de l'examen des réactions des autorités publiques.

S'agissant de l'effet négatif que peuvent avoir les produits d'appel sur les fabricants, la question est de savoir si cette pratique peut les contraindre à baisser leurs prix ou à perdre des ventes. Il peut en être ainsi si les produits utilisés comme appel perdent leur image de qualité auprès des consommateurs, ce qui réduit la demande de ces produits et augmente son élasticité-prix. On peut admettre, toutefois, que les consommateurs associent généralement le prix et la qualité sans en déduire que les produits d'appel vont nécessairement entraîner une érosion de l'image de qualité des produits en cause. Les consommateurs devraient être capables de faire la distinction entre la pratique des produits d'appel et celle du rabais

permanent. Par ailleurs, le distributeur n'a pas intérêt à faire durer la pratique du produit d'appel jusqu'au point où le produit perd de son image de qualité au point que le prix ne représente plus une valeur exceptionnelle. Enfin, on peut douter que la réputation de qualité d'un article soit en quoi que ce soit affectée par la pratique du produit d'appel dans le secteur des biens de grande consommation lesquels font l'objet d'achats répétés qui permettent aux consommateurs de se faire une opinion à travers leur propre expérience.

Il semblerait que la pratique du produit d'appel pourrait aussi entraîner une baisse du prix à la production en renforçant la puissance d'achat si elle concentre les ventes entre les mains du distributeur[50]. Cette hypothèse semble peu probable car elle peut impliquer une contradiction interne: comme on l'a noté dans la section précédente, pour qu'il y ait puissance d'achat, il ne suffit pas de détenir une part élevée des achats, il faut que le ratio coût du changement de marque/coût du changement d'enseigne (CCM/CCE) soit faible. Toutefois pour qu'il y ait une concentration des ventes par un changement des achats des consommateurs au profit du produit d'appel, il est préférable que le ratio CCM/CCE soit élevé. La concentration des ventes pourrait aussi résulter d'une forte augmentation des ventes du produit utilisé comme article d'appel aux consommateurs existants, ce qui est également peu probable parce que les distributeurs éviteront sans doute d'utiliser comme appels des produits à forte élasticité-prix de la demande en raison du coût excessif qui pourrait en résulter[51].

Un dernier point : lorsque les plaintes des fabricants à propos des produits d'appel concernent, comme prévu, des articles caractérisés par un faible ratio CCM/CCE et de faibles élasticités-prix de la demande, les autorités de la concurrence devraient attacher peu d'importance aux inquiétudes des fabricants selon lesquelles ces produits amèneraient les autres détaillants n'utilisant pas cette pratique à retirer les leurs de leur catalogue. En raison de la faiblesse présumée des ratios CCM/CCE et des élasticités-prix, les détaillants non utilisateurs de produits d'appel devraient enregistrer des pertes limitées de ventes et de clients. Ils n'ont donc pas de raison de prendre le risque de retirer de leur catalogue des produits dont d'autres distributeurs se servent temporairement comme articles d'appel. On peut certainement s'attendre à ce qu'ils cherchent à obtenir des réductions de prix auprès des fabricants et peut-être à ce qu'ils menacent de retirer les produits de leur catalogue mais ces menaces devraient être rarement mises à exécution. Une réaction beaucoup plus probable consistera à réduire les efforts de promotion de ces produits.

En résumé, lorsque les produits d'appel portent préjudice aux fabricants, il est très probable qu'ils seront associés à une puissance d'achat bien qu'il soit peu vraisemblable qu'ils entraînent un renforcement de cette dernière ou qu'ils conduisent à une réduction immédiate des ventes. Il est également peu probable que cette pratique d'appel entraîne réellement une dégradation de l'image de qualité de ces produits chez les consommateurs. Néanmoins, lorsqu'une telle détérioration se produit, les fabricants peuvent perdre non seulement des ventes mais aussi la capacité d'appliquer un prix suffisamment élevé pour justifier des investissements destinés à maintenir la qualité du produit. Le véritable risque des produits d'appel, qui est difficile à évaluer, est que les producteurs qui sont vulnérables à cette pratique seront dissuadés d'effectuer les investissements d'amélioration de la qualité.

5.2.2 Réaction des autorités publiques

Comme nous avons noté plus haut qu'il est peu justifié en termes d'efficience économique de protéger les petits détaillants spécialisés contre les produits d'appel, on s'interrogera ici essentiellement sur l'utilité de protéger les producteurs contre les effets possibles de cette pratique en termes de réduction des ventes et de dégradation de la qualité.

Si les fabricants qui ont en face d'eux des acheteurs en position de force ne sont pas capables de se protéger eux-mêmes contre un détournement de leur réputation de qualité on peut se demander si

l'interdiction des produits d'appel aurait nécessairement pour effet de rétablir un niveau efficient d'investissements dans la qualité. Malheureusement, la réponse est négative. Un fabricant qui se refuse à cesser de traiter avec un grand distributeur pratiquant les produits d'appel est vulnérable non seulement à cette pratique mais à un détournement plus direct de son investissement à savoir l'exigence de l'acheteur que le produit soit vendu au-dessous des coûts moyens totaux (y compris un retour normal sur les investissements de qualité antérieurs). En fait, si l'on interdit les produits d'appel les détaillants qui souhaitent appliquer une stratégie combinant les prix élevés et les prix bas seront obligés de demander des prix discriminatoires spéciaux aux fabricants afin d'atteindre le résultat obtenu plus directement par les produits d'appel. Les fabricants risquent donc de se trouver en définitive exposés à un degré plus important et non moindre de puissance d'achat de la part des détaillants.

Non seulement il est peu probable que l'interdiction des produits d'appel soit par elle-même d'une grande assistance à certains fabricants et détaillants mais elle s'avérera difficile à appliquer sauf si l'on définit cette pratique d'appel comme une vente au-dessous du prix de revient facturé[52]. Dans la réalité un certain nombre de pays ont été un peu plus loin en ajoutant au prix facturé une marge bénéficiaire normale. Le calcul de cette marge entraînerait les autorités de la concurrence dans une forme déguisée de réglementation des prix.

Une dernière note de prudence est de rigueur à propos de l'interdiction des produits d'appel parce que les fabricants ne demandent pas nécessairement cette interdiction en raison du préjudice causé à la réputation de leurs articles, mais simplement parce que les produits d'appel empêchent les ententes et les prix élevés d'oligopole. Des prix de détail exceptionnellement bas peuvent faire craindre aux fabricants qu'il ne s'agit pas de produits d'appel, c'est-à-dire qu'un concurrent fournit des produits au-dessous des prix normaux. L'application efficace d'une réglementation interdisant les produits d'appel contribuerait à éliminer ces soupçons, mais la plus grande transparence qui en résulterait en matière de prix entraverait plus qu'elle ne favoriserait un renforcement de la concurrence entre les fabricants. Elle faciliterait aussi la détection par les détaillants des entorses aux accords de la nation la plus favorisée (NPF) ce qui rendrait ces accords plus attrayants. Ce facteur serait également défavorable à la concurrence et aux consommateurs parce que la généralisation du principe de la NPF contribue à stabiliser les ententes entre producteurs et les prix parallèles.

Nous avons mentionné plus haut que les fabricants lésés par la pratique des produits d'appel hésiteraient à cesser leurs livraisons de ces produits de crainte d'être accusés de prix imposés. S'il en est ainsi, ceci devrait conduire plutôt à renoncer à interdire les prix imposés en tant que tels qu'à soutenir une législation contre les produits d'appel. Il est intéressant de noter qu'au moins deux pays de l'OCDE ont traité ce problème de manière plus efficiente en prévoyant simplement une exception à leur législation régissant le refus de vente[53]

Au total, l'interdiction des produits d'appel peut n'offrir qu'une protection très limitée aux fabricants ou aux petits détaillants spécialisés mais risque fort de porter atteinte à la concurrence. Si elle est adoptée, l'atteinte à la concurrence doit constituer un critère obligatoire, autrement dit il est conseillé d'appliquer la loi seulement aux cas "déraisonnables" et non pas sous la forme d'une interdiction "en soi" et la définition du prix d'appel doit être basée simplement sur le prix de la facture.

5.3 Restrictions verticales entre détaillants et fabricants

Tandis que les restrictions verticales ont été imposées dans le passé par les fabricants aux détaillants, ces dispositifs sont utilisés désormais pour maximiser les intérêts communs de ces deux catégories dans la mesure où les détaillants jouent actuellement un rôle beaucoup plus important dans la

chaîne de valeur. Tel est du moins l'avis de la London Economics (1997, 40) qui met en lumière les pratiques suivantes:

- fourniture exclusive ;
- refus de stockage ou retrait du catalogue ;
- niveau minimal de livraison: les détaillants exigent du fabricant des quantités minimum (afin de les empêcher de livrer à d'autres détaillants) ;
- exigence d'un minimum de publicité: les détaillants refusent de stocker un produit s'il n'a pas fait l'objet d'un minimum de dépenses de publicité ;
- exigence d'investissements à fonds perdus: les détaillants refusent de conclure un contrat de fourniture avec les fabricants (en particulier pour des produits sous leur propre marque) s'ils n'ont pas investi à fonds perdus dans les installations de production.

Point encore plus important, ce rapport indique aussi que le refus de vente

> ...a constitué traditionnellement une méthode utilisée par les fabricants pour surmonter les problèmes liés au comportement de « profiteur » de certains détaillants... Toutefois, selon certaines allégations récentes, certains détaillants auraient incité les fabricants à refuser d'approvisionner d'autres distributeurs afin de réduire l'efficacité de la concurrence de ces derniers. (London Economics, 1997, 40).

L'affaire Toys "R" Us examinée ci-dessus peut donc se retrouver dans d'autres pays.

Une analyse complète des restrictions verticales qui détaillerait leurs possibles effets favorables ou défavorables à la concurrence dans le contexte de la puissance d'achat déborderait largement les limites de la présente note. Cinq de ces restrictions méritent au moins une brève mention en relation avec la puissance d'achat.

5.3.1 Analyse

i) Exclusivité territoriale

Accorder à un distributeur un droit exclusif de distribuer un produit sur un territoire donné pourrait certainement accroître la puissance d'achat en concentrant les achats et peut-être en augmentant les CCE si le territoire est suffisamment étendu. Dans le sens inverse, l'exclusivité territoriale pourrait aussi être associée à une augmentation des CCM pour l'article concerné et à une diminution des CCE pour les biens qui le concurrencent. Cela paraît particulièrement probable si l'exclusivité a été instituée par un fabricant pour encourager un détaillant à accroître ses efforts de vente du produit en question. En somme, il est difficile de prédire l'effet de l'exclusivité sur la puissance d'achat pour les produits concernés, mais si elle est instituée par le fabricant elle augmente généralement la puissance d'achat pour les produits concurrents vendus par le détaillant. Si au contraire elle est imposée par un acheteur puissant, le résultat le plus probable est un simple accroissement de la puissance d'achat pour les biens concernés.

ii) Contrats d'exclusivité d'approvisionnement

Ces contrats sont plus particulièrement utilisés dans le cas de marques de distributeurs où l'acheteur peut exiger d'être le seul vendeur des produits. Lorsqu'elle est pratiquée par une entreprise dominante ou si elle est suffisamment répandue, l'exclusivité d'approvisionnement peut avoir un effet

anticoncurrentiel en réduisant l'entrée ou la viabilité des détaillants concurrents. En revanche, elle peut être favorable à la concurrence en facilitant des échanges d'informations plus complets et plus rapides entre les détaillants et leurs fournisseurs. Il est possible aussi que les contrats d'exclusivité soient préférables à l'intégration verticale parce qu'ils permettent une meilleure division du travail entre les directions des fabricants et des détaillants et parce qu'ils préservent des incitations à l'efficience plus fortes pour les détaillants. Par ailleurs, la supériorité des contrats d'exclusivité sur l'intégration verticale peut être liée à des imperfections des marchés des capitaux.

iii) Vente liée et obligation d'achats groupés

Les fabricants qui cherchent à réduire la puissance d'achat peuvent très bien recourir à ces techniques. En groupant leurs produits, ils peuvent réussir à réduire les CCE/CCM relatifs à leur offre combinée. Bien qu'il soit peu probable que les consommateurs changent d'enseigne parce qu'ils ne trouvent pas un produit de marque nationale, ils peuvent le faire si le retrait du catalogue concerne l'ensemble des biens de consommation produits par un fabricant diversifié bien connu.

iv) Prix imposés

Les détaillants qui offrent leurs propres marques en concurrence avec des grandes marques auront naturellement tendance à favoriser leurs produits y compris en refusant de proposer des marques nationales concurrentes. Une stratégie moins risquée consisterait, toutefois, à accroître l'écart de prix en faveur des marques de distributeurs, de préférence en augmentant les prix des grandes marques plutôt qu'en réduisant les prix des marques de distributeurs. Les fabricants chercheront naturellement à s'opposer à cette stratégie par l'application de prix imposés maximum. En fait, une fois que les détaillants sont en concurrence avec leurs fournisseurs, on ne voit pas pourquoi les fabricants n'auraient pas le même pouvoir de fixation des prix au détail que celui dont jouissent leurs concurrents au moyen des marques de distributeurs.

Il existe un lien possible entre les prix imposés minimum et la puissance d'achat. Steiner (1997, 442) illustre ce point par certaines remarques attribuées à S. Robson Walton, Senior Vice Président de Wal-Mart :

> Je pense qu'il est probablement exact que les fabricants obtiendraient des prix-usine plus élevés par l'application de prix imposés, en particulier si le nombre de producteurs est limité et même si l'on écarte le recours à une entente. Le prix à la production est largement déterminé par le pouvoir de négociation des distributeurs qui vendent la marchandise. Plus ces détaillants ont à gagner dans la négociation, plus ils se montreront durs dans cette dernière. Dans notre cas, nous négocions plus durement pour obtenir des concessions de prix auprès du fabricant lorsque ces économies nous permettront de vendre davantage de marchandises, contrairement à ce qui se passe lorsqu'il existe un prix au détail fixé qui générerait seulement une marge plus forte (Walton, 1982, 15-16).

v) Redevances d'emplacement et commissions de catalogue

Dobson et al (1998, 22) ont fourni une définition et un commentaire pertinents concernant les redevances d'emplacement :

> Il s'agit de paiements effectués, par exemple à un supermarché, par un fabricant pour que ses produits soient présentés à une place déterminée sur les linéaires ou même seulement pour qu'ils

> soient présentés. Ils correspondent au fait que l'espace sur les rayons quelle que soit l'importance du supermarché est dans une certaine mesure un bien rare et que les produits se font concurrence pour l'occuper. Il va de soi que les produits dont le supermarché peut difficilement se passer ne seront probablement pas fortement taxés mais les marques secondaires sont vulnérables à ce genre de pression.

Le point essentiel à noter à propos de ces redevances est qu'elles ne varient pas en fonction des ventes au détail ultérieures et qu'elles sont parfois versées uniquement pour obtenir le droit de figurer parmi les références des groupements d'achats. Elles peuvent représenter des sommes très importantes. Shaffer (1991) observe :

> Malheureusement, ces redevances font l'objet de négociations orales et il n'existe pas de données publiées à leur sujet. Toutefois certains articles de presse récents citent des sources professionnelles qui laissent penser que cette pratique représentait entre 1/3 et 1/2 des 19 milliards de dollars de dépenses de promotion des producteurs en 1987. Certaines grandes surfaces exigeraient jusqu'à 100 000$ pour chacun des produits stockés.

Michael Antalics, un membre du personnel de la FTC américaine, a offert une bonne analyse des effets favorables et défavorables à la concurrence des commissions d'emplacement qu'il définit généralement comme "des paiements effectués une fois pour toutes par les fabricants aux détaillants pour obtenir le placement d'un *produit nouveau* sur le rayon"[54]. Parmi les effets favorables à la concurrence, il mentionne que ces paiements représentent une forme de concurrence sur les prix entre les producteurs et un moyen d'assurer la meilleure utilisation de l'espace sur les rayons. Il note aussi que ces redevances ne sont pas assimilables à l'offre d'une réduction du prix de gros au détaillant parce qu'une redevance fixe payée d'avance transfère au producteur l'essentiel du risque de l'échec de nouveaux produits. Ce transfert du risque se justifie par le fait que le fabricant doit mieux connaître l'attrait de ses produits sur le marché que le détaillant.

En ce qui concerne les effets anticoncurrentiels, Antalics commence par minimiser l'importance des effets des redevances d'emplacement sur l'augmentation des coûts en capital de l'entrée.

> ...ceci n'est généralement pas considéré comme ayant un effet anormal d'exclusion. Un grand nombre de techniques commerciales généralement admises telles que la publicité ou le recours à des procédés de fabrication efficients et à forte intensité de capital peuvent également accroître le coût de l'entrée (Antalics, 1997, 2).

Il constate toutefois que les redevances d'emplacement peuvent soulever des problèmes du point de vue de la législation antitrust dans les domaines des prix d'éviction, de l'exclusivité de l'approvisionnement et de la discrimination en matière de prix. Il traite chacun de ces aspects davantage d'un point de vue juridique qu'économique et il se réfère essentiellement au droit des États-Unis. Les prix d'éviction entrent en jeu parce qu'un fabricant peut les déguiser en redevances d'emplacement[55]. Les redevances peuvent aussi représenter un moyen d'acheter un accord d'exclusivité qui peut avoir des effets anticoncurrentiels si l'effet d'exclusion est suffisamment important. La différenciation des redevances d'emplacement selon les détaillants pourrait être considérée sur un plan juridique comme une discrimination en matière de prix dont les effets sur la concurrence seraient, comme expliqué plus haut, difficiles à déterminer. Antalics termine son examen des effets anticoncurrentiels en notant que les accords horizontaux entre les fabricants visant à ne pas verser de redevance d'emplacement constitueraient une entente horizontale illégale et probablement anticoncurrentielle.

Les commentaires d'Antalics doivent être complétés par l'analyse intéressante effectuée par Shaffer (1991) des redevances d'emplacement et des prix imposés en tant que moyen possible pour un

fabricant d'aider un détaillant à s'engager de manière crédible à pratiquer des prix plus élevés que le niveau concurrentiel. Sa théorie, qui suppose implicitement un degré élevé de concurrence en amont et donc une absence de puissance d'achat et qui exige également que les prix de gros puissent être observés par les autres détaillants, s'énonce comme suit :

> Chaque pratique (prix imposés et redevances d'emplacement) contribue à accroître les bénéfices du détaillant. A première vue, les redevances de location d'espace sur les linéaires semblent sans incidence défavorable dans la mesure où les transferts de bénéfices purs entre branches d'activité n'ont aucune conséquence en termes de bien-être. Ceci suppose implicitement que la somme des bénéfices du producteur et du détaillant est fixe, ce qui ne sera pas le cas en général. Les fabricants sont en concurrence entre eux pour obtenir la clientèle des détaillants et ces derniers sont en concurrence pour obtenir les faveurs des consommateurs. Les redevances d'emplacement, en réduisant la concurrence au niveau du détail, aboutissent à accroître le total des bénéfices. Du fait que les bénéfices des producteurs ne doivent pas être négatifs, les contrats d'attribution d'emplacements coïncident avec des prix de gros unitaires supérieurs aux coûts de production marginaux. Les détaillants qui signent ces contrats reçoivent non seulement un paiement d'avance direct mais bénéficient indirectement de la réduction de la concurrence sur les prix en aval. En s'engageant à accepter un coût de gros relativement élevé, une entreprise de distribution au détail annonce son intention d'être moins agressive dans la fixation de ses prix. D'autres sociétés sont incitées à relever leurs prix de détail et l'entreprise d'origine bénéficie des effets de rétroaction[56].

Ce que nous avons noté à propos des redevances d'emplacement s'applique en quasi totalité, du moins en ce qui concerne les paiements en une seule fois relatifs aux produits nouveaux, uniquement à la part de ces redevances qui excède les coûts effectifs de l'introduction d'un nouveau produit. Ces coûts devraient être faibles et concerner pour une large part les dispositions logistiques en matière de transport, de stockage et de paiement.

5.3.2 Implications pour l'action des autorités publiques

Le fait qu'une dimension de puissance d'achat peut être l'un des facteurs qui motive l'existence d'une restriction verticale est de peu d'effet du point de vue de l'analyse générale qui doit être appliquée à ces restrictions pour déterminer si elles ont un effet favorable ou défavorable à la concurrence. Il faut seulement, semble-t-il, formuler trois observations générales. La première est qu'il peut être nécessaire de revoir l'interdiction des prix imposés en particulier lorsqu'elle concerne des prix maximum lorsque leur effet essentiel est de permettre à un détaillant de fixer à la fois ses prix et ceux d'un concurrent. Un assouplissement de la réglementation interdisant les prix imposés ou du moins une application en cas d'effets déraisonnables et non pas automatique semble très souhaitable. En fait lorsque les préoccupations relatives à la puissance d'achat se manifestent, l'argument en faveur de l'application d'une analyse fondée sur les effets déraisonnables à toutes les catégories de restrictions verticales se trouve renforcé. Le second point qui mérite d'être noté est que la présence de la puissance d'achat rend plus probable une négociation des restrictions verticales sous la pression des acheteurs pour des raisons autres que le souci d'obtenir des efficiences favorables à la concurrence. En particulier, en présence d'une puissance d'achat, les accords d'exclusivité d'approvisionnement apparaîtraient plus suspects lorsqu'ils ont pour effet de défavoriser les détaillants tiers. Ceci s'applique à un degré moindre à l'exclusivité territoriale. Le dernier point général à noter est que l'utilisation ostensible de la vente liée et du groupage des produits pour contrecarrer la puissance d'achat ne diminue pas la nécessité de soumettre ces arrangements à une analyse attentive lorsqu'ils sont pratiqués par des entreprises dominantes ou qu'ils sont généralisés. La présence d'une puissance d'achat ne modifie pas le risque de réduction de la concurrence en amont que présentent ces restrictions.

5.4 Législation relative à l'abus de position dominante

5.4.1 Analyse

Les acheteurs disposant d'une puissance d'achat peuvent être caractérisés comme des entreprises dominantes à l'égard de leurs fournisseurs, qu'elles le soient ou non à l'égard de leurs clients. Par ailleurs, leurs fournisseurs pourraient être victimes d'abus du fait soit d'une "exploitation" (c'est-à-dire de prix inférieurs au niveau concurrentiel) soit d'une exclusion (c'est-à-dire d'efforts pour décourager les autres de leur offrir un accès aux consommateurs). En fait, la législation de la concurrence d'un grand nombre de pays de l'OCDE comporte une interdiction de l'abus de position dominante qui est clairement destinée à être appliquée à la fois aux activités de vente et d'achat. Il existe néanmoins ici une différence importante. Tandis que l'abus de position dominante de la part d'un vendeur va, pratiquement par définition, réduire le bien-être économique, tel n'est pas nécessairement le cas de l'abus de position dominante par un acheteur. Il est même possible que la puissance d'achat puisse contrecarrer la position de force du vendeur en amont et renforcer par là même l'efficience économique et le bien être des consommateurs. Ceci est plus plausible à court terme qu'à long terme, mais les avantages à court terme pourraient être suffisants par eux-mêmes pour justifier une plus grande sensibilité dans l'application de l'abus de position dominante dirigé contre les fournisseurs et non les consommateurs .

5.4.2 Implications pour l'action des autorités publiques

La législation concernant l'abus de position dominante peut soit compléter d'autres dispositions visant directement la puissance d'achat telles que celles examinées ci-dessus, soit se substituer à elles. En termes d'amélioration de l'efficience économique, la législation concernant l'abus de position dominante a un avantage sur les autres dispositions qui ne nécessitent pas de démontrer soit un effet anticoncurrentiel soit la possession par l'acheteur au moins d'une certaine forme de position de force durable sur le marché. Cet avantage doit, toutefois, être considéré en fonction d'un inconvénient potentiel important. Alors que les autres dispositions se bornent souvent à interdire un comportement particulier, les dispositions en matière d'abus de position dominante confèrent souvent à un organisme chargé de la concurrence le pouvoir d'agir comme une sorte d'autorité réglementaire définissant les conditions d'accès à une installation, dans ce cas les rayons du détaillant. On a même évoqué la possibilité d'appliquer la doctrine des installations essentielles pour résoudre certains problèmes de puissance d'achat[57]. Toutefois, il est peu probable que l'impossibilité d'accès à une seule enseigne prive un fabricant de plus de 20 pour cent de ses clients potentiels, ce qui est assez loin du niveau normalement exigé pour une installation essentielle[58].

Bien qu'une grande prudence soit nécessaire dans l'utilisation de la législation relative à l'abus de position dominante pour réglementer les prix, les mesures visant les conditions qui augmentent les obstacles à l'entrée comme la vente liée, l'exclusivité territoriale et l'exclusivité d'approvisionnement semblent présenter beaucoup moins de risque. C'est dans ce domaine que la réglementation visant l'abus de position dominante semble bien adaptée pour compléter les législations examinées ci-dessus ou même s'y substituer.

Qu'elle soit avisée ou non, l'utilisation des dispositions en matière d'abus de position dominante pour contrôler la puissance d'achat a été très limitée en pratique. La raison en est simple. La méthode classique utilisée pour établir au moins une présomption de l'existence d'une position dominante fait appel aux parts de marché. Il est rare qu'un seuil de part de marché faisant présumer une position dominante soit publié mais en règle générale il est peu probable qu'une telle présomption existe au-dessous de 33 1/3 pour cent[59].Les détaillants sont couramment accusés de disposer d'une puissance d'achat même s'ils représentent beaucoup moins que ce pourcentage dans les achats en amont et les ventes en aval. Les autorités publiques peuvent réagir de deux manières à ce problème. La première formule qui a été appliquée en Allemagne, en France et au Portugal consiste à compléter la législation relative à l'abus de

position dominante par des dispositions concernant l'interdiction d'abuser de la "dépendance économique". Elle est examinée immédiatement ci-après. La seconde méthode peut sans doute être qualifiée plutôt de proposition. Elle se concentrerait sur les services que les détaillants rendent aux fournisseurs en amont en cherchant une base logique pour segmenter ce marché des services[60]. Le même résultat pourrait être obtenu en réduisant la dimension géographique du marché. L'une ou l'autre technique permettrait d'établir qu'un détaillant excède, du côté de la vente, le seuil de part de marché correspondant à une présomption de position dominante. Incidemment, l'approche de la définition affinée du marché pourrait aussi être appliquée en aval dès lors que la législation relative à l'abus de position dominante d'un grand nombre de pays n'exige pas que la position dominante et l'abus s'appliquent à un seul et même marché. Nous donnerons des indications supplémentaires sur la question essentielle de la définition du marché lorsque nous étudierons l'examen des fusions.

5.5 Abus de la dépendance économique

5.5.1 Description et analyse

Historiquement, l'interdiction de l'abus de la dépendance économique est apparue d'abord en Allemagne (1973) puis s'est étendue à la France (1986) et plus tard au Portugal (1993)[61]. Cette interdiction est destinée fondamentalement à étendre le champ d'application de la réglementation de l'abus de position dominante à des situations dans lesquelles des acheteurs qui ne sont pas en position dominante sur leurs marchés de vente sont néanmoins dans une position de force vis-à-vis d'autres entreprises. Dans le contexte fabricant/distributeur, un fournisseur est considéré comme économiquement dépendant s'il n'a pas d'autre alternative pour écouler ses produits que de recourir à un détaillant ou si ce dernier est un partenaire incontournable pour lui. En présence d'une telle dépendance économique, on peut présumer un déséquilibre entre les parties se traduisant par une différence fondamentale de puissance d'achat. Ce déséquilibre permet au détaillant d'obtenir un traitement qui ne serait jamais accordé par le fabricant dans des conditions de concurrence normales. Parmi les exemples courants, on peut citer des conditions de crédit anormalement favorables, des remises non justifiées en termes de coûts y compris des rabais rétroactifs, des conditions exclusives d'approvisionnement et les redevances d'emplacement/commissions d'inscription au catalogue.

Dès lors que les dispositions visant l'abus de la dépendance économique constituent fondamentalement des prolongements de la législation concernant l'abus de position dominante, il ne suffit pas, pour un fabricant, de prouver qu'il est dépendant et qu'il a été lésé par une certaine pratique. Il doit généralement exister un "effet défavorable sur le marché", c'est-à-dire une atteinte à la concurrence. Ce qu'on peut ou doit entendre par atteinte à la concurrence semble être sujet à débat. Par exemple, lors du Forum de la CE, Christian Babusiaux de la Direction générale de la concurrence, de la consommation et de la répression des fraudes française a énuméré et rejeté les arguments en faveur de la répression des abus de la dépendance économique au moyen de "dispositions spécifiques concernant la loyauté des pratiques commerciales plutôt que la protection de la concurrence"[62]. Dans une section intitulée "La restriction de la concurrence résultant de [l'abus de la dépendance économique] peut être prouvée à partir de ses effets", M. Babusiaux a formulé les trois points suivants :

1. le fabricant perd une partie de sa capacité à prendre des décisions de manière indépendante. En particulier, le risque de se voir refuser l'accès au marché à la suite de décisions prises par un petit nombre d'acheteurs et d'être contraint de faire des concessions, qu'il n'était pas disposé à consentir lorsque les relations commerciales ont débuté, le prive dans une large mesure de sa liberté d'action en tant que fournisseur. Il n'est plus en mesure de choisir ses partenaires, de déterminer le niveau de prix en dessous duquel une transaction n'est pas

rentable pour lui, d'obtenir une rémunération pour certains services ou parfois même d'offrir de tels services ;

2. l'incertitude est supprimée du fait que la partie en position dominante peut, à tout moment, obliger le fournisseur à s'aligner sur les conditions convenues avec un concurrent. Pourtant, l'incertitude sur le comportement des concurrents constitue l'un des stimulants les plus puissants de la concurrence ;

3. un obstacle à l'arrivée de nouveaux concurrents sur le marché est créé du fait que les distributeurs peuvent obtenir des concessions qui sont hors de proportion avec les quantités vendues et les services commerciaux rendus aux fournisseurs. Ceci est dû à l'exagération des effets d'échelle et, dans la production, aux coûts supplémentaires extrêmement élevés de l'établissement de relations commerciales (entrée en catalogue) et à la coopération commerciale qui est imposée (Ehlermann et Laudati, ed, 1997, 198).

5.5.2 Implications pour l'action des autorités publiques

L'interdiction de l'abus de la dépendance économique semble avoir déçu ses promoteurs mais la rareté des cas observés et l'échec et la frustration rencontrés dans la plupart d'entre eux étaient probablement prévisibles. Les fournisseurs qui sont prêts à se plaindre d'abus ne sont probablement pas réellement dépendants tandis que ceux qui le sont souffrent en silence[63]. Qui plus est, comme le signale Vogel (1998, 8-9) dans la mesure où ces dispositions sont motivées par le souci de protéger les concurrents, elles vont à contre courant des tendances actuelles en matière d'application de la législation antitrust et elles ne reposent sur aucun fondement théorique établi. Se pose aussi le problème difficile de la recherche d'un remède sans court-circuiter l'économie de marché. Dans une note communiquée à l'auteur, l'autorité de la concurrence portugaise reconnaît ce danger[64].

> Ce que l'on entend sanctionner, c'est essentiellement l'abus d'une situation de dépendance plutôt que des pratiques et des comportements dictés par de meilleures solutions commerciales.
>
> Il est impossible d'obliger quelqu'un à conserver un fournisseur ou un client lorsque le marché offre de meilleures solutions pour vendre ou acheter le même produit. Faute de quoi, le principe essentiel de l'économie de marché qui est celui de l'autonomie des agents économiques dans la définition de leur propre politique commerciale serait menacé, ce qui favoriserait le maintien d'entreprises dépendantes et entraverait l'entrée sur le marché de concurrents potentiels (citation légèrement révisée par l'auteur).

Ceci ne signifie pas que les pays qui se sont dotés de dispositions visant l'abus de la dépendance économique estiment qu'elles n'ont eu aucun effet positif. Au cours du Forum de la CE, Christian Dobler de l'Office fédéral des cartels allemand a déclaré :

> Ces dispositions n'ont pas été appliquées très souvent mais nous pensons qu'elles ont un effet dissuasif. Les cas qui se présentent se rapportent habituellement à des redevances d'entrée, des redevances d'inscription en catalogue et des loyers d'emplacement sur les linéaires. Notre tentative pour empêcher la dépendance économique n'a été couronnée de succès que dans des cas individuels. Pour ce qui est d'attaquer le problème de la concentration de la puissance d'achat à ses racines, les dispositions existantes, y compris celles concernant le contrôle des fusions sont de peu d'utilité (Ehlermann et Laudati, ed., 1997, 174).

Les trois pays qui ont adopté des dispositions visant l'abus de la dépendance économique ont jugé nécessaire de les renforcer. En Allemagne ont été instituées des "présomptions" de dépendance afin de simplifier la preuve. En France, la définition des cas de dépendance n'exige plus la preuve que l'abus a un effet restrictif sur le marché dans son ensemble, il est interdit aux grandes surfaces de faire de la publicité à la télévision et l'ouverture de grandes surfaces ou l'extension de celles existantes est soumise à certaines restrictions. C'est au Portugal, toutefois, que la réglementation visant l'abus de la dépendance économique a fait l'objet des développements les plus larges. Le droit de la concurrence a été modifié en mai 1998 par l'adjonction d'interdictions en soi (qui ne nécessitent pas la preuve d'effets économiques négatifs) des "pratiques de négociation abusives" qui peuvent être appliquées sans qu'une plainte ait à être déposée. Ces pratiques peuvent généralement être décrites comme permettant d'obtenir d'un fournisseur des conditions de prix, de paiement, de vente ou de coopération commerciale exorbitantes par rapport aux conditions générales de vente. On entend par "exorbitantes" des conditions qui confèrent à l'acheteur un avantage évident hors de proportion avec l'importance de ses ventes ou la valeur des services fournis.

Il est évidemment trop tôt pour savoir si les tentatives pour renforcer et compléter la législation sur l'abus de la dépendance économique permettront de réduire la puissance d'achat d'une manière favorable à la fois aux concurrents et à la concurrence. De même que dans le cas de la législation visant la discrimination par les prix, il semble que l'effort pour améliorer les symptômes de la puissance d'achat présente des risques évidents. Une meilleure approche consisterait à empêcher l'émergence ou le renforcement de la puissance d'achat chaque fois qu'il est probable qu'elle soit utilisée pour limiter la concurrence. Nous passerons donc à l'examen des fusions.

5.6 Fusions conglomérales entre fabricants et fusions horizontales et verticales entre détaillants

5.6.1 Analyse

La puissance d'achat, dans le sens où nous utilisons cette expression, exige pratiquement l'existence d'une puissance de vente en amont. Il est probablement exact aussi que la perspective d'acquérir une part des ventes d'amont pourrait donner aux détaillants une motivation supplémentaire pour augmenter leur part de marché et se différencier des autres détaillants. Dans la mesure où l'acquisition et l'exercice d'une puissance d'achat peuvent être dommageables pour les consommateurs et où les dimensions de ce problème ne sont nullement claires, les organismes chargés de la concurrence ont une raison supplémentaire d'examiner de très près les fusions entre fabricants qui sont potentiellement anticoncurrentielles[65].

L'apparition de la puissance d'achat peut s'accompagner d'autres évolutions en amont. Les fabricants peuvent chercher à s'entendre pour contrebalancer la puissance d'achat au niveau du détail[66]. En regroupant un ensemble assez large de marques suffisamment connues, ils peuvent éviter de devoir partager les rentes avec les détaillants. Lorsque ces fusions constituent de véritables *conglomérats* par nature, elles ont une bonne chance d'être considérées comme n'étant pas contraires à la plupart des législations de la concurrence. Ces politiques méritent peut être d'être examinées dans la mesure où le fait d'isoler les fabricants de la puissance d'achat pourrait se traduire par une hausse des prix pour le consommateur.

Outre une certaine position de force sur le marché en amont, un certain degré de concentration du commerce de détail ne correspondant pas nécessairement à la notion traditionnelle de puissance de vente est probablement nécessaire à la naissance de la puissance d'achat. Il existe au moins quelques indications que l'accumulation de la puissance d'achat ou la capacité d'égaler celle des concurrents ont inspiré des fusions entre détaillants[67]. Rares sont, toutefois, les organismes chargés de la concurrence qui seront en mesure de freiner l'accumulation de la puissance d'achat en empêchant les fusions aboutissant à des parts de marché inférieures aux niveaux considérés normalement comme nécessaires pour créer des problèmes

de puissance de vente. Ceci peut être regrettable s'il existe des cas dans lesquels les fusions dans le commerce de détail bénéficient à l'origine aux consommateurs mais déclenchent simultanément une tendance à la concentration anticoncurrentielle chez les détaillants[68]. Cette tendance pourrait se développer même en l'absence de fusions supplémentaires parce que les détaillants dépourvus de puissance d'achat pourraient être progressivement éliminés du marché.

La puissance d'achat peut également mériter un examen attentif et prospectif lors de l'examen par les organismes de la concurrence des fusions verticales potentiellement anticoncurrentielles entre fabricants et détaillants, mais une fois encore les effets de la puissance d'achat peuvent aller dans un sens ou dans l'autre. Une fusion verticale qui a des effets d'exclusion pourrait encore être bénéfique pour les consommateurs si elle crée une puissance d'achat conduisant à une baisse des prix des fabricants répercutée ultérieurement sur les consommateurs.

5.6.2 Implications pour l'action des autorités publiques

La puissance d'achat pose deux problèmes difficiles du point de vue de l'examen des fusions. Le premier concerne le critère de concurrence appliqué dans les fusions. Certains pays utilisent une variante du critère de "réduction substantielle de la concurrence" tandis que d'autres ne peuvent interdire les fusions que si elles « créent ou renforcent une position dominante ». Les deux critères sont généralement fusionnés dans une certaine mesure par une définition large de la position dominante couvrant également la position dominante conjointe ou collective. Ceci ne permet toutefois de prendre en compte qu'en partie le rôle des fusions s'agissant de faciliter la collusion ou d'améliorer les chances de fixation des prix selon des méthodes oligopolistiques contraires à la concurrence. En toute hypothèse, le critère à base de position dominante crée de réels problèmes lorsqu'il s'agit d'examiner des fusions entre détaillants dans des circonstances où la puissance d'achat sera renforcée et tendra elle même à produire des effets anticoncurrentiels. Ces problèmes ont été bien décrits dans la contribution écrite de l'Allemagne au Forum de la CE :

> ...depuis le début des années 80, [l'Office fédéral des cartels] a constamment appliqué le contrôle des fusions aux fusions et acquisitions dans le secteur de l'alimentation au détail. Sa position était que les grands groupes de distribution constituaient un oligopole exerçant une position dominante sur le marché tant du côté de la demande que de l'offre. Les détenteurs d'un oligopole à la différence des concurrents plus petits étaient considérés comme indispensables à leurs fournisseurs qui étaient tributaires des ventes à ces grands acheteurs. L'opinion de l'Office fédéral des cartels était qu'il n'existe aucune concurrence substantielle entre les membres de l'oligopole du côté de la demande dès lors que la satisfaction des besoins d'un acheteur ne fait pas obstacle à celle des besoins des autres. L'Office interdisait régulièrement aux membres de l'oligopole d'acquérir des concurrents du fait que chaque acquisition aurait renforcé la puissance d'achat de l'oligopole et donc sa position dominante. Cette interdiction de fait des fusions pour les grandes entreprises a beaucoup contribué à freiner le processus de concentration pendant plusieurs années.
>
> Les tribunaux allemands n'ont cependant pas admis cette position. La jurisprudence a refusé l'idée que les principaux distributeurs constituaient un oligopole occupant une position dominante sur le marché. Contrairement à l'Office fédéral des cartels qui considérait qu'il existait un seul marché de l'approvisionnement, les tribunaux ont soutenu qu'il existait des marchés d'approvisionnement différents selon les catégories de produits. Ceci incluait l'ensemble des marchés potentiels des fabricants, non seulement le marché du détail mais aussi les marchés de la restauration collective et de l'industrie agro-alimentaire. Tout en reconnaissant qu'un grand nombre de fabricants étaient dépendants de l'oligopole, le tribunal n'estimait pas que ce dernier occupait une position dominante vis-à-vis de l'ensemble des fournisseurs. Les différences entre

> les termes et conditions relevées par l'Office fédéral des cartels suggéraient selon le tribunal qu'il existait une concurrence entre les membres de l'oligopole, même si en considérant toute les catégories de produits ensemble, le groupe de l'oligopole obtenait des conditions d'achat sensiblement meilleures.
>
> L'Office fédéral des cartels est lié par la décision du tribunal. Dès lors que les parts de marché du côté de la demande sont généralement plus faibles que sur les marchés de l'offre, l'Office ne voit actuellement aucune possibilité supplémentaire de prouver la position dominante sur le marché du côté de la demande. C'est pourquoi, lorsqu'il examine les fusions et les acquisitions dans l'alimentation au détail, il se concentre exclusivement sur la question de savoir si une puissance d'achat est créée vis-à-vis du consommateur final sur les marchés régionaux. Toutefois, pour examiner si le groupe oligopolistique de grands distributeurs occupe une position prédominante sur le marché au niveau régional par rapport à ses concurrents, on tient compte de la position prééminente du groupe sur les marchés d'approvisionnement (voir Ehlermann et Laudati, ed, 1997, 202-203).

Comme l'illustre l'extrait ci-dessus, la deuxième difficulté soulevée par la puissance d'achat du point de vue de l'examen des fusions a trait à la définition du marché. Lorsqu'elles examinent les marchés de détail, les autorités de la concurrence devraient prendre soin d'adopter des définitions du marché qui reflètent le type de comportement des consommateurs que nous avons décrit dans la Section III de la présente note. Plus précisément, le comportement consistant à faire toutes ses courses au même endroit représente sur certains marchés une considération importante qui réduit sensiblement le nombre de magasins concurrents. Cet aspect est reflété dans deux décisions récentes en matière de fusion. La première concerne la fusion entre les distributeurs finlandais de produits alimentaires Kesko et Tuko et la seconde celle des fournisseurs de matériels de bureau américains Staples et Office Depot.

Dans le cas de la fusion Kesko/Tuko, la Commission Européenne a défini le marché comme s'appliquant aux paniers de produits d'épicerie frais et secs et aux produits non alimentaires généralement vendus dans les supermarchés (lessives etc., produits de toilette, articles en papier à jeter après usage, et produits d'hygiène personnelle). Sont explicitement exclues de la définition les ventes des détaillants spécialisés, des kiosques à journaux et des stations-service. Pour parvenir à cette définition, la Commission a noté que :

> ...en Finlande, la concurrence s'opère entre les supermarchés et les autres commerces de détail capables d'offrir aux consommateurs une gamme étendue de produits permettant l'achat des produits de consommation courante dans le même magasin et offrant des services étroitement liés tels que places de stationnement, caddies, etc.[69]

Dans la fusion Staples/Office Depot, la FTC des États-Unis a constaté que les prix des fournitures de bureau (y compris les matériels et les produits informatiques et les meubles de bureau) étaient sensiblement plus faibles sur les marchés où les trois principaux distributeurs de fournitures de bureau étaient en concurrence. Ceci constituait une preuve satisfaisante du fait que, comme mentionné plus haut, des magasins de fournitures de bureau où l'on peut tout acheter en une seule fois avec de fortes remises sur les prix représentaient effectivement un marché différent de celui desservi par des points de vente plus petits offrant une gamme de produits limités (qui existaient en grand nombre dans chaque ville).

6. Remarques de conclusion

Une certaine sensibilité dans l'application de l'interdiction des ententes horizontales, des restrictions verticales et de l'abus de position dominante s'ajoutant à une rigueur dans l'examen des fusions

(en dépit des problèmes mentionnés ci-dessus) semble constituer la meilleure méthode pour traiter les problèmes de puissance d'achat. A la différence de l'interdiction de la discrimination en matière de prix et dans d'autres domaines, des produits d'appel et de l'abus de la dépendance économique, qui cherche à réglementer l'utilisation de la puissance d'achat, les instruments plus classiques de la lutte antitrust peuvent être appliqués pour réduire à la fois son incidence et ses dangers pour le consommateur[70]. Ils y parviennent en préservant et protégeant directement la concurrence sur les marchés tant d'amont que d'aval. En l'absence de position de force sur le marché d'amont, le type de puissance d'achat sur laquelle nous avons concentré notre attention serait sans effet et, si les marchés d'aval sont suffisamment concurrentiels, la puissance d'achat devrait normalement être sans danger pour le consommateur et pourrait même lui être favorable.

Il existe deux autres raisons pour choisir d'aiguiser les dispositions classiques que l'on trouve dans la plupart des droits de la concurrence plutôt que d'élaborer une approche sur mesure de la puissance d'achat. La première est qu'il est très difficile de concevoir des mesures d'interdiction de la discrimination, des produits d'appel ou de l'abus de la dépendance économique qui soient à la fois applicables en pratique et peu susceptibles d'avoir des effets secondaires sur les accords efficients et favorables à la concurrence. La discrimination en matière de prix peut avoir de nombreuses causes autres que la puissance d'achat et être très utile comme moyen d'introduire une plus grande concurrence entre les fabricants. Rien ne garantit que l'interdiction des produits d'appel va protéger les investissements dans des articles de qualité (ou en fait que les produits d'appel nuisent à la réputation de qualité) mais elle peut très bien mettre un terme à une technique de publicité efficiente et peut-être évincer les grands distributeurs qui adoptent des stratégies autres que les rabais importants sur les prix. Il n'est pas facile, semble-t-il, de faire appliquer effectivement l'interdiction de l'abus de la dépendance économique tout en évitant de figer les structures de distribution existantes.

Il faut ajouter une mise en garde importante à nos conseils de prudence à l'égard de l'adoption d'une approche sur mesure pour réglementer la puissance d'achat. Les pays doivent s'assurer que leur droit de la concurrence interdit efficacement aux grands distributeurs d'utiliser directement leur puissance d'achat pour obtenir des conditions discriminatoires en leur faveur. Comme le montrent par exemple les cas Australian Safeway Stores, Carlton and United Breweries et Toys "R" Us, il existe un risque réel d'atteinte à la concurrence lorsque les distributeurs utilisent la puissance d'achat pour contrôler les relations des fournisseurs avec eux-mêmes et leurs concurrents.

Si une approche sur mesure vis-à-vis de la puissance d'achat n'est pas d'une évidente nécessité et peut même être nuisible, ceci ne signifie pas que les autorités de la concurrence doivent s'en désintéresser. Des tendances qui sont en relation étroite avec la puissance d'achat, c'est-à-dire le renforcement de la concentration au niveau du commerce de détail, peuvent en fait être à l'origine d'inconvénients pour les consommateurs. On peut s'interroger sérieusement sur la validité des hypothèses selon lesquelles la grande distribution est et restera toujours par définition concurrentielle. Si les obstacles à l'entrée dans le petit commerce et le commerce spécialisé sont généralement très faibles, il n'en est pas de même dans la grande distribution combinant l'alimentation, les autres produits de grande consommation et une très large gamme de biens durables. Un grand nombre d'autorités de la concurrence souhaitent peut-être revoir les définitions du marché dans les affaires impliquant des distributeurs et trouver des moyens plus efficaces de convaincre les tribunaux que les stations service et les kiosques à journaux ne sont pas en mesure de limiter la puissance d'achat des chaînes de grande distribution.

Les autorités de la concurrence seront certainement décidées à exercer une surveillance étroite sur le commerce de détail s'il s'avère que ce secteur n'est peut être plus aussi concurrentiel par nature qu'il l'était dans le passé. Ce secteur est d'une importance cruciale parce qu'un manque de concurrence à ce niveau pourrait avoir les mêmes effets sur les consommateurs qu'un renforcement significatif de la concentration non pas seulement dans une branche d'activité mais sur la quasi-totalité du spectre de la

production de biens de grande consommation et de biens de consommation durables. Si les marchés au détail sont suffisamment concentrés, en particulier dans le cas où les distributeurs parviennent à se différencier en utilisant des marques de distributeurs et d'autres techniques, les détaillants peuvent acquérir un pouvoir significatif d'augmentation unilatérale des prix. Ils peuvent également apprendre à coordonner leurs politiques de prix avec celles des autres grands distributeurs.

Les évolutions des marchés du détail appellent des mesures qui vont au delà d'un renforcement de l'application de la réglementation. Elles obligent aussi à repenser certains aspects de la politique de la concurrence, en particulier à l'égard des restrictions verticales. Pour prendre un exemple marquant et sujet à controverse, les arguments en faveur de l'interdiction automatique des prix imposés méritent d'être réexaminés dans un contexte où les détaillants concurrencent leurs fournisseurs et ne se contentent plus de les compléter.

Les fonctionnaires de la concurrence doivent se montrer plus que vigilants dans l'application des instruments antitrust classiques à un secteur du commerce de détail de plus en plus segmenté et concentré. Ils devraient aussi préconiser la suppression des dispositions qui offrent une protection douteuse aux petits fabricants et aux petits détaillants et s'opposer aux propositions de dispositions de ce type. Le terme « douteuse » revêt ici une double signification. Par exemple, la protection offerte aux petits producteurs par les dispositions visant les produits d'appel est au mieux éphémère et ces dispositions risquent aussi de réduire directement la concurrence sur les prix qui est favorable aux consommateurs. Un domaine qui appelle une attention urgente est celui des réglementations qui limitent la création ou l'extension de grandes surfaces commerciales. Ces restrictions peuvent répondre à des préoccupations sociales justifiées de la part des gouvernements, mais les autorités de la concurrence doivent considérer qu'il est de leur devoir d'expliquer les coûts économiques de ces mesures.

Le droit de la concurrence doit-il se borner à protéger la concurrence plutôt que les concurrents ?

Cette question affleure toujours lors des débats sur la puissance d'achat bien qu'elle n'ait pas été mise en lumière dans la présente note. Nous avons cependant fait plusieurs fois allusion au fait que la puissance d'achat peut avoir des effets négatifs évidents sur certaines entreprises de production et de vente au détail tout en étant simultanément favorable aux consommateurs. Si les organismes de la concurrence ont le double mandat de protéger à la fois la concurrence et les concurrents, elles auront certainement des choix difficiles à opérer dans des affaires mettant en cause la puissance d'achat. Même si l'organisme n'a qu'un seul mandat, à savoir promouvoir l'efficience économique en préservant et en protégeant la concurrence, il n'échappera pas nécessairement aux pressions en faveur de la protection de certains concurrents. Ceux qui souffrent de la concurrence se hâteront de soutenir que la concurrence exige des concurrents et qu'ils méritent donc entièrement une protection contre ce qu'ils considèrent comme l'exploitation abusive d'un pouvoir de négociation. Les tribunaux, en particulier les tribunaux de droit commun, sont également assez disposés à admettre ce type de raisonnement. Les organismes chargés de la concurrence doivent toutefois se méfier beaucoup de ces arguments[71].

Il est vrai que la protection de la concurrence concerne aussi les concurrents mais seulement ceux qui répondent avec efficience aux besoins des consommateurs. A l'inverse, prétendre que protéger les concurrents c'est aussi protéger la concurrence est dangereusement erroné. Le Dr. Groger du Ministère de l'Économie allemand a offert lors du Forum de la CE l'important commentaire suivant qui constituerait aussi une bonne note de conclusion pour la présente étude :

> La question de savoir s'il faut protéger la concurrence ou les concurrents est réellement d'importance cruciale. Nous avons examiné ce problème sous tous les angles en Allemagne et je suis convaincu en fin de compte qu'il s'agit d'une question de philosophie. La mienne est que si

nous protégeons la concurrence comme une institution en soi, nous allons aussi automatiquement protéger le consommateur. Toutefois, si nous tentons de faire prévaloir la justice dans des cas individuels et vis-à-vis de certains concurrents, je pense que nous gagnerons la bataille mais que nous risquons de perdre la guerre de la protection de la concurrence et que la concurrence en souffrira finalement[72] (Ehlermann et Laudati, ed., 1997, 184).

NOTES

1. Sauf pour la France et l'Allemagne, ces données sont extraites de Cotterill (1997, 128) qui cite David Hughes (1994). Les parts de marché pour la France sont extraites de Borghesani et al (1997, 18) tandis que le chiffre de l'Allemagne qui ne concerne que les 4 premières firmes est extrait d'un document de travail de l'Office Fédéral des cartels reproduit dans Ehlermann et Laudati, ed. (1997, 201).

2. Des indications plus détaillées sur la concentration du secteur de la distribution figurent dans une série de documents de travail de l'OCDE de J. Fawson (# 140), L. Pellegrim et A. Cardani (#139), P. Messerlin (#138) et J. Lachner, U. Tger et G. Weitzel (#137) concernant les systèmes de distribution du Royaume-Uni, de l'Italie, de la France et de l'Allemagne, qui décrivent également une concentration de plus en plus grande du commerce de gros et de détail en Europe.

3. Pour un tableau des groupements d'achat européens, voir Corstjens et Corstjens (1995,283). Des données plus récentes (septembre 1998) sont disponibles auprès de l'Association européenne des marques (AIM) Bruxelles (FAX 32.2.734 67.02). Les données de l'AIM montrent que les grands groupes de distribution appartiennent chacun à un seul groupement et évitent d'adhérer à des groupements comportant déjà un grand distributeur de leur principal pays d'établissement.

4. Des chiffres très similaires concernant 1992 et 1995 et 15 et 12 pays de l'EEE respectivement sont publiés dans Commission Européenne (1998, 22). Voir aussi Stenkamp et Dekimpe (1997, 919) pour des données complémentaires reflétant l'importance croissante des marques de distributeurs en France, en Grande Bretagne et en Espagne.

5. Pour une bonne analyse des marques de distributeurs et d'autres différences notables entre le Royaume-Uni et les États-Unis en matière de commerce de détail des produits alimentaires, voir Cotterill (1997).

6. Voir Kumar (1997, 834) et Stern et Weitz (1997, 832).

7. Voir Cullen et Whelan (1997) qui soutiennent que les marques de grande consommation de second rang subissent rapidement les effets combinés de la concentration accrue de la production et du commerce de détail et de l'importance grandissante des marques de distributeurs.

8. Dobson et Waterson (1996, 30) notent une croissance considérable de la concentration et de la rentabilité du commerce de détail au Royaume-Uni:.

> Le cas le plus frappant est celui de l'épicerie où la part de marché des cinq premières entreprises est passée de moins de 25 pour cent des ventes nationales en 1982 à 61 pour cent en 1990. Les marges bénéficiaires nettes de ce groupe ont, par ailleurs, pratiquement doublé au cours de cette période pour atteindre en moyenne 7 pour cent, ce qui n'est peut-être pas sans rapport avec la forte augmentation de la concentration. Qui plus est, la domination des détaillants sur les producteurs dans ce secteur est reflétée par le fait que le rendement du capital employé dans le commerce de l'alimentation au détail est pratiquement deux fois supérieur à celui de la production. La position des grandes sociétés multinationales qui détiennent des marques faisant l'objet d'une publicité intensive a elle-même été largement circonvenue par la capacité des détaillants à contrôler l'attribution des espaces de vente tout en introduisant leurs propres marques qui concurrencent efficacement les produits de ces sociétés.

Ils ont développé ce point par la suite (p. 31).

> [L'augmentation des marges brutes] a pu résulter de la capacité des détaillants à profiter des économies d'échelle et à améliorer leur productivité ainsi que de leur intégration dans le commerce de gros mais elle peut refléter aussi leur aptitude accrue à occuper une position dominante sur le marché de l'achat et de la vente. En fait... le commerce de détail britannique est généralement le plus rentable d'Europe. Les six premiers bénéfices sont réalisés par des entreprises basées au Royaume-Uni et par

> exemple dans le secteur le plus important, celui de l'épicerie, les marges nettes des principales firmes britanniques sont près de 3 fois supérieures à la moyenne de l'Union européenne.

A la page 38 ils indiquent :

> Dans certains domaines comme l'épicerie, la concentration du pouvoir des détaillants au Royaume-Uni est exceptionnelle par rapport à ce qui existe dans de nombreuses autres économies occidentales et bien que l'Allemagne, la France et les États-Unis par exemple aient connu une augmentation des niveaux de concentration, la concurrence apparaît de nature différente. L'augmentation de la concentration dans ces pays a été due largement au développement des chaînes d'hypermarchés à prix réduits opérant avec des faibles marges. En revanche, au Royaume-Uni, le marché de l'épicerie est dominé par de grandes entreprises qui mettent l'accent sur les marques de détaillants et la différenciation des services ce qui a permis d'éviter une concurrence rigoureuse sur les prix et permis le maintien de marges nettes et de bénéfices élevés.

Dans un rapport ultérieur (Dobson et al, 1998, 42) il est souligné à nouveau que des phénomènes différents se produisent peut-être au Royaume-Uni.

> Par exemple, dans l'épicerie, on observe que les marges nettes moyennes des grands distributeurs sont environ trois fois supérieures au Royaume-Uni à ce qu'elles sont en France, Allemagne, Italie et Espagne (où les hypermarchés à prix réduits sont beaucoup plus répandus, particulièrement dans ces deux derniers pays).

Pour un comparaison générale entre les secteurs de l'épicerie des États-Unis et du Royaume-Uni, y compris en ce qui concerne l'importance différente des marques privées, voir Cotterill (1997).

9. Une mention même brève des barrières à l'entrée serait incomplète sans référence à l'utilisation croissante d'Internet pour faciliter la vente directe. Cette tendance pourrait avoir un effet sur la plupart, sinon la totalité, des constatations de la présente note sur la puissance d'achat. Comme le dit un récent article de presse: "La partie de bras de fer à laquelle fabricants et détaillants se livrent depuis longtemps sur le terrain se poursuit sur l'écran et s'intensifie, affectant potentiellement tous les secteurs de la vente au détail et de la fabrication - et aussi les consommateurs". (Stoughton et Walker, 1999, p. 1). On a quelque raison de soupçonner que les détaillants vendant des biens dont la qualité nécessite un contrôle physique, principalement ceux qui vendent des produits d'épicerie, sont relativement protégés contre cette tendance.

10. Certains lecteurs se demandent peut-être déjà si les détaillants oligopsonistes, du moins ceux qui vendent au même ensemble de consommateurs, ont vraiment le pouvoir de réduire la production en amont. S'ils achètent et vendent moins (et à un prix de détail plus élevé), pourquoi leur clientèle n'irait-t-elle pas faire ses achats dans un autre magasin, ce qui laisserait inchangée la production en amont. La section III de l'étude cherche à répondre à cette question en se concentrant sur le comportement d'achat des consommateurs et en particulier sur leur préférence supposée pour l'approvisionnement dans un seul magasin.

11. Jacobson et Dorman (1991, 13, n.22) citent plusieurs références à l'appui de leur hypothèse selon laquelle:"...les courbes d'offre en pente ascendante dans le secteur manufacturier sont l'exception et non la règle".

12. Dans le cas le plus simplifié, un fournisseur efficient mais captif transfère le capital de ses propriétaires au détaillant puissant en lui prenant un prix inférieur au coût total moyen. Quand ce transfert est complet, le détaillant est forcé de vendre son affaire. Un fournisseur nouveau ou existant sera disposé à l'acheter tant qu'il pourra s'assurer qu'il ne partagera pas le destin de son prédécesseur. S'il n'est pas possible d' pas obtenir une protection contractuelle, le seul acheteur sera un détaillant. Dans les deux cas, l'hypothèse d'une intégration verticale par le bas ne changera rien à l'efficience de la production: le "prix" des biens du fournisseur en faillite reviendra bientôt au niveau de leur coût total moyen.

13. Trois domaines surtout nécessitent une attention supplémentaire. Premièrement, l'analyse de l'Annexe 1 pourrait être modifiée si l'on postule une puissance d'achat et une évolution du pouvoir de marché en amont et en aval au lieu du contraire. Deuxièmement, il faut prendre explicitement en compte les effets de réputation sur les acheteurs et les vendeurs. Les effets externes au processus de négociation signifient qu'il ne faut pas seulement examiner le pouvoir relatif de négociation pour prédire les résultats. Enfin, point lié dans une certaine mesure au précédent, quand les fournisseurs vendent à des détaillants *en concurrence*, des rabais spéciaux consentis à certains pourraient modifier le "jeu" de la négociation pour les autres. Nous sommes tentés de penser, mais ce n'est qu'une conjecture, que ces dynamiques auront tendance à augmenter la probabilité et l'importance des rabais accordés lors des négociations suivantes et à accroître les quantités vendues aux consommateurs finals.

14. Les clauses de la nation la plus favorisée sont des obligations contractuelles exécutoires de vendre à un acheteur au prix le plus bas demandé à tout autre acheteur. Quant à l'association étroite entre puissance d'achat et discrimination en matière de prix, il doit être très rare que les clients d'un fournisseur aient exactement la même puissance d'achat et soient également capables de l'exploiter.

15. Par exemple, d'après Dobson et al. (1998, 5), il y a puissance d'achat quand "...une entreprise ou un groupe d'entreprises obtiennent de fournisseurs des conditions plus favorables que celles accordées aux autres acheteurs ou que l'on attendrait dans des conditions normales de concurrence". Cette définition pourrait être grandement améliorée si on la limitait à "...des conditions plus favorables que celles accordées à des acheteurs en concurrence". Ces derniers en effet vendent au même ensemble de consommateurs finals, donc leur demande dérivée pour les produits des fournisseurs d'amont doit avoir des élasticités analogues à moins que les acheteurs n'aient pas la même puissance d'achat. On pourrait aussi affiner la définition de Dobson et al. en y incluant une référence à la cause des conditions discriminatoires. Un bon exemple nous en est donné par une étude antérieure de l'OCDE où nous lisons:.

> La puissance d'achat peut être définie comme la situation qui existe lorsqu'une entreprise ou un groupe d'entreprises *soit parce qu'il détient une position dominante en tant qu'acheteur d'un produit ou d'un service soit parce qu'il dispose d'avantages sur le plan de la stratégie commerciale ou d'un pouvoir de marchandage par suite de sa taille ou d'autres caractéristiques,* est à même d'obtenir d'un fournisseur des conditions plus favorables que celles qui sont offertes aux autres acheteurs (OCDE 1981, 10, souligné par nous).

Une définition très similaire a été fournie lors du Forum de la CE par le professeur Antunes qui dirigeait à l'époque l'organisme portugais de la concurrence:

> Il y a puissance d'achat lorsqu'une entreprise ou un groupe d'entreprises soit du fait d'une position dominante pour l'achat d'un produit ou d'un service soit du fait d'avantages en termes de stratégie commerciale ou d'un pouvoir de négociation important résultant de sa taille ou d'autres caractéristiques est en mesure d'obtenir d'un fournisseur des conditions plus favorables que celles offertes aux autres acheteurs.[Ehlermann et Laudati, ed. (1997, 225)].

16. Ce problème et celui, évoqué plus haut, du traitement discriminatoire appliqué à des détaillants en concurrence n'existeraient pas si les marchés des capitaux et les fournisseurs étaient informés parfaitement sans que cela leur coûte rien. Toutefois une telle perfection n'est pas de ce monde.

17. Bell et al (1997, 854) donnent certaines des raisons de l’approvisionnement dans un seul point de vente qui sont les suivantes :.

> Les habitudes des consommateurs en matière de courses ont connu une évolution profonde sous l’effet à la fois de facteurs socio-démographiques et de la taille et de la localisation des points de vente. L’approvisionnement en un seul lieu a été encouragé par la motorisation croissante de la population, l’augmentation du taux d’activité des femmes et la croissance du revenu disponible. Les consommateurs se déplacent moins fréquemment pour effectuer leurs achats de produits alimentaires,

effectuent des trajets plus longs pour se rendre aux magasins et dépensent des sommes plus importantes à chaque fois.

Ils ajoutent plus loin (p. 858) que le fait de faire ses courses au même endroit est encouragé par l'éloignement des grandes surfaces situées à la périphérie des villes et la réglementation qui interdit aux hypermarchés de s'installer trop près les uns des autres.

Les données concernant la Belgique, la France, l'Allemagne, l'Italie et le Royaume-Uni montrent que 90 pour cent ou plus des consommateurs font leurs courses une fois par semaine ou moins pour les produits d'épicerie préemballés. Aux Pays-Bas, ce pourcentage tombe à 80 pour cent. Voir Food Marketing Institute (1992). des données plus récentes (1995) pour seize pays d'Europe occidentale semblent infirmer (à l'exception notable de la Suisse) l'idée d'une faible fréquence des achats. Elles montrent que les Européens visitent leur enseigne primaire (pour l'épicerie et les produits connexes) 2,14 fois par semaine en moyenne, mais que la fréquence varie selon le type de magasin. Ceux dont l'enseigne primaire est un petit magasin de proximité y vont en moyenne 3.44 fois par semaine. A l'autre extrémité, ceux qui donnent la préférence à un hypermarché ne s'y rendent en moyenne qu'1.38 fois par semaine. Voir Food Marketing Institute (1995, 32).

L'attrait de l'approvisionnement dans une seule enseigne ne se limite pas aux produits de consommation courante. La Federal Trade Commission (FTC) des États-Unis a empêché la fusion de Staples Inc. et de Office Depot Inc. en raison des informations empiriques dont elle disposait et qui confirmaient clairement qu'il existait un marché séparé des supermarchés de l'équipement de bureau offrant aux "consommateurs la commodité d'un lieu unique d'approvisionnement pour une grande variété de matériels de bureau, de matériels informatiques et de mobilier de bureau à des prix très bas". United States Federal Trade Commission (1997a,1).

18. Voir INSEE (1998, 2).

19. Le fait que les prix promotionnels ne font pas l'objet de publicité prouve peut-être que la pratique de prix élevés et bas ne vise pas seulement les consommateurs instables.

20. Des comparaisons exactes exigeraient non seulement une masse de données statistiques et des vérifications soigneuses mais aussi un moyen de tenir compte du fait que des paniers de contenu différent seraient achetés dans chaque magasin en raison des changements constants affectant l'ensemble des prix relatifs, sans parler du fait que certains produits (comme les viandes et les produits frais et les marques de distributeurs) ne sont pas directement comparables. Il n'est pas surprenant qu'il existe une certaine disparité entre les différences perçues et réelles entre enseignes, comme l'illustrent les données présentées dans Corstjens et Corstjens (1995, 153).

21. Une grande partie du développement qui suit s'inspire étroitement de Corstjens et Corstjens (1995, 196-218).

22. Fait surprenant, même parmi les clients qui fréquentent souvent plus d'un supermarché, 53 pour cent déclarent qu'ils remplaceraient le produit manquant par un équivalent et seuls 24 pour cent qu'ils iraient dans un autre magasin - voir INSEE (1998, 2). A noter que "aller dans un autre magasin" ne signifie pas forcément changer d'enseigne primaire et qu'apparemment la solution de renoncer à l'achat n'a pas été proposée.

23. Pour simplifier le développement suivant, on a regroupé les conséquences de l'achat différé et du changement d'enseigne. Cette solution est raisonnable étant donné que les CCE et les coûts d'une visite dans un autre magasin sont probablement très fortement corrélés. Qui plus est, les détaillants ennemis du risque auront tendance à redouter presque autant les décisions d'achat différé que celles de changement d'enseigne puisque l'essai d'un autre point de vente pourrait beaucoup influencer le choix par le consommateur d'un lieu d'achat unique par la suite. Dans le texte les références aux CCE doivent s'entendre comme comprenant les coûts d'une visite dans un autre magasin

24 . Pour une étude de cette affaire qui est actuellement examinée par la FTC voir United States Federal Trade Commission (1996 et 1997c).

25. Ehlermann et Laudati, ed. (1997,226)..

26. Ibid. page 187.

27. Voir Blair et Harrison (1993, 117-121) pour une discussion des principales solutions de remplacement , à savoir intégration verticale, intégration verticale par contrat et contrats de prix de formule. Voir aussi Scherer (1990, 521-522) pour la question de savoir pourquoi il peut être difficile pour les parties ayant la puissance d'achat et de vente de coopérer pour arriver à un résultat qui maximise le profit commun, avec pour conséquence éventuelle une intégration verticale.

28. Selon Cotterill (1997, 131):

> Une raison pour laquelle les marques de détaillants ont un avantage de prix par rapport à celles de fabricants est leur capacité de limiter les dépenses de marketing parce qu'elles comportent des économies de gamme sur tous les produits grâce à la valeur de leur nom réputé et respecté, par exemple Sainsbury.

Dobson et Waterson (1996, 37) citent un administrateur de Tesco:

> La valeur qu'acquiert le nom de l'entreprise peut être transférée à une gamme de produits qui eux-mêmes renforcent l'image du magasin.

29. Corstjens et Corstjens (1995, 246-247) offrent des aperçus intéressants sur l'apport de la marque au bien-être du consommateur. Ils examinent aussi les avantages comparatifs des fabricants, des détaillants et des tiers ("propriété légère ou flottante de la marque", voir 178) en tant que fournisseurs de marques concurrents:.

> La marque offre trois services aux consommateurs: identification, assurance-qualité et associations. Les détaillants sont parfaitement capables d'offrir le premier de ces services. Le second dépend de (a) la capacité d'acquérir des produits de grande qualité et (b) de la capacité de rassurer. Dans les domaines où la technologie de fabrication de bons produits est largement diffusée et où le produit est facile à évaluer par le consommateur, les détaillants rassurent très bien. En revanche ils ont des difficultés lorsque cette technologie est entre les mains d'un petit nombre de grands fabricants ou lorsque les produits visent des fonctions spécifiques difficiles à évaluer.

Le troisième service rendu par la marque, à savoir les associations, soulève une série particulière de problèmes pour les détaillants. Ces derniers ont généralement une image fonctionnelle de bonne valeur et peuvent offrir des associations satisfaisantes lorsque cette image répond à ce qui est demandé à la marque. Lorsque les associations demandées impliquent une image ou répondent à un besoin d'identification ou de plaisir, les détaillants sont handicapés par leur image terre à terre. Dans ces domaines, la masse critique des fabricants leur permet de créer les images souhaitées au moyen de la publicité et d'investir dans la connaissance de leurs marchés pour optimiser leur positionnement et leurs innovations psychographiques.

> Les consommateurs vont "acheter" la marque auprès de l'organisation capable d'offrir le meilleur rapport coût/efficience. Ils sont disposés à un degré variable à renoncer à l'une ou l'autre des satisfactions attendues de la marque pour payer un prix plus bas.

Steenkamp et Dekimpe (1997, 920) concluent que les différences considérables de pénétration des marques de distributeurs selon les catégories de produits montrent qu'elles se heurtent à "...une résistance plus forte dans les catégories où:

1. la différence de qualité par rapport aux grandes marques est plus importante...;

2. le niveau de sophistication technique est élevé (seul un petit nombre d'acteurs, généralement des fabricants nationaux détenteurs de droit acquis, disposent de l'expertise nécessaire...);

3. le niveau de l'innovation est élevé (ce qui limite le nombre de "niches" qui subsistent dans l'espace du produit...);

4. le degré de concurrence entre les marques nationales est élevé...;

5. le recours à la publicité est plus important que les promotions commerciales...".

30. En revanche, certains consommateurs préfèrent peut-être un choix simplifié. Steekamp et Dekimpe (1997, 919) ont noté que parmi les avantages des marques de distributeurs pour les consommateurs figurent: un choix plus large de produits de meilleure qualité à des prix plus bas et "...pour les consommateurs qui sont devenus fidèles à une enseigne, l'existence d'une marque de distributeur offrant en permanence une qualité élevée pour une large gamme de catégories de produits peut faciliter considérablement les achats"

31. Corstjens et Corstjens (1995, 189) présentent un graphique qui confirme ce point en montrant que même les entreprises de biens de consommation courante les plus importantes opèrent sur un très petit nombre de catégories de produits comprises entre 15 et 2.

32. Une bonne description de ce phénomène se trouve dans London Economics (1997, 34) :.

> La stratégie de marque propre sera en partie déterminée par l'image du détaillant lui-même et la déterminera en partie. S'il décide de vendre uniquement des produits de marque, le positionnement du détaillant sur le marché en termes de portefeuille de produits et de prix dépend fortement des fabricants dont les produits sont stockés. Si en revanche le détaillant a aussi des produits de sa propre marque, il peut se différencier de ses concurrents par le prix et la qualité de ces articles.
>
> L'importance de ce mode de différenciation entre détaillants est indiquée par le degré de corrélation entre la pénétration des marques de distributeurs et le positionnement commercial des détaillants sur certains marchés. Dans l'épicerie par exemple, les détaillants qui ont le plus grand nombre de produits de leur marque (Sainsbury's, Tesco et Asda) sont aussi positionnés plus haut que ceux qui privilégient les produits de marque (Kwik Save, Aldi et Netto). La nature de cette corrélation est complexe et la relation de causalité joue dans les deux sens:
>
> * la réussite du détaillant dans la vente des produits de sa marque dépend de sa réputation de qualité;
>
> * la réputation de qualité du détaillant dépend de la qualité des produits de sa marque (exactement comme celle du fabricant dépend de la qualité de ses produits).

33. Voir Bell et al. (1997, 857) qui présentent des données sur certains produits pour le Royaume-Uni et la Belgique montrant que la part de marché des marques secondaires a diminué entre 1990 et 1993. Cullen et Whelan, qui ont examiné l'incidence de la concentration croissante de l'industrie et du commerce de détail ainsi que des marques de distributeurs, ont noté:.

> Au niveau européen, l'équilibre du pouvoir sur le marché se fera probablement entre les fabricants d'euromarques ou de marques mondiales et la grande distribution, tandis que les fabricants de marques nationales occupant la troisième ou quatrième place sur le marché des biens de grande consommation se trouvent devant la perspective soit d'une poursuite de l'érosion de leur part de marché soit d'une spécialisation sur certains créneaux soit peut-être de la fourniture de marques de distributeurs.

Corstjens et Corstjens (1995, 192-194) prédisent aussi un avenir difficile aux "petites marques" de plus en plus coincées entre les marques de distributeurs et les grandes marques nationales.

34. Se référant aux marques privées, Cotterril (1997,29) déclare: "Cette entrée dans le secteur agroalimentaire [soit par intégration verticale soit par contrat] crée un nouvel acteur qui est aussi un acheteur informé, ce qui peut conduire à une baisse des prix de gros non seulement pour les marques de distributeurs mais aussi pour les produits de marque".

35. L'argument pourrait s'inscrire dans la ligne de la citation de Steenkamp et Dekimpe (1997, 928) donnée ci-dessus, selon laquelle les distributeurs qui sont les principaux initiateurs des efforts d'innovation accomplis par les producteurs de marques privées ne sont pas aussi bien équipés que les fabricants indépendants pour l'innovation primaire. En outre, le potentiel bénéficiaire de l'innovation pour une marque de distributeur peut être limité par le fait que ces marques sont distribuées exclusivement dans une seule enseigne parmi de nombreux magasins concurrents dont chacun dispose d'un noyau de clientèle semi-captive. Ce dernier argument n'est toutefois valable que si les imperfections supposées des marchés des licences existent vraiment.

36. La majorité inclut apparemment des marques très connues comme Unilever, Pepsico, Nestlé, Heinz, Playtex, Ralston Purina, Hershey, RJR Nabisco et McCain.

37. Voir la note 15 ci-dessus.

38. Pour un bon aperçu général de la théorie économique de la discrimination en matière de prix, voir Varian (1989).

39. S'il obtient des crédits suffisants, un nouvel entrant plus efficient sera en mesure de vendre moins cher que ses concurrents temporairement plus gros. A partir de ces prix plus bas, il pourrait obtenir en définitive une part de marché égale ou supérieure à celle de ses concurrents et par là même égaler ou éliminer en fin de compte leur puissance d'achat.

40. Par "rentes totales" on entend aussi les rentes acquises sur des produits autres que ceux que le fabricant fournit au distributeur..

41. La communication de la délégation australienne à la table ronde du Comité du droit et de la politique de la concurrence de l'OCDE sur la puissance d'achat (Paris, 29 octobre, 1998) contient une brève description de ce cas en page 10. Voir aussi la page 4 de l'Aide-mémoire sur les débats de la table ronde..

42. Pour plus de détails sur cette affaire, voir United States Federal Trade Commission (1996, 1997c et 1998). L'affaire a fait l'objet d'une décision de la Federal Trade Commission et donnera probablement lieu à un appel.

43. La commissaire Orson Swindle s'est désolidarisé de l'opinion majoritaire concernant l'aspect de boycott horizontal. Le communiqué de presse déclarait:.

> Selon le commissaire Swindle, "c'est précisément la plausibilité de la théorie verticale et la vigueur des preuves en faveur de cette théorie qui affaiblissent la thèse de l'entente entre les fabricants de jouets constatée par la majorité". Swindle ajoute qu'il "existe peu de preuves directes ou circonstancielles de l'existence d'une entente entre fabricants pour boycotter les halles aux jouets". En fait,"la pression de TRU sur les fabricants rendait simplement inutile tout accord horizontal entre les industriels". Il observe que "le caractère indispensable de TRU conférait à chaque fabricant de jouets toutes les incitations - toutes les incitations *unilatérales* - à céder aux exigences de TRU concernant les halles aux jouets". De l'avis de Swindle, "il n'est pas nécessaire d'imaginer une entente horizontale pour expliquer les actions des fabricants (United States Federal Trade Commission, 1998, 3).

44. Voir par exemple Scherer (1990, 515-516) Carlton et Perloff (1998, 773-774) et Martin (1994). Ce dernier, cité par Dobson et al. (1998, 29) observe que "...le Robinson-Patman Act est presque universellement condamné par les économistes comme protégeant des modes de distribution inefficients et imposant des coûts substantiels à la collectivité".

45. L'interdiction de la discrimination en matière de prix dans huit pays de l'OCDE a été examinée dans une enquête qui est déjà assez ancienne - voir OCDE (1981, 66-79).

46. Au cours du séminaire sur la puissance d'achat organisé par la Direction générale de la concurrence, de la consommation et de la répression des fraudes française, le directeur des achats d'Auchan, une des sociétés françaises d'hypermarchés, a contesté l'idée selon laquelle sa firme détenait une puissance d'achat à l'égard de sociétés multinationales de fabrication, en donnant comme exemple le fait qu'Auchan représentait 15 pour cent des ventes de Procter and Gamble en France mais que ce chiffre ne représentait que 0.8 pour cent des ventes de Procter and Gamble dans le monde (voir France, 1997, 26). L'argument semble un peu trompeur dans la mesure où Auchan est aussi une entreprise multinationale possédant des magasins en Espagne, en Italie, au Portugal, en Pologne et aux États-Unis. Voir Commission Européenne (1998, pp. 23 et 26). Qui plus est, il appartient à des groupements d'achat internationaux, voir 3 ci-dessus.

47. L'ancien chef du service de la concurrence portugais, le Dr. Antunes a déclaré que les producteurs portugais avaient réagi à la puissance d'achat "en créant leur propre carte maîtresse pour essayer de se regrouper afin de négocier avec les détaillants et les grossistes" (Ehlermann et Laudati, ed., 1997, 182). Voir aussi de Wilt et Krishnan (1995, 38) pour cinq exemples d'alliances stratégiques dans l'industrie alimentaire qui peuvent constituer en partie une réaction à la puissance d'achat, à savoir Nestlé-Coca Cola (thé/café, boissons), Pepsico-Unilever (boissons à base de thé), Pepsico-General Mills (restauration rapide en Europe), Unilever-BSN (glaces, yoghourts), Twinings-Seven Up (thé glacé). Ces alliances peuvent refléter des facteurs spécifiques au secteur des boissons et ne représenter aucune tendance précise.

48. Voir la contribution de la délégation australienne à la table ronde de l'OCDE (Paris, 29 octobre I998) qui contient en page 9 une brève description de cette affaire. Voir aussi pp. 13-14 de l'Aide-mémoire des débats de la table ronde.

49. Pour un bref aperçu des conditions préalables à de véritables prix d'éviction, voir l'Annexe II.

50. Nous voulons parler d'accroître la puissance d'achat plutôt que de la créer, parce que la pratique nuisible de produits d'appel ne survivra vraisemblablement pas en l'absence d'une puissance d'achat initiale.

51. En dehors de la faible élasticité-prix de la demande, les qualités d'un produit d'appel du point de vue du détaillant seront les suivantes: difficulté de stockage par le consommateur, achats fréquents par la plupart des clients, standardisé ou assez bien connu pour faciliter la comparaison de prix et relativement bon marché (afin qu'une réduction de prix importante en pourcentage n'entraîne pas une perte importante en valeur absolue sur chaque unité vendue).

52. London Economics (1997, 102) notait :.

> "...il est très difficile de distinguer le produit d'appel de l'application d'un prix normal à un produit à forte élasticité, de grande marque et de consommation courante. Par ailleurs, les structures de coûts et les systèmes de répartition des coûts de différents détaillants peuvent varier substantiellement, si bien qu'un critère simple de marge en pourcentage appliqué à un produit d'appel qui est valable pour un détaillant ne le sera probablement pas pour un autre. En outre, l'utilisation d'une règle générale de ce type équivaut à un prix imposé qui est spécifiquement prohibé par la loi sur le prix de revente".

53. Voir s. 61 (10) (a & b) du Competition Act du Canada, R.S., 1985, c. C-34 amendé (décembre 1990). Voir aussi London Economics (1997, 101) où il est indiqué que le Royaume-Uni permet aux fournisseurs "d'interrompre légalement les livraisons de marchandises à un détaillant s'ils ont des raisons valables de penser qu'il les a utilisées comme produits d'appel".

54. Antalics (1997, 1), souligné par nous.

55. Le lecteur est à nouveau renvoyé à l'Annexe I pour une analyse des prix d'éviction.

56. Shaffer (1991, 121)..

57. Dobson et al. (1998, 37) déclarent :.

> Du fait du rôle de contrôle des entrées que jouent les grandes chaînes de distribution à l'heure actuelle en maîtrisant l'accès aux consommateurs, elles sont de plus en plus en mesure d'exercer une puissance d'achat étant donné que pour les fabricants la distribution par ces enseignes est cruciale pour leur activité et que le problème est celui de l'accès à une installation essentielle (le fabricant n'ayant aucun autre moyen viable de mettre en place un circuit de distribution qui offre la même échelle et les mêmes avantages économiques).

58. Voir la synthèse de la présentation de Jérôme Philippe lors de l'Atelier de la concurrence: " L'analyse de la puissance d'achat" (France, 1997, 12-15). Il signale qu'une difficulté d'accès à certains clients ne peut pas être assimilée à la difficulté d'accéder à un marché. D'autre part, lorsque les consommateurs ne trouvent pas un produit dans un magasin, que font-ils en réalité? Selon M. Philippe, rares sont à sa connaissance les études qui ont répondu à cette question, mais il ajoute:.

> ...une étude récente effectuée par une société spécialisée montre que le consommateur moyen fréquente au moins trois grandes surfaces. Il est donc possible de différer les achats et ce comportement a parfois été observé dans des proportions considérables dans certains cas concrets (14).

Malheureusement cette "étude récente" n'est pas précisée. La constatation que "...le consommateur moyen fréquente au moins trois grandes surfaces" ne cadre pas bien avec les résultats d'enquêtes mentionnés plus haut [seuls 26 pour cent des clients de supermarchés aux États-Unis visitent au moins grandes surfaces par semaine - voir Corstjens et Corstjens (1995, 201) et seulement 20 pour cent des clients français fréquentent régulièrement au moins trois supermarchés - voir INSEE (1998, 2)]. Ces différents résultats ont peut-être un rapport avec la signification exacte de "fréquentent" ou "fréquentent régulièrement", c'est-à-dire avec la périodicité que ces termes impliquent.

59. L'article 22(2) 1 de la loi allemande contre les restrictions de la concurrence présume qu'il y a position dominante au-delà d'une part de marché de 33 1/3. Ce seuil est le plus faible parmi les pays de l'OCDE, à la connaissance de l'auteur.

60. Voir Vogel (1998). L'application effective de sa proposition exigerait probablement certaines modifications de la législation dès lors que dans la réalité les services ne sont pas "vendus" au fournisseur d'amont. Incidemment Vogel a proposé une segmentation selon les "...caractéristiques des services fournis et les conditions dans lesquelles les services sont vendus".

61. La section 22 (1) 2 de la loi allemande contre les restrictions de la concurrence donne une définition quelque peu élargie de la position dominante, appliquée par la suite dans 22 (4 & 5), 26 (2, 3 & 4) pour constituer l'interdiction. La section 22 (1) 2 déclare:.

> [une entreprise est dominante sur le marché...dans la mesure où, dans son rôle de fournisseur ou d'acheteur d'un certain type de biens ou de services commerciaux] elle a une position primordiale sur le marché par rapport à ses concurrents; à ce titre, sa part du marché, sa puissance financière, son accès aux marchés des fournitures ou des ventes, ses liens avec d'autres entreprises, *sa capacité de déplacer son offre ou sa demande vers d'autres biens ou services commerciaux, ainsi que la capacité du côté opposé du marché de traiter avec d'autres entreprises doivent être prises en compte en particulier* (souligné par nous).

La section 26 (2) interdit aux entreprises "dominant le marché" d'entraver de façon déloyale une autre entreprise ou d'accorder un traitement différent injustifié à des entreprises similaires. Elle poursuit en prévoyant une protection supplémentaire dans les cas où "...des entreprises petites ou moyennes en tant que fournisseurs ou acheteurs d'un certain type de biens ou de services commerciaux dépendent des [firmes dominant le marché] dans une mesure telle qu'il n'existe pas de possibilités suffisantes et raisonnables de traiter avec d'autres entreprises". La section 26 (2) établit aussi une présomption de cette dépendance quand un acheteur "...obtient régulièrement des avantages spéciaux qui ne sont pas accordés à des acheteurs similaires". La section 26 (3) vise plus directement la puissance d'achat puisqu'elle interdit aux entreprises dominant le marché et aux associations de telles entreprises d'utiliser leur position sur le marché pour obtenir des conditions discriminatoires. Cette interdiction est renforcée par la section 26 (4): "Les entreprises ayant un pouvoir de marché supérieur par rapport à leurs concurrentes petites et moyennes ne doivent pas utiliser leur pouvoir de marché pour gêner de façon déloyale ces concurrentes soit directement soit indirectement".

Les articles 7, 8 et 9 de la loi française sur la concurrence (ordonnance No. 86-1243 du 1er décembre 1986 relative à la liberté des prix et de la concurrence) interdisent à une entreprise ou un groupe d'entreprises de pratiquer "l'exploitation abusive" d'une "entreprise cliente ou fournisseur" qui se trouve dans un état de dépendance économique à son égard et "qui ne dispose pas de solution équivalente". Cette prohibition ne s'applique toutefois que si les exploitations abusives "...ont pour objet ou peuvent avoir pour effet d'empêcher, de restreindre ou de fausser le jeu de la concurrence sur un marché...". Le point de savoir exactement ce qui constitue la dépendance ou l'absence de "solution équivalente" fait l'objet de discussions en France - voir le point de vue très différent exprimé par Christian Babusiaux (de la Direction générale de la concurrence, de la consommation et de la répression des fraudes) et par le Conseil de la concurrence français, dans Ehlermann et Laudati, ed. (1997, 197, 222 - 223).

S'il est certainement possible de rencontrer une situation où un fabricant et un détaillant dépendent chacun économiquement de l'autre, il serait difficile d'imaginer que l'une de ces deux parties puisse exploiter abusivement l'autre à moins que leurs degrés de dépendance soit très différent. Il faut aussi noter que la première partie de l'article 8, si on la combine avec les articles 7 et 9, interdit l'abus anticoncurrentiel d'une position dominante. En gardant ces points à l'esprit, il semble raisonnable de conclure que la deuxième partie de l'article 8 doit s'appliquer aux cas où, malgré l'absence de position dominante, il existe une telle inégalité de pouvoir de négociation qu'il y a exploitation abusive de la partie faible.

L'article 4 de la loi portugaise sur la concurrence stipule: "Est aussi prohibé l'abus, par une entreprise ou plusieurs, d'une position de dépendance économique vis-à-vis de cette entreprise par un fournisseur ou acheteur en l'absence de solution équivalente...". Les abus sont définis par référence à l'article 2 (1) qui établit une prohibition générale de l'abus de position dominante et fournit une liste non exhaustive de pratiques abusives y compris celle qui vise la discrimination appliquée à des transactions équivalentes.

62. Ehlermann et Laudati, éd. (1997, 196).

63. Le cas Toys "R" Us examiné plus haut suggère que ce problème est peut-être quelque peu exagéré. L'exercice le plus dommageable de la puissance d'achat, du point du vue du consommateur, naît peut-être quand un détaillant amène un fabricant ou plusieurs à pratiquer une discrimination dans les ventes afin de renforcer la position de l'acheteur puissant aux dépens de ses concurrents. On pourrait penser que l'un de ces concurrents, ou plusieurs, serait prêt à se plaindre s'il discernait ce qui arrive. Toutefois, il serait plus difficile pour ces tiers d'obtenir la preuve.

64. Des opinions similaires sont également exprimées dans la contribution de la délégation portugaise à la table ronde sur la puissance d'achat du Comité du droit et de la politique de la concurrence de l'OCDE (Paris, 29 octobre 1998) p. 3.

65. S'exprimant devant le Forum de la CE, Frédéric Jenny du Conseil de la concurrence français observe:.

> Le représentant de l'Allemagne a dit que le contrôle des fusions n'avait pas été entièrement efficient et n'avait pas vraiment résolu le problème de l'abus de la dépendance en Allemagne. Je pense qu'il serait préférable de traiter le problème en amont et d'éviter ainsi certaines des raisons qui ont conduit, en France, à une très forte concentration dans le secteur de la distribution [Ehlermann et Laudati, éd., 1997, 181).

66. Des situations très similaires seraient celles dans lesquelles les parties à une fusion affirment qu'en dépit de la création d'une position de force sur le marché cette dernière n'entraînera aucun préjudice pour les consommateurs en raison de l'existence d'acheteurs en position de force qui sont en mesure de compenser la puissance de vente. Pour une étude de la défense de la puissance d'achat dans les affaires de fusion, voir Steptoe (1993).

67. Kumar (1997, 830) cite le désir d'acquérir une puissance d'achat comme l'une des quatre raisons de la vague de fusions entre détaillants, y compris certaines fusions transfrontières très importantes..

Voir aussi Stern et Weitz (1997, 826) qui rapportent que:

> L'une des principales motivations de la fusion entre Federated Department Stores et Macy's en 1994 était de donner aux sociétés combinées une puissance d'achat semblable à celle exercée par J.C. Penny et The May (sic) Company qui était la plus grande chaîne de grands magasins des États-Unis avant la fusion.

68. Évidemment, il est possible aussi qu'une fusion s'accompagne simultanément de la création d'une puissance d'achat et d'une puissance de vente suffisante pour que les consommateurs ne bénéficient même pas d'une baisse des prix initiale. Tel semble avoir été l'un des motifs du rejet par la Commission des fusions et des monopoles du Royaume-Uni de la fusion entre Kingfisher et Dixons Group (1990, 67).

69. Contribution écrite de la Commission européenne à la table ronde sur l'examen de la puissance d'achat organisée par le Comité du droit et de la politique de la concurrence le 29 octobre 1998, Paris, page 3.

70. Dans certains pays de l'OCDE, l'approche classique comprend la capacité de modifier directement la structure du marché. Par exemple, en France, les autorités de la concurrence ont décidé en juin 1987 la "...dissolution des organismes d'achat de très grande taille, c'est-à-dire les groupements qui avaient été constitués à partir des principales entreprises de distribution" (Ehlermann et Laudati, ed., 1998, 168).

71. Par exemple au Forum de la CE, le Président de la section traitant de la dépendance économique, le professeur Walter Van Gerven, ancien avocat général près de la Cour européenne de justice a déclaré :.

> N’est-il pas frappant du point de vue du droit de la concurrence que les décisions de la Commission et la jurisprudence de la Cour aient systématiquement traité toutes les restrictions de la liberté des concurrents comme une restriction de la concurrence? Il s’agit d’une approche très légaliste: considérant que le droit de faire concurrence est un droit de l’homme fondamental, toute restriction de ce droit constitue une violation de l’article 85. Toutefois, la concurrence doit aussi être comprise comme l’état du marché comme on le voit à travers la notion d’accords de moindre portée dans la jurisprudence de la Cour et la pratique de la Commission. Toutes les restrictions de la liberté concurrentielle ne sont pas interdites: la restriction doit dépasser un certain seuil. Il est peut être temps, après 35 ans, de revoir les fondements du droit de la concurrence (Ehlermann et Laudati, ed., 1997, 183).

72. S’exprimant aussi lors du Forum de la CE, Frédéric Jenny du Conseil de la concurrence français a déclaré :.

> Il faut être clair sur ce point. Nous ne devons pas confondre la protection de la concurrence avec la protection d’un concurrent qui constituent deux objectifs très différents...

L’abus de la dépendance économique concerne une relation bilatérale. La tendance naturelle est donc de chercher à protéger un concurrent, la personne qui est dans une situation de dépendance plutôt qu’à protéger le marché contre les distorsions de la concurrence (Ehlermann et Laudati, ed., 1997, 180).

Annexe 1

EFFETS ÉCONOMIQUES INITIAUX DE LA PUISSANCE D'ACHAT EXERCÉE PAR LES DISTRIBUTEURS MULTIPRODUITS

Le lecteur qui souhaiterait consulter des illustrations graphiques est renvoyé à Blair et Harrison (1993, 36-61, 109-129), Dobson et al (1998, 11-21) ou Jacobson et Dorman (1991, 5-19). Aucun de ces documents ne traite de manière adéquate le cas C ci-après. Dans tout ce qui suit, on fait l'hypothèse que l'on a affaire à des fabricants qui vendent directement, c'est-à-dire qu'il n'y a pas de grossistes.

1. Marchés de concurrence parfaite en amont et en aval

2. Pour simplifier l'analyse, partons d'un équilibre de concurrence parfaite à la fois en amont et en aval et supposons qu'il est perturbé par l'apparition d'un détaillant monopsoniste (c'est-à-dire au moins un sous-groupe de fournisseurs face à un acheteur unique. En obtenant un statut de monopsone, un détaillant pourrait offrir un prix intermédiaire entre le coût total moyen et le coût variable moyen et trouver encore à court terme des fournisseurs prêts à l'approvisionner. Il aurait aussi une incitation à long terme si les fournisseurs concernés ont collectivement une courbe en pente ascendante de l'offre à long terme et s'il existe des obstacles à l'entrée sur le marché d'amont. Dans ces conditions, et en supposant que le monopsoniste continue de vendre sur un marché parfaitement concurrentiel, les conséquences à long terme de la puissance d'achat seraient :

1. le niveau des prix des fournisseurs chuterait au-dessous de celui où il se trouvait avant l'apparition du monopsone ;

2. les quantités livrées par les fournisseurs affectés diminueraient et l'un d'eux au moins cesserait son activité ;

3. le monopsoniste réaliserait des bénéfices supra-concurrentiels.;

4. un écart apparaîtrait entre le prix payé par le monopsoniste pour une unité supplémentaire et le coût total de cette unité pour lui (du fait que l'augmentation des quantités achetées entraîne une augmentation du coût de toutes les unités achetées antérieurement) ;

5. le surplus du producteur acquis par les fournisseurs serait supérieur aux gains, en termes de surplus du producteur, du monopsoniste (autrement dit il y aurait une perte sèche pour l'économie) ;

6. les consommateurs continueraient à acheter la même quantité aux mêmes prix qu'auparavant *à condition* que les fournisseurs non affectés soient en mesure de compenser la réduction de quantité sans hausse de prix (ce qui veut dire qu'ils constituent *collectivement* une branche d'activité à coûts constants).

Toutes les conséquences ci-dessus ne se manifesteraient pas si la courbe de l'offre des fournisseurs était horizontale comme c'est le cas généralement pour les industries manufacturières[1] . Elles ne s'appliqueraient pas non plus si la courbe de l'offre avait une pente descendante, hypothèse qui semble, toutefois, peu probable à long terme[2] .

Les résultats à long terme prévus devraient se généraliser, bien qu'avec des effets dommageables atténués, sous la forme d'un oligopsone. Un examen plus approfondi de cette hypothèse sortirait du cadre de la présente note.

Au total, en supposant qu'il existe une concurrence parfaite dans la production et la distribution, la puissance d'achat classique impose une perte sèche à l'économie et crée des superbénéfices pour les détaillants qui la détiennent mais elle ne réduit pas nécessairement le surplus du consommateur. Ces situations présentent peu d'intérêt du point de vue des autorités de la concurrence puisque les pertes sèches qui en résultent sont probablement faibles (en particulier si les courbes de l'offre à long terme du secteur sont relativement élastiques) et que la plupart des services concernés sont de plus en plus enclins à protéger la concurrence (et les intérêts des consommateurs) plutôt que les concurrents.

Il existe, semble-t-il, dans l'analyse précédente deux "contradictions" qui doivent être signalées. La première est qu'on suppose une courbe de l'offre à long terme ascendante pour les fournisseurs affectés mais une courbe de l'offre horizontale pour le groupe de fournisseurs non concernés. Ce paradoxe apparent pourrait s'expliquer par le commerce extérieur mais on voit mal pourquoi les importations seraient librement disponibles alors que les exportations des fabricants affectés ne le sont vraisemblablement pas. Une réponse possible serait que les fabricants lésés sont trop petits pour se lancer avec profit dans le commerce international. Une autre contradiction potentielle concerne l'hypothèse selon laquelle les détaillants peuvent avoir une puissance d'achat tout en vendant sur un marché de concurrence parfaite. En l'absence d'une (improbable) réglementation gouvernementale qui obligerait certains fournisseurs à vendre seulement à un détaillant ou à un petit nombre de détaillants, il semble peu probable que la puissance d'achat des distributeurs puisse coexister avec des marchés de détail concurrentiels.

Au sens strict, il est impossible que des conditions concurrentielles, y compris une absence d'obstacles à l'entrée, existent au stade du détail et qu'il y ait encore une puissance d'achat. Si le commerce de détail connaissait une situation de concurrence parfaite (ce qui inclut des consommateurs parfaitement informés n'ayant pas d'économie de gamme dans leurs achats) quelqu'un serait toujours en mesure de créer rapidement des points de vente efficients pour les produits que les détaillants en position de force ne vendent plus ou défavorisent. Il est possible, toutefois, que certaines imperfections du marché permettent la coexistence entre une puissance d'achat et une concurrence dans le commerce de détail suffisamment forte pour que les détaillants ne puissent réaliser que des bénéfices supra-concurrentiels très faibles ou nuls. Cette conjonction de circonstances, liée au comportement d'achat des consommateurs, est le thème principal de la Section III de la note.

2. Concurrence parfaite en amont combinée à une puissance de vente et une puissance d'achat en aval

Cette situation est analogue à celle du cas A sauf que cette fois l'on postule qu'au départ il existe un monopole en aval. Dans ces conditions, l'addition du pouvoir de monopsone va réduire le prix au niveau du fabricant, diminuer encore la quantité vendue et augmenter le prix de détail. En d'autres termes, on peut prévoir que l'exercice de la puissance d'achat va se traduire par une réduction du surplus du producteur et du consommateur; autrement dit il y aura une perte sèche résultant à la fois d'une mauvaise allocation de ressources productives et d'une inefficience de la substitution des biens de consommation. Comme dans le cas A, ces résultats attendus devraient probablement se généraliser sous forme d'oligopole et d'oligopsone, mais ici encore l'examen de cette question sortirait du cadre de la présente note[3] .

9. Comme dans le cas A également , l'aspect de cette situation qui concerne la puissance d'achat ne présentera probablement pas un grand intérêt pour les autorités de la concurrence si les courbes de l'offre à long terme sont très élastiques. Dans ces conditions la part du lion de la réduction éventuelle du surplus du

consommateur serait probablement imputable davantage à la puissance de vente au détail qu'à la puissance d'achat.

3. Position de force sur le marché d'amont combinée à une puissance d'achat mais à une absence de puissance de vente au stade du détail

Dans sa forme la plus extrême, il s'agit du "monopole bilatéral" classique (un fabricant monopolistique et un détaillant unique). A la différence des deux premiers cas, il permet d'exercer la puissance d'achat pour réduire le prix payé au fournisseur tout en augmentant la quantité achetée. En d'autres termes, les concessions sur les prix ne seraient pas directement liées au changement des coûts unitaires du fournisseur mais résulteraient principalement de l'exercice du pouvoir de négociation.

Le monopole bilatéral est généralement décrit comme conduisant à un résultat indéterminé. Il est néanmoins utile de signaler que dans un marché où un fabricant monopolistique qui maximise ses bénéfices se trouve d'abord face à une puissance d'achat nulle, la quantité achetée auprès du fabricant et revendue au détaillant doit être celle celle qui maximise les bénéfices du fabricant et du détaillant considérés ensemble (à savoir Qm). Si cette situation est perturbée par l'apparition d'un monopsone, les deux parties auront un intérêt commun à maintenir la production correspondant au bénéfice maximum Qm et à se mettre d'accord d'une façon ou d'une autre sur une répartition acceptable des profits. Cet accord dépendra du déroulement de la négociation, elle-même influencée considérablement par ce que chaque partie sait de l'autre. L'incertitude quant à l'issue sera beaucoup accrue si au lieu d'un monopoliste en amont face à un monopsoniste en aval il y a un oligopole traitant avec un oligopsone. Dans ce cas, les parties seraient toujours incitées à réduire le volume des achats jusqu'à atteindre la quantité qui maximise le profit commun (Qm), mais cela nécessitera alors un mécanisme de contingentement de la distribution qui empêcherait en fait la concurrence au moins à l'égard de la revente des produits achetés au monopole d'amont.

La prévision intuitivement la plus séduisante en ce qui concerne ce cas, en particulier dans sa forme généralisée d'oligopole d'amont et d'oligopsone d'aval, est que la puissance d'achat se traduise par une baisse du prix payé aux producteurs et une augmentation du montant acheté et revendu du fait que les détaillants, à force de se concurrencer, perdent la rente qu'ils pouvaient initialement obtenir des producteurs. Cela semble logique puisque, si les oligopsonistes étaient en mesure d'imposer aux oligopolistes un prix ferme (si bien que l'oligopole est en fait confronté à une courbe de la demande parfaitement élastique), la production d'équilibre qui maximise les profits serait supérieure à Qm. D'autre part, si les membres de l'oligopole étaient capables de fixer les prix, ils chercheraient à maintenir la quantité vendue à Qm. Personne n'aurait intérêt à ramener la production au-dessous de Qm.. L'hypothèse la plus réaliste est donc que l'apparition de la puissance d'achat va entraîner une augmentation de la production et une baisse du prix pour les consommateurs. Toutefois, si cela se produit, la production et les prix demeureront respectivement au-dessous et au-dessus des niveaux qu'ils auraient sur des marchés d'amont et d'aval concurrentiels et en l'absence de puissance d'achat.

On doit noter à nouveau, sans le résoudre, un type de contradiction qui s'applique au moins dans la situation de monopole bilatéral simplifié. Un détaillant monopsoniste constitue la seule voie d'accès au marché pour le détenteur du monopole en amont. En tant que tel, le détaillant se met en fait dans la position de son fournisseur et obtient la même position de force sur le marché que ce dernier, c'est-à-dire que nous nous trouvons en fait dans le cas D examiné plus loin.

Si l'on suppose l'existence d'un oligopsone d'aval au lieu d'un monopsone il est possible qu'un fournisseur d'amont détenteur d'une puissance de vente se lance dans une discrimination par les prix ou par d'autres moyens soit de manière unilatérale soit sous la pression d'acheteurs qui n'ont pas la même

position de force. Cette discrimination aura généralement un effet d'amélioration du bien-être dans la mesure où elle entraînera une augmentation des quantités vendues tant au niveau du producteur qu'au stade du détail. Il pourrait toutefois ne pas en être ainsi, si la discrimination crée une structure de marché moins concurrentielle au niveau soit de la production soit du commerce de détail. Cette question est développée dans la section V de la note.

4. Position de force sur le marché d'amont combinée à une position de force sur le marché d'aval et à une puissance d'achat

La principale différence entre ce cas et le précédent, en supposant toujours que l'addition de la puissance d'achat poussera les parties à aller vers la position qui maximise le profit commun, est quelque peu surprenante et pose un problème. C'est la suivante: il serait plus probable que la puissance d'achat soit associée à une augmentation de la quantité faisant l'objet de transactions que dans le cas où il n'y a pas de puissance de vente en amont. Cela tient au fait que la situation avant l'apparition de la puissance d'achat se caractérise par un problème de double marginalisation, c'est-à-dire que la quantité initiale échangée doit être inférieure au niveau qui maximise le profit commun[4] .Il vaut la peine de mentionner, toutefois, que même sans l'addition de la puissance d'achat les parties sont incitées à s'engager dans une forme d'accord vertical, ou même d'intégration verticale, pour mettre fin aux inefficiences provoquées par la double marginalisation. Dans tous les cas, les résultats exacts en termes de quantité vendue et de prix demandés dépendent ici encore du pouvoir relatif de négociation[5] .

NOTES

1. Voir note 11 ci-dessus.

2. Si leur courbe de l'offre collective était effectivement descendante, il pourrait exister un équilibre instable. Qui plus est, la réduction des achats tendrait à accroître le prix des fournisseurs et il faudrait davantage qu'une simple puissance d'achat pour faire de cette évolution une opération rentable pour les détaillants.

3. Après avoir examiné ce que nous avons appelé les cas A et B, Dobson et al (1998, 13) notent:.

   Bien que cette analyse soit présentée principalement par référence au détenteur d'un monopsone, seul acheteur sur le marché, les principes sont aisément applicables à des situations dans lesquelles certains acheteurs (isolément ou conjointement) reconnaissent leur capacité à influencer les prix du marché. Dans ces circonstances, l'exercice de la puissance d'achat semble nécessiter trois conditions: en premier lieu que les acheteurs représentent une part substantielle des achats sur le marché, en second lieu qu'il existe des obstacles à l'entrée sur le marché de l'acheteur et en troisième lieu que la pente de la courbe de l'offre soit ascendante.

4. Dans la contribution du Royaume-Uni à la partie du Forum de la CE en avril 1995 consacrée à la dépendance économique [Ehlermann et Laudati, ed. (1997, 209)], on lit:.

   ...même si la puissance d'achat exerce une influence significative sur la discrimination en matière de prix par les vendeurs, on ne peut pas considérer cet effet comme nuisible en soi. L'exercice de la puissance d'achat diminue les problèmes liés à la double marginalisation et élève le surplus des consommateurs au-dessus du niveau qui serait le sien s'il n'y avait pas d'exercice de la puissance d'achat. Moins il existe de pouvoir de marché au niveau du détail, plus la puissance d'achat aura d'effets bénéfiques pour le consommateur. Toutefois, les préoccupations actuelles quant à la puissance d'achat sont dues au fait que l'on attribue à tort les conséquences nuisibles du pouvoir de marché à l'exercice de la puissance d'achat, qui est généralement bénéfique.

5. Blair et Harrison (1993, 112-121, plus 126-129) et Dobson et al. (1998, 18) estiment que l'on peut prédire sans grand risque dans ce cas que les parties iront vers la production qui maximise le profit commun (Qm) et par la suite négocieront sur le partage des bénéfices obtenus. On peut admettre que les parties ont en fait un intérêt commun à aller vers Qm, tout en restant sceptique en ce qui concerne la fiabilité d'un mécanisme qui permettrait d'obtenir ce résultat. Il apparaît donc qu'il faut poursuivre les travaux sur ce point.

Annexe 2

PRIX D'ÉVICTION

Les indications qui suivent sont extraites des conclusions de la publication de l'OCDE (1989, 97-100).

On entend par prix d'éviction le prix bas pratiqué pendant une courte période pour essayer d'exclure des concurrents par d'autres moyens qu'une meilleure efficience, dans le but d'acquérir une puissance de marché ou de protéger celle-ci. Cette pratique inquiète les responsables de la politique de la concurrence depuis le vote des premières législations antitrust et e reste un sujet de préoccupation pour de nombreuses juridictions. Des demandeurs, se décrivant eux-mêmes comme « proie », se plaignent souvent auprès des responsables de la politique de la concurrence des prix d'éviction qui seraient pratiqués à leur encontre et, lorsqu'ils y sont autorisés, ils intentent des actions privées devant les tribunaux....

Les prix d'éviction... constituent une forme complexe de comportement anticoncurrentiel. Ils infligent à celui qui les pratique des pertes importantes ou un manque à gagner qu'il espère récupérer plus tard en exerçant une puissance de marché. Par conséquent, la structure du marché est un facteur-clé pour pouvoir déterminer si une pratique de prix d'éviction a un fondement rationnel. Le "prédateur" doit détenir une part très importante du marché ou tout au moins avoir la capacité de l'acquérir. De plus, les conditions d'accès doivent être telles que, afin de pouvoir récupérer les pertes subies, elles permettent l'exploitation de la puissance de marché pendant une durée suffisante, suite à la stratégie prédatrice. S'il se trompe sur l'état du marché il ne récupérera pas les pertes qu'il s'est infligé et, dans ce sens, on peut dire que l'éviction a eu un effet contraire à son but.

Pourtant les autorités chargées de la concurrence se voient saisies assez régulièrement de plaintes contre des pratiques de ce genre, mais dans leur grande majorité ces affaires ne portent sur rien de plus que sur des prix de concurrence normaux. C'est pourquoi les autorités de la concurrence doivent avoir à leur disposition une méthode leur permettant de distinguer de manière systématique, parmi la multitude de plaintes, l'infraction réelle. Cette règle devrait permettre d'identifier les prix d'éviction tout en n'imposant que peu de restrictions, voire aucune, à la possibilité pour les entreprises de soutenir avec vigueur la concurrence par les prix. Ces conditions, susceptibles d'entrer en conflit l'une avec l'autre, exigent qu'une réglementation peu restrictive soit mise au point prudemment. Toute règle de ce genre devrait aussi donner des indications précises au monde des affaires pour encourager la concurrence par les prix et limiter les actions abusives en justice.

Des règles applicables aux cas d'éviction, comme celle qui sera proposée ci-dessous, ne sont pas le seul mécanisme qui puisse permettre aux autorités de la concurrence de s'attaquer aux prix d'éviction. Ceux-ci ne peuvent réussir que si les marchés fonctionnent mal. C'est pourquoi l'activité des autorités de la concurrence qui vise à promouvoir et protéger le fonctionnement concurrentiel des marchés réduirait considérablement la probabilité de réussite d'une stratégie d'éviction. Ainsi l'amélioration des conditions d'entrée et d'expansion dans un marché, y compris la suppression des barrières à la concurrence internationale, sera la meilleure arme pour combattre les pratiques d'éviction.

Un mode d'action prometteur contre les prix d'éviction est la méthode dite "à deux niveaux": les autorités chargées de la concurrence considéreraient tout d'abord le marché en cause et détermineraient si les pratiques d'éviction sont susceptibles d'y réussir. Elles pourraient réaliser une enquête rapide pour la définition du marché du produit et du marché géographique, ainsi que des conditions d'entrée lorsque les prix sont supérieurs aux prix de concurrence. Lorsque la structure du marché et les conditions d'accès

donnent à penser qu'il est peu probable que le soi-disant prédateur puisse exercer une puissance économique dans la période antérieure à ses pratiques d'éviction, l'enquête devrait prendre fin car la concurrence ne subirait aucun préjudice, même si certains concurrents étaient lésés pendant la période de baisse des prix. Il conviendrait, dans le même esprit, de réexaminer les règles en vigueur qui interdisent les ventes au-dessous d'un certain prix de revient plancher, quelles que soient les conditions du marché, car de telles règles sont susceptibles d'empêcher certaines mesures de baisse des prix à caractère concurrentiel.

Les affaires qui sont retenues après cette première étape devraient faire l'objet d'une enquête dans de multiples directions. La seconde étape devrait être axée sur le rapport prix/coûts, compte tenu du contexte économique. Dans cette partie de l'enquête, on ne devrait se fixer aucune limite de prix au-dessous de laquelle il y aurait nécessairement éviction; même la distribution de produits gratuits peut être justifiée dans certains cas. Les autorités chargées de la concurrence devront donc étudier quels sont les facteurs qui justifient une forte baisse des prix :

a) des prix supérieurs aux coûts totaux ne devraient pas être considérés comme une pratique d'éviction. De nombreuses décisions ont souligné qu'une règle exigeant que les prix soient supérieurs au total des coûts aura pour effet de protéger des fabricants inefficients ;

b) des prix compris entre la moyenne des coûts variables et celle des coûts totaux, même s'ils ne peuvent être maintenus à long terme, peuvent être économiquement valables et ne pas avoir de caractère d'éviction dans des circonstances très diverses. Par exemple, ils peuvent ne pas être une manœuvre d'éviction lorsqu'il y a surcapacité pour une raison quelconque, que des marchandises doivent être cédées soit parce qu'elles sont démodées ou périssables soit parce que les goûts des consommateurs ont changé. La pression de la concurrence sur un marché déterminé peut également conduire à fixer les prix dans cette zone, de sorte que les écarts entre les prix suivant les marchés peuvent simplement refléter la différence d'intensité de la concurrence et ne pas nécessairement correspondre à une manœuvre d'éviction ;

c) des prix, même inférieurs à la moyenne des coûts variables, peuvent être économiquement justifiés, par exemple dans des circonstances comme celles décrites au paragraphe précédent lorsque, en raison des coûts liés à la reprise des activités, les pratiques de prix inférieurs aux coûts variables pourront servir à minimiser les pertes. De plus, les nouveaux arrivants sur un marché doivent pouvoir jouir d'une grande liberté pour fixer leurs prix afin d'inciter les acheteurs à modifier leurs habitudes ou pour s'assurer des économies d'échelle. La même latitude devrait être accordée pour la détermination du prix d'un produit nouveau, lorsque des prix de départ bas peuvent se justifier par la nécessité pour le fabricant d'acquérir de l'expérience et d'augmenter le volume de ses ventes.

Il est très difficile de trouver une bonne définition des coûts ; la méthode cas par cas adoptée par les tribunaux semble la meilleure solution. Cependant, un prédateur peut présenter des coûts erronés et l'adoption de règles fondées sur les coûts encouragerait probablement l'utilisation de techniques comptables de manipulation. Ce qui est particulièrement préoccupant dans ce cas, ce sont les prix internes pratiqués par une entreprise intégrée verticalement et la ventilation des coûts opérée par les entreprises à production très diversifiée. De telles entreprises ont d'autant plus d'occasions de se livrer à des manœuvres occultes d'éviction que celles-ci ont des chances de réussir (l'information étant asymétrique) et aussi de rester impunies (les prix paraissant supérieurs aux coûts). Les tribunaux et les autorités de la concurrence doivent donc veiller attentivement à ce que les coûts soient justifiées et ne pas hésiter à écarter ceux qui paraissent sans rapport avec la réalité.

Si les prix semblent parfaitement adaptés aux coûts et aux conditions économiques, l'enquête devrait prendre fin. Il semble peu justifié de chercher à prouver l'intention lorsque les prix sont tels qu'ils

peuvent parfaitement s'expliquer par les circonstances économiques. De plus l'enquête pourrait conduire à des résultats anormaux. Il serait, par exemple, peu judicieux de poursuivre en justice une personne pour "mauvaise" intention alors que le même prix pratiqué par un tiers dans une autre intention n'entraînerait aucune responsabilité. Il semble, au contraire, que l'intention et d'autres facteurs n'aient d'utilité que lorsque la comparaison prix/coût n'est pas décisive, par exemple, lorsque la ventilation des coûts est incertaine ou que le contexte économique n'est pas très précis.

Si l'enquête porte ainsi sur l'intention, il peut être utile d'obtenir des preuves écrites de l'état d'esprit des responsables de la société. Cependant, ces éléments de preuve ne devraient pas être exigés car une entreprise bien conseillée peut veiller à ce que ce genre de documentation soit introuvable. C'est l'examen de ses actes qui permettra le mieux de découvrir les intentions de l'entreprise incriminée. Dans certains cas, on constatera qu'un comportement anticoncurrentiel ne portant pas sur les prix va de pair avec des pratiques de prix et le premier comportement devrait permettre avec suffisamment de fiabilité de découvrir les véritables objectifs du défendeur. Parmi les exemples de comportement ne portant pas sur les prix, on pourrait citer: des litiges abusifs conte la « victime », l'intervention auprès d'organismes chargés de la réglementation, l'ingérence dans les relations commerciales de la victime avec ses fournisseurs ou ses clients et le recours inexplicable par d'autres motifs à des contrats assortis d'exigences ou à des accords d'exclusivité.

Ce second stade de l'enquête, qui pourrait s'étendre au delà d'une simple comparaison prix/coût, est certes plus restreint que la méthode qui englobe "tous les facteurs" comme le proposent certains commentateurs. Toutefois le risque serait grand que cette sorte d'enquête sans fin finisse par s'embourber, submergée par la multitude des possibilités d'investigation. Les prix d'éviction peuvent ne pas être la seule tactique employée par une entreprise qui s'efforce d'acquérir une puissance commerciale. Les pratiques d'éviction autres que par les prix, notamment celle qui consiste à augmenter les coûts des concurrents, peuvent aussi être utilisées, soit concurremment avec une campagne de baisse des prix, soit indépendamment... De plus, une réglementation trop restrictive appliquée aux prix pourrait être détournée par un prédateur dont les pratiques ne concernent pas les prix pour imposer des restrictions à des concurrents ou les mettre au pas. Les pratiques d'éviction autres que par les prix ne sont pas fondées sur un compromis entre les pertes actuelles et les gains à venir - en fait, les gains peuvent être immédiats - de sorte que ces pratiques sont peut-être plus répandues que les seuls prix d'éviction. De plus, des manœuvres d'éviction autres que par les prix pourraient être utilisées comme instrument du protectionnisme par une entreprise nationale s'efforçant de limiter la concurrence internationale, par exemple en impliquant l'importateur potentiel dans une action en justice onéreuse, ou en demandant aux organismes gouvernementaux de bloquer effectivement les importations. Il est à noter, pourtant, que la notion de pratique d'éviction autre que par les prix n'est pas simple et que des activités véritablement concurrentielles, par exemple l'innovation en matière de produits, pourraient être à tort interprétées comme étant une manœuvre d'éviction autrement que par les prix. C'est donc une théorie qu'il convient d'appliquer avec précaution.

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SECRETARIAT SUGGESTED QUESTIONS FOR DELEGATES SUBMISSIONS*

1. trends in manufacturing and retail distribution affecting retail buyer power, including the use of private brands;

2. actual and proposed provisions in competition or related statutes (including general Civil Codes) which may prohibit certain behaviour associated with retailer buyer power, including how these relate to one another and the role played by the general competition agency in their enforcement;

3. how your competition laws deal with groupings of retailers - are they permitted to combine their buying power; at what point do such groups amount to a merged entity; and are such groups permitted to engage in common promotion including advertising a common price;

4. interesting cases involving buyer power, highlighting whether and how such power is being used to harm not just suppliers or retail competitors, but also the competitive process hence consumers as well; and

5. your agency's views on whether problems associated with retail buyer power should be treated primarily by competition agencies enforcing general competition law or by other agencies enforcing other laws.

* These questions are excerpted from pre-roundtable guidance provided to Members to assist in the preparation of their written submissions. They are reprinted here because some of the submissions included in this publication make reference to them.

QUESTIONS DU SECRÉTARIAT SUGGÉRÉES POUR LES SOUMISSIONS DES DÉLÉGUÉS*

1. les tendances observées dans la fabrication et la distribution de détail qui affectent la puissance d'achat des détaillants, y compris le recours à des marques proprs à une enseigne ;

2. les dispositions (textes existants ou propositions) figurant dans la loi sur la concurrence ou des législations connexes (y compris dans les Codes civils) qui peuvent interdire certains comportements associés à la puissance d'achat des détaillants, en précisant notamment de quelle manière des dispositions sont liées entre elles, ainsi que le rôle joué dans leur application par les autorités chargées d'une manière générale de la concurrence ;

3. de quelle manière les groupements de détaillants sont traités par les législations sur la concurrence des différents pays : sont-ils autorisés à mettre en commun leur puissance d'achat, à quel moment ces groupes sont-ils assimilés à une entité fusionnée et sont-ils autorisés à faire une promotion commune, notamment à afficher un même prix ;

4. des cas intéressants impliquant une puissance d'achat, en indiquant si et comment cette puissance est utilisée d'une manière qui nuit non seulement à des fournisseurs ou à d'autres détaillants concurrents, mais également à l'ensemble du processus concurrentiel et, de ce fait, à tous les consommateurs ; enfin,

5. l'avis des autorités de la concurrence des différents pays sur la question de savoir si les problèmes liés à la puissance d'achat des détaillants devraient être traités en premier lieu par les autorités de la concurrence chargées de faire appliquer le droit de la concurrence général ou par d'autres autorités chargées de faire appliquer d'autres lois.

* Ces questions sont extraites du guide préliminaire procuré aux Membres pour les aider dans la préparation de leurs soumissions écrites. Elles sont réimprimées ici car quelques soumissions incluses dans cette publication y font référence.

AUSTRALIA

1. Executive Summary

This contribution on behalf of Australia is confined to a discussion of the buying power of food retailers.

Australia has a highly concentrated retail grocery sector which is dominated by three national chain store groups. These chains sell 77 percent of the branded packaged groceries, up from 40 percent in 1975, and have been steadily increasing their market share at the expense of independently owned stores. The trend has been greatly affected by the scarcity of large, well-located sites for full-range supermarkets. The trend can also be attributed in part to the deregulation of trading hours, the rise of "cheque-book" competition (the acquisition of independent retail grocery stores by the chains) and expansion and refurbishment strategies of the three major chains.

One response to this creeping increase in market share by the chains has been the creation, through merger and acquisition, of a 'fourth force' in the form of a large independent grocery wholesaler to supply the independents. A number of key merger and acquisition issues arose as that took place. A big issue was whether the merger of two major wholesalers, who primarily competed to supply the numerous small, independently owned, stores throughout Australia was likely to substantially lessen competition and if so, whether there was a sufficient "public benefit" to warrant the merger. Although the ACCC did not oppose the acquisitions[1], the matters went before the Competition Tribunal and gave rise to a number of interesting issues. For example, whether there are separate markets for grocery wholesaling and retailing and what effect competition at the retail level would have on wholesaling activity. Would, for example, the pressure of competition by the major retail chains on smaller, independent stores prevent the merged wholesaler from raising prices, even though it no longer faced competition from another wholesaler.

A recent development has been the establishment by one of the three major retail chains of a wholesaling division to supply independent stores in competition with the "fourth force" wholesaler. Although only a relatively small operation, its market share has grown at the expense of the other wholesaler. Questions about the impact of the chains moving to supply independents which compete with their own retail outlets are only just starting to come to the surface.

As a consequence of the concentration at the retail level, when mergers at the manufacturer/producer level (particularly in the food sector) are proposed, a significant contributing factor in allowing them to proceed has been the argument that any market power arising from the merger would be constrained by the countervailing power of the supermarket chains. Thus, concentration at the retail level is affecting concentration at the manufacturing level. The grocery sector, where there is market power at the retail level that imposes backward pressure on producers, provides an interesting contrast to the petroleum sector where there is market power at the producer/refiner end which is arguably squeezing profits at the retail level. Traditional competition law and thinking is geared toward combating the latter type of misuse of market power, i.e. from seller to buyer. Competition agencies are having to rethink their strategies in dealing with situations where a buyer could misuse its market power against the companies that sell to it, as some would argue to be the situation emerging in the grocery industry.

2. Background

The request for contributions indicated that the discussion should focus on the buying power of food and non-food retailers. However, this contribution is confined to a discussion of buying power only in the food sector.

Australia is a highly urbanised nation, with most of its population concentrated in two widely separated coastal regions – the largest in the east and south-east of the continent and a smaller region in the south-west of the continent. The most densely populated one percent of the continent contains 84 percent of the population of 18.7 million.

Australia has a highly concentrated retail grocery sector which is dominated by three national chain store groups - Woolworth's[2], Coles[3] and Franklin's[4].

The remainder of the retail grocery sector is made up of a large number of smaller, independently owned stores. These independent stores, which operate under one of around sixty banner groups[5], are each supplied by a grocery wholesaler. While a few banner groups operate nationally, many only operate within their home state. David's[6] is the dominant wholesaler and operates in all states and territories in Australia, except Western Australia. David's is now the sole supplier (some would say "monopoly") to most independent retailers following recent mergers and acquisitions. In Western Australia, Foodland Associated[7] is also a virtual monopolist to independents in that State. A recent development in Queensland has seen the establishment by Woolworth's, of a wholesaling division (Australian Independent Wholesalers[8]) to supply independent stores in competition with David's. This is only a recent development, and signals an interest by the chains to diversify their operations to include wholesale sales to independent retailers. While this operation only has a relatively small market share, this market share has been acquired at David's' expense.

The approximate relative positions of the players in the national market are:

	Grocery Sales (%)	Sites
Woolworth's	34	664
Coles	28	671
Franklin's	15	260
David's	17	c 3 500
Other Wholesalers	6	c 800

3. Issue 1: Trends in manufacturing and retail distribution affecting retail buying power, including the use of private brands

For the past two decades, the share of the Australian grocery industry held by the national supermarket chains has been growing at the expense of independent retailers. In 1975 independents held a 60 percent share and this has been eroded constantly to the current level of 23 percent. The declining market share held by independents can be attributed to a number of factors, including the scarcity of sites, the deregulation of trading hours, the rise of "cheque-book competition" and expansion and refurbishment strategies of the three major chains.

The development of grocery retailing in Australia has been greatly affected by the scarcity of large, well-located sites for full-range supermarkets. In relation to shopping centre developments,

successful developers have favoured chain retailers over potential independent store owners as lessees, for two reasons. First, the national identity and the strong market performance of chain stores are seen as likely to attract customers to the shopping centre. Secondly, the financial strength and stability of a large public company makes it a more attractive lessee than an independent store operator. A recent trend has seen the national chains acting as developers of shopping centres with their own stores as the anchor tenant.

Chequebook or creeping acquisitions are a feature of the Australian grocery retailing industry. There are a variety of reasons why retailers may decide to sell their business, including: the decision to retire, the business is not making an adequate return, or because a very favourable offer has been made for the business. Controversy exists as to whether these acquisitions have anti-competitive effects or are simply adjustments within the market. No one sale by itself is likely to substantially lessen competition[9] but aggregation of a number of sales could be argued to have that effect.

There is increasing concern about the chains acquiring independents. First, it appears that the amounts being paid by the chains are often in excess of industry valuation[10], which may indicate that the chains expect to recoup the cost of purchase via higher prices based on market power. Secondly, the stores being purchased tend to be the largest and the closest competitors to the chains. As the price at which producers supply manufactured goods includes a volume discount, the declining sales of the independent sector result in higher prices to those remaining, thus reducing their ability to compete with the chains.

While competition policy/law is not concerned with the fate of individual competitors in most circumstances, it is concerned with conduct which adversely affects the competitive process. The gradual demise of the independent grocery sector is likely to affect competition adversely if, in future, the chains have acquired so much power that it is not possible for new entrants to become established and conscious parallelism mutes competition between the remaining chains.

However, while the ultimate outcome of creeping acquisitions is likely to be a reduction in competition, the difficulties in establishing a breach of the law relate to the very small market shares generally being acquired, and the question therefore of whether the competition effect is substantial. To establish substantiality, it may be argued that the acquisitions are part of a strategy and so should be treated jointly. It is generally believed that the court would be disinclined towards such an aggregation. Another possibility would be to treat these acquisitions as a misuse of market power. The problem with this is that it must be shown that market power has been used for a proscribed anti-competitive purpose and that would be very difficult to establish (discussed further below).

As a further indication of the demise of the independents, the chains have now entered the smaller regional and rural markets[11]. The chains now see these regional centres as potential areas of growth. These smaller, regional areas have traditionally been uncontested by the chain stores. This is now changing and instead of setting up the full scale supermarkets that exist in the larger centres, the chains are developing smaller, more focused, retail stores to compete head on with the independents. Because independents cannot obtain terms and conditions as favourable as the chains, they are now suffering and their share of the market is declining further.

In an effort to combat this trend, David's undertook a program of acquisitions of generally regional or state based independent wholesalers to build itself up as a "fourth force", a unified wholesaler which could provide retail and financial support to independent retailers to help them compete with the chains. As already noted, the Australian retail grocery industry is dominated by the three major chains stores, whose market shares of the branded packaged groceries have grown from 40 percent in 1975 to 77 percent. This growth has been at the direct expense of the independent retail sector, whose market share and profitability continues to decline. David's considered that if it could increase its size, by joining

together all of the independent wholesalers in Australia, they could attain the necessary efficiencies and volume of purchases to compete with the three chains on equal footing.

In support of its "fourth force" argument, David's submitted that:

a strong national position is critical across most wholesale and retailing sectors. The (current) fragmented state based structure of the independent wholesalers can only contribute to their continued decline.

The message is clear. Independent retailers can only survive if they are part of a larger group that can deliver the benefits of big business in terms of buying and marketing, merchandising, store design, information technology, signage etc., while retaining the advantages of an owner operator at the store level.[12]

Development of this "fourth force" necessarily involved a deliberate strategy of mergers, acquisitions and rationalisation of banner groups and retail stores in an effort to make the independent sector more efficient and more competitive. It also necessarily meant that the larger integrated group would have greater volume and would therefore have greater buying power and be better able to obtain terms and prices similar to those enjoyed by the chains.

Australia's competition authority, the Australian Competition and Consumer Commission (ACCC) played a significant role in the restructuring of the grocery sector through its examination of the various mergers that have taken place over the past few years to create the "fourth force"(see below under Issue 4).

3.1 Private brands

Generics, or private or 'house' brands, comprise a significant proportion of sales in Australia. In 1994, private label sales comprised 15 percent of the volume of grocery sales, and ten percent of sales by value. Access to generic products is considered to be an essential input to grocery wholesaling. An entrant that is unable to provide such a range of products would have difficulty attracting retail customers. Development of a generic range takes time and considerable expense and there are significant economies of scale associated with volume orders. A new entrant to the grocery retailing sector would have to either develop its own range of products or seek to obtain access to a current supplier of the generic products. Access to private brands is therefore considered to be a considerable barrier to entry into the grocery industry in Australia.

It is also of interest to note that Coles has attempted to improve the image of its private brand from a generic to a high quality private label. This has not been particularly successful as consumers in Australia have tended to associate these types of labels with the cheaper "generic" labels. This is also reflected in the close inverse link between the demand for generic or private label products with the prevailing economic conditions in Australia.

4. Issue 2: Provisions in competition statutes prohibiting behaviour associated with retailer buying power

Australia's national competition law, the Trade Practices 1974 (TP Act), contains a number of relevant prohibitions relating to the buying power of multi-product retailers[13].

4.1 Repealed price discrimination provision

Section 49 of the TP Act, which was repealed in 1995, prohibited a supplier from discriminating between purchasers in prices charged for goods if that discrimination was of such magnitude or of such a recurring or systematic character that it had the effect, or was likely to have the effect, of substantially lessening competition. The section was repealed on the basis that anti-competitive aspects of the practice are adequately covered by other sections of the TP Act, primarily section 46.

4.2 Misuse of market power

Section 46 of the TP Act prohibits a business that has a substantial degree of power in a market from taking advantage of that power for the purpose of:

- eliminating or substantially damaging a competitor;
- preventing the entry of a person into any market; or
- deterring or preventing a person from engaging in competitive conduct in any market.

Section 46, along with its equivalents in the statutes of other countries, often poses a dilemma for competition authorities: while intended to prevent conduct which is anti-competitive, vigorous and effective competition may force rivals from the market. The test generally applied is to ask whether the conduct in question could have occurred in a competitive market.

Retail buying groups or retailers with significant market power, will use their strong bargaining positions to obtain goods at lower prices, for the obvious purpose of raising their own profits and giving them a competitive edge over their rivals. Section 46 explicitly requires proof that business behaviour is for the purpose of damaging competition. The type of conduct referred to above clearly may also be for the purpos*e* of driving out their competitors, but such a purpose would be very difficult to infer from the actual conduct. It is therefore extremely difficult to determine "purpose" in order to prove a breach of this section.

If it is concluded that concentrated buying power does raise competition issues which are not within the TP Act, then consideration could be given to statute changes. This is a very difficult issue and the 1993 review of the operation of the Act by the Hilmer Committee stressed the need to maintain a balance between deterring undesirable unilateral conduct, encouraging business certainty and minimising the regulatory interference in daily business decisions. Solutions could include replacing the purpose test with another test based on an effects test. However, the Hilmer Committee reflected that this solution does not address the central issue of how to distinguish between socially detrimental and socially beneficial conduct..

Another option for change may be to adopt a specific provision preventing discrimination in pricing to different buyers. However, as noted above, a provision of this kind based on the US Robinson-Patman Act applied from 1974 with little effect before it was abandoned in 1995.

4.3 Anti-competitive agreements

Section 45 of the TP Act prohibits agreements which involve, for example, market sharing or which restrict the supply of goods, if they have the purpose or effect of substantially lessening competition in a market in which the businesses operate. Any such agreements that fix prices are *per se* illegal, i.e.

there is no requirement to determine whether the conduct will substantially lessen competition, it is deemed to do so.

4.4 Unconscionable conduct

Section 51AC, which came into effect in July 1998, covers a stronger party dealing with a disadvantaged party in a harsh or oppressive manner. The section prohibits a stronger party exploiting its bargaining advantage to impose contractual terms or engage in conduct that would be unreasonable, given the particular commercial relationship between the parties. For the purposes of the section, conduct in relation to another person is only harsh or oppressive if a reasonable person would conclude, in all the circumstances, that in a fair and competitive market, the conduct would not be reasonably necessary for the protection of the present or future legitimate interests of the corporation[14].

The provision basically gives small business the same strong legal protection that was previously only available for consumers under the TP Act. However because the provision is aimed at the protection of small business, s 51AC only applies to individual transactions of less than $A1 million.

5. Issue 3: How the competition law deals with groupings of retailers

5.1 Joint buying and selling groups (Co-operatives)

The buying and selling activities of joint (or co-operative) buying and selling groups, including for example banner groups in the independent grocery sector, are to some extent excepted from the *per se* illegality of section 45A[15] of the TP Act. Agreements relating to:

- the price for goods or services to be acquired collectively by the parties to the agreement; and
- joint advertising of the price for the sale of goods or services collectively acquired,

are excepted from s 45A, and are not considered to be *per se* illegal, but must still be considered on normal competition grounds under s 45[16].

The TP Act does not specifically refer to co-operatives, rather it treats them in the same manner as other forms of business structures which are subject to the TP Act. While co-operatives are generally thought of as being confined to rural industries, they are often found in other sectors.

Co-operatives are normally formed to:

- enhance the bargaining position of members so that they can deal on better terms, including price, than they could achieve individually with their customers and suppliers; and
- enable members to add value to their product.

Generally, the ACCC sees such objectives as being of no concern to it and in many cases the creation of co-operatives provides a competitive impetus to the market by giving its members collectively a greater degree of bargaining power in their dealings with suppliers and others. However, the TP Act does place competitive limits on the trading practices of such co-operatives. There are several areas where the

activities of co-operatives or their members require special care to be taken to ensure that the conduct does not contravene the TP Act. These areas include:

- the agreement to form the co-operative;
- the rules the co-operative imposes on its members; and
- mergers between co-operatives.

A co-operative, by its very nature, represents an agreement between competitors and as such may have anti-competitive consequences, in that the agreement to form the co-operative may, for example, lead to a substantial lessening of competition. In such instances the agreement is illegal unless authorised on public benefit grounds[17].

In considering the matter, the ACCC would look closely at the rules of the co-operative, particularly restrictions on the ability of members to supply customers other than via the co-operative. Such issues must of course be considered on a case by case basis. The market power which arises from such a coalescing in a co-operative of the interests of producers may also create the opportunity for the resultant co-operative to engage in anti-competitive conduct. This is particularly likely where the co-operative is a substantial business, as many are, and is able to exercise a significant influence on the markets in which it participates.

As noted above, certain conduct may be authorised by the ACCC on public benefit grounds. In considering any applications for authorisation, the ACCC is likely to be concerned if the co-operative rules seek unduly to limit or prohibit the ability of the members of a co-operative to deal directly with manufacturers. Similarly, the ACCC would also be concerned if contracts between a co-operative and those who buy from it tie the buyers to purchasing exclusively from the co-operative.

Any adverse effects on competition would be likely to be abated if the rules of the co-operative allowed members access to an independent low cost appeals mechanism, for dispute resolution purposes. Such procedures would prevent, or at least lessen, the capacity of a co-operative using its rules for anti-competitive purposes. For example, if a member were to increase its market share to the apparent detriment of other members because of some innovation that the member had developed or entrepreneurial flair, then an independent appeals mechanism would prevent the other members of the co-operative seeking to inappropriately constrain, discipline, or even expel the innovative member.

5.2 Joint ventures

Price fixing provisions made for the purpose of a joint venture do not breach the TP Act[18] if the provisions relate to:

- joint supply by all or some venture parties of goods jointly produced by them pursuant to the venture;
- supply by the venture parties, in proportion to their shares in the venture, of goods jointly produced by them pursuant to the venture;
- joint supply by the venture parties of services pursuant to the venture;
- supply by a joint venture company of goods produced by it pursuant to the venture; or

- supply by a joint venture company of services other than services supplied on behalf of that company by one of its shareholders or a related company to a shareholder.

However, price fixing agreements falling within the above exceptions must still be considered on normal competition grounds under s 45 (discussed above).

6. Issue 4: Cases involving buying power

6.1 Carlton and United breweries[19]

This case illustrates the use of power in one market to effect an outcome in another, and concerns conduct by Carlton and United Brewing (CUB), Australia's largest brewery conglomerate.

South Australian Brewing Company (SA Brewing) was a subsidiary of South Australian Brewing Holdings and was a relatively small regional participant in the brewing industry. In December 1986 SA Brewing agreed to manufacture, package and supply Payless Superbarn (Vic) Pty Ltd with beer to be sold under the Payless brand through its supermarkets.

In response to this, CUB contacted SA Brewing expressing concern about the arrangement and suggested that CUB might review its purchases of beer cans from Gadsden, another subsidiary of SA Brewing Holdings. At the time, CUB obtained approximately 70 percent of the cans used for its packaged beer from Gadsden; CUB had a supply contract with Gadsden which expired on 30 June 1987; and purchases by CUB accounted for over 50 percent of Gadsden's sales of beverage cans. The result was that in March 1987 SA Brewing informed Payless that it would be unable to supply it with generic beer. Although CUB was one of the two major participants in the brewing industry at this time, it was its role as a major purchaser of cans which gave it the market power to prevent SA Brewing supplying Payless.

The defendant, CUB, conceded the facts alleged by the ACCC and a penalty of $A175 000 was imposed[20].

6.2 Australian Safeway stores

This case involves allegations that a division of Woolworth's induced a bread manufacturer to engage in prohibited resale price maintenance – allegations the manufacturer did not deny and in respect of which a penalty of $A1.25 million was imposed against it in May 1997. Action against the Woolworth's division is continuing.

The ACCC alleges that the Woolworth's division, Australian Safeway Stores (which bakes its own bread in-house in competition with other lines of bread), induced or attempted to induce resale price maintenance by Tip Top and certain other bread manufacturers in Victoria in 1994 and 1995. It is further alleged that the Woolworth's division used its market power as a purchaser of bread from Tip Top Bakeries to minimise competition at the retail level by "encouraging" Tip Top to impose resale price maintenance conditions on its customers, i.e. other retailers in competition with Safeway at the bread retailing level.

6.3 David's acquisitions cases

In recent years, David's undertook a series of mergers and acquisitions[21] to give effect to its concept of a "fourth force" (discussed above). This strategy involved the acquisition of other independent grocery wholesalers in eastern and south-eastern Australia to supplement its own wholesaling activities.

The effect of the series of acquisitions was to give David's a virtual 'monopoly' over wholesaling to the independents in that part of the continent.

A number of key issues arose in relation to the acquisition by David's of the two competing wholesalers in the three mainland eastern states, Composite Buyers and Queensland Independent Wholesalers. The ACCC did not oppose either merger. The key reason behind its decisions was that the strong competitive pressure from the integrated retail chains put pressure on the independent retailers, which in turn put backward pressure on the wholesalers to restrain any monopoly power that might have arisen as a result of each of the mergers. Indeed it was considered that the achievement of some economies of scale from each of the mergers would be likely to be passed on and allow the small independent retailers to compete more strongly with the vertically integrated chains. Further, these cases raised a couple of very interesting issues, for example, whether there are separate markets for grocery wholesaling and retailing; and what effect competition at the retail level would have on wholesaling activity.

One of the major issues that had to be confronted during the examination of these mergers was that of market definition and these cases provided considerable material to enable these issues to be further examined and understood. Discussed below are the key issues that arose during the consideration of the appropriate "market" in this context.

6.4 Product market

The ACCC found that grocery retailers supply a bundle of goods and services to consumers, and the prices they are able to charge reflect the composition of that bundle. The goods component may differ between retailers according to the range of goods offered - so convenience stores may stock a limited range of high volume items, while supermarket chains offer a wide range of products and some independent groceries stock some more unusual items. Different stores may also differ in the speed with which they introduce new products. It was suggested during the David's/Queensland Independent Wholesalers Case in 1993[22] that it was the independent stores which first introduced many new products and that it was only after they had been established that the chains would stock them. The chains have, of course, expanded their product range by entering into areas previously served by specialist suppliers such as butchers, fruiterers, and nurseries.

Essentially, the role of the retailer in the supply chain is to assemble goods and services for consumers. They add value to this offering according to the convenience of location and shopping hours, and there is amenity value in the layout of the store, the number of checkouts available, the nature of the parking facilities, arrangements for home delivery and the like. While some items can be excluded from the bundle of goods and services supplies, such as store supplied parking facilities, most cannot be excluded but their significance can be altered.

6.5 Geographic market

The ACCC concluded that each of the national grocery chains, Woolworth's, Coles and Franklin's, and the independent wholesalers operate state-based warehouse/distribution patterns, reflecting the trade-off between economies of scale in warehousing and considerable interstate transport costs (due to the long distances involved). Substitution on the demand and supply sides point towards state based markets. The Trade Practices Tribunal's approach[23] was different. Its decision in relation to the geographic dimension of the market in this case was based on the accepted notion that the purpose of market definition is to allow an analysis of the competitive process relevant to the conduct under consideration. In this case, it was stated that decision making was centralised both for the integrated chains and for David's and was made for the country as a whole, although there was scope for individual variants to suit particular local circumstances.

There is no question that the integrated chains adopt national strategies, are run from head office, negotiate with suppliers on a national basis, and present a national product image or images (where there is more than one category of store). Likewise the strategic decisions of David's are made at the enterprise level or, as David's itself would put it, the "national level". This is the level at which decisions are made with respect to investment in warehousing, information technology, retail sites and stores, and refurbishment of stores ...[24]

In addition, the Tribunal found a national market to be appropriate to assess the claims by David's in relation to the benefits which would flow from the merger. The basis of the fourth force argument was that it would enable the independent retailers to compete more effectively with the national grocery chains, i.e. nationally. Further, access to the various efficiencies, improvements in buying power, and access to capital would be enhanced from operating on a national scale.

6.6 Functional market

Until recently, identification of the relevant functional dimension of markets was largely neglected. For any product there is a series of steps involved in creating the good or service and then supplying consumers/users. Depending on the product, the supply chain may be relatively simple or considerably more complex. The problem from a competition policy perspective is to identify the parts of the supply chain relevant for analysing the specific issue under consideration. In some cases this may involve only one functional level; in others it may involve several stages in the supply chain.

Substitution is an inappropriate tool for identifying the functional dimensions of a market, as rarely can one step in the supply chain be substituted for another. However, recognition that in considering trade practices issues, constraints on the production/pricing decisions of the firm(s) under consideration may be through substitutability or from factors reflecting "commercial reality", may facilitate a more consistent approach to identifying the relevant functional dimensions of the market.

This may again be illustrated in relation to acquisitions by David's. Starting from the wholesaling activities of the independent wholesalers, one should ask whether there were any significant constraints (absent those of alternative suppliers of wholesaling services to independent retailers) on the decision making of the merged firm. The answer would be that any attempt to exercise market power in relation to supply to the independent retailers by the merged firm would result in a loss of sales as those retail customers compete with the vertically integrated grocery chains. This in turn would result in higher unit supply costs for the merged firm, further reducing the ability of its retail customers to compete with the chains and so reducing the business of the merged firm. The critical feature of grocery wholesaling is that it is volume driven. Just as the retailers had only one source of wholesale supply, so the wholesaler had only one potential group of customers. Any attempt to analyse the merger looking only at wholesaling activity would have little prospect of adequately representing the true competitive environment in which the wholesaler operated.

6.7 Rank Commercial/Foodland Associated

In 1994 Rank Commercial, a New Zealand company, announced a take-over bid for the Australian and New Zealand assets of Foodland Associated, the only independent grocery wholesaler operating in the state of Western Australia. Prior to the merger, the Coles supermarket chain had a 23 percent share of the Western Australian retail grocery market, with Foodland Associated being the dominant market player, supplying 51 percent of the groceries sold in that state.

A proposed agreement between Rank Commercial and Coles would have seen Foodland Associated's Australian assets pass to Coles, increasing their market share to 75 percent. Further, because Foodland Associated is the only wholesaler of groceries to independent retailers in Western Australia the acquisition would have resulted in Coles supplying groceries to the independent retail stores that were competing with its own retail outlets.

The ACCC made the following assumptions in order to analyse the proposed acquisition:

- significant economies of scale and scope exist in grocery wholesaling and retailing;
- following the acquisition, Coles would have obtained improved terms from its suppliers if only because of the increased volume of purchases. There are economies of scale, as well as pecuniary benefits, in obtaining grocery products from manufacturers;
- barriers to entry into grocery wholesaling were high. It was unlikely that a new independent wholesaler would have succeeded in Western Australia had Coles exercised its market power following such an acquisition. Nor was there any real likelihood that the existing independent wholesaler in South Australia would sell into Western Australia;
- at the time of the proposed acquisition, Coles, Woolworth's, Action Stores and the other independent retailers competed strongly with each other for the retail supply of groceries to consumers.

After the acquisition, Coles would have had the following options:

- retain the cost savings from the acquisition (no price changes) but Coles' profits would increase;
- use the reduction in supply costs to lower the prices to independent retailers and to Coles' own retail outlets (full pass through);
- raise prices to the independent retailers in order to shift customers to its own retail outlets (this would also give some benefit to Woolworth's).

An analysis of the likely strategic behaviour of Coles post acquisition suggested that the third option was the most likely.

On 28 June 1994 the ACCC sought and obtained an injunction to restrain Rank Commercial from issuing its take-over documents. Rank Commercial/Coles subsequently announced a decision not to proceed with the bid, ostensibly on commercial grounds. The Court then made final orders preventing Coles and Rank Commercial from proceeding with the bid.

7. Issue 5: Whether retail buying power should be treated primarily by competition agencies enforcing general competition law

It is considered very important that the ACCC continues to scrutinise retail buying power issues. Countervailing power and market structures are key considerations for competition agencies responsible for merger control. Due to the nature of the conduct, such strategies may overlap with other types of anti-competitive behaviour such as exclusive dealing and "tying" arrangements. It is therefore logical that all of

these inter-related forms of anti-competitive behaviour are kept under the jurisdiction of the one agency, notably the country's central competition authority.

The types of issues that are emerging in the grocery sector are an excellent example of why the ACCC needs to maintain active involvement in the regulation and supervision of the sector, and particularly in respect of buying power.

The following are a very broad outline of the types of competition related issues that are being faced in the industry:

- the benefits enjoyed by the chains from being vertically integrated are also having significant horizontal implications. The best prices and promotions are being offered to the chains, which adversely affects the independents. These benefits are suspected to reflect more than just economies of scale;

- the present market structure of the grocery industry and the pressures on retailers to cut costs may result in conduct which is anti-competitive. There have been claims that the chains have been involved in predatory pricing, exclusive supply arrangements and have imposed "most favoured nation" clause arrangements. However, no action has been taken by the ACCC;

- an oligopolistic market structure at the wholesale/retail level of the grocery industry imposes backward pressure on the agricultural and manufacturing sector which depends on the chains for the majority of their sales. This causes profits to be squeezed at the producer level and arguably a misallocation of resources to the extent that it drives otherwise viable and competitive players out of business;

- the ACCC is commonly presented with arguments about the significant countervailing power of the supermarket chains when it considers mergers at the manufacturer/producer level, particularly in the food sector. This countervailing power argument is often a significant contributing factor in the ACCC's decision to allow mergers in this sector to proceed. Therefore concentration at the retail level is affecting concentration at the manufacturing level;

It is interesting to draw a contrast between the grocery industry, where there is market power at the retail level that imposes backward pressure on producers, with the petrol industry where there is market power at the producer/refiner end which is arguably squeezing profits at the retail level. Traditional competition law and thinking is geared toward combating the latter type of misuse of market power, i.e. from seller to buyer. Competition agencies are having to rethink their strategies in dealing with situations where a buyer could misuse its market power against the companies that sell to it, as some would argue to be the situation emerging in the grocery industry.

NOTES

1. For a narrative, see David's Acquisitions Cases under Issue 4.

2. Woolworth's is Australia's largest grocery retailer and trades across Australia. It has no connection with similarly named groups overseas and is also involved in general merchandising through various discount department stores, liquor retailing, some food manufacturing and processing, ladies' fashion retailing and retailing of electronic products.

3. Coles is the grocery division of Coles Myer and trades across Australia. Coles Myer is Australia's largest retail conglomerate, being a major market participant in both traditional and discount department stores, liquor retailing, fast food and ladies' fashion outlets.

4. Franklin's operates in the eastern and south-eastern States of New South Wales, Victoria, Queensland and South Australia.

5. Banner groups are loosely defined as buying groups. However, the activities of the banner groups extend beyond just product purchasing; they also have common store signage, layouts and product ranges and participate in the joint advertising and promotion of products.

6. David's is the largest independent grocery wholesaler and distributes groceries, refrigerated foods, liquor and general merchandise.

7. Foodland Associated Limited is the sole independent grocery wholesaler in Western Australia and distributes 41.9 percent of the branded packaged groceries sold in that State (four percent nationally) to approximately 722 stores.

8. Australian Independent Wholesalers supplies twelve independently owned retail stores in Queensland and Northern New South Wales operating under the "Spar" banner group and the Foodworks banner in Victoria and New South Wales.

9. The merger test under section 50 of the *Trade Practices Act 1974*.

10. For a good store it appears that a guide to the value of the business is ten times average weekly revenue plus stock, whereas recent purchase prices have been around sixteen times average weekly revenue plus stock

11. Traditionally smaller regional and rural markets were not considered promising, primarily due to the smaller size of these communities relative to the metropolitan areas. In *David's Limited* (1995) ATPR (Com) 50-185 it was considered that the coverage of the chains in non-metropolitan areas was limited. It was stated that 11 and 14 percent of the populations of NSW and Victoria respectively were not directly served by the chains and that eight and nine percent of their populations did not live within 50 km of a chain store. These percentages are likely to be even higher in Queensland, Western Australia and the Northern Territory where, on average, the population centres are smaller and are more geographically remote.

12. IBIS Business Information Pty Ltd (April 1995) *Review of the Supermarket & Grocery Store Retailing Industry and the Grocery Wholesaling Industry*, pp 32 - 33.

13. The TP Act is primarily enforced by the ACCC, although a private right of action also exists (only the ACCC may obtain an injunction in relation to mergers and acquisitions).

14. Under s 51AC the court may take into account a range of circumstances in determining whether a business has been subjected to unconscionable conduct. It may consider the parties' relative commercial strengths;

whether undue influence was exerted; whether the contract exceeded what was reasonably necessary for the legitimate interest of the supplier; the requirements of any applicable industry code; and whether there was evidence of disclosure, good faith and willingness to negotiate.

15. Which deems that price fixing agreements substantially lessen competition. See s 45A(4) of the TP Act.

16. That is, such price agreements will still breach the TP Act if they have the purpose or effect of substantially lessening competition in a market.

17. Under the authorisation and notification provisions of the TP Act, the ACCC has the power to grant immunity from legal proceedings for some arrangements or conduct that might otherwise breach the restrictive trade practices provisions of the TP Act. Such an exemption will only be granted if the applicant can prove that the anti-competitive detriments arising from the conduct or agreement will be outweighed by offsetting public benefits.

18. By operation of s 45A(2) of the TP Act.

19. *Trade Practices Commission v Carlton & United Breweries* (1990) ATPR 41-037.

20. At the time this matter was settled, the maximum penalties available under the TP Act for a breach of this type were $A250 000 per offence. In 1993 the maximum penalty was increased to $A10 million for each contravention.

21. In 1992, David's made a take-over bid for Queensland Independent Wholesalers (QIW). This bid was opposed by QIW which sought a declaration from the Federal Court that the take-over would constitute a contravention of the merger provision of the TP Act. In addition, the Commonwealth Attorney-General, the Minister then responsible for the administration of the TP Act, sought a Federal Court injunction restraining David's from acquiring QIW. In April 1993, the Court held that David's' proposed take-over of QIW would breach the TP Act and this decision was upheld on appeal.

    In February 1995 David's sought authorisation from the ACCC to acquire Composite Buyers Limited (CBL). At that time David's and CBL were the sole wholesale grocery suppliers in Victoria and held 94 percent of the independent wholesale market in New South Wales and a small share in Tasmania. The authorisation was granted by the ACCC, and the decision was upheld by the Australian Competition Tribunal, following an appeal by QIW. However, the acquisition did not eventuate. In September 1995, QIW successfully acquired CBL instead.

    David's then acquired the merged QIW/CBL in 1996. This resulted in David's significantly increasing its share of the national market from 6.3 percent in 1975 to 17.4 percent in 1997

22. *QIW Retailers Limited* v *David's Holdings Pty Limited & Ors*; *Attorney-General of the Commonwealth* v *David's Holdings Pty Limited & Anor* (1993) ATPR 41-226.

23. *Re: Queensland Independent Wholesalers Ltd (1995) ATPR 41-438*. Also note that the Trade Practices Tribunal was renamed the Australian Competition Tribunal in November 1995.

24. *Re QIW*, op. cit., p 40950.

CANADA

Buyer power of multiproduct retailers refers to a buyer who can negotiate from a supplier a below list price or unusually large discounts for products due to its dominant position in the relevant market. Buying groups are based on any association of independent firms which combine the volumes of the members' purchases for the purpose of qualifying for or earning price concessions based on that volume.

Buyer power is prevalent in both food and non-food retailers. It creates efficiencies for both seller and buyer-with the result that lower prices should be passed onto consumers. Nevertheless, care should be taken to ensure that a multiproduct retailer does not engage in anti-competitive behaviour by abusing its dominant position as defined in s. 78 of the Competition Act or have a buying group become a vehicle to fix prices, allocate markets or restrain output, or engage in any other anti-competitive behaviour that would violate s. 45, the conspiracy provisions of the Act.

Section 78, the civil provision applicable to abuse of dominant position, includes a list of non-exhaustive "anti-competitive acts". Any analysis of abuse requires that the following elements must be met before the restrictive trade practice comes into question:

1. Section 78-there must be an anti-competitive act;

2. Section 79(1)(a)- there must be substantial or complete control of a class or species of business;

3. Section 79(1)(b)- there must be a practice of anti-competitive acts;

4. Section 79(1)(c)- there must be a substantial lessening of competition.

In the event that all of the above criteria are met with regard to the anti-competitive act, the Competition Tribunal may prohibit the practice and, in addition or in lieu, may make a further remedial Order to overcome the effects of the practice.

In considering its Order, the Tribunal shall take note of whether the practice is the result of superior economic performance. It should also be remembered that if the Director elects to proceed under the abuse provisions, he cannot address the conduct in question under the criminal provisions.

As per s. 45, it is a criminal offence in Canada for parties to enter into an agreement which lessens competition unduly in a market. The approach is to examine both the structure of the market, i.e. do the parties have market power, and secondly to consider their behaviour. It is the combination of market power and injurious behaviour that makes a lessening of competition undue. Penalties could include fines up to $10 million and imprisonment for up to five years, or both.

Substantively, s. 45 of the Competition Act prohibits parties from entering into an agreement which, "*inter alia*," prevents or lessens competition unduly or is likely to do so. Several elements must be established in order for an offence to be found. First, the Crown must prove the existence of an agreement. Second, the agreement is one whose likely effect is to prevent or lessen competition unduly. Third, the Crown must prove that the accused had the intention to enter into the agreement and had knowledge of that

agreement. Finally, the Crown must establish that on an objective view of the evidence adduced that the accused intended to lessen competition unduly. This can be satisfied by establishing that a reasonable business person, who can be presumed to be familiar with the business in which he or she engages, would or should have known that the likely effect of the agreement would be to unduly prevent or lessen competition.

The Supreme Court of Canada has provided considerable guidance on the meaning of the element of undueness. In addition to stating that an undue effect is one which is serious or of significance, the Court outlined a two-step approach which may be used to determine undueness. After determining the relevant product and geographic markets in which the parties operate, the first step is to determine whether the parties to the agreement have market power or will be likely to obtain it pursuant to the agreement. In the second step the Court will evaluate the parties' behaviour to determine whether some behaviour likely to injure competition has occurred, or is likely to occur. Price fixing, restrictions on output, limits on services offered, or market sharing are almost always of competitive significance, and hence the Director will view such agreements as constituting injurious behaviour.

With respect to the conspiracy provisions, it should be noted that in some circumstances, activities of an association or a buying group could raise an issue under the Act. Any agreement among members that would, if implemented, lessen competition unduly by, for example fixing the prices charged by members for their outputs or by allocating customers among members, could be a criminal offence. Care should be taken to structure association or buying groups so that they will not provide, or appear to provide, a forum for members to engage in such anti-competitive behaviour.

The conspiracy provisions also prohibit agreements which prevent or lessen unduly competition in the purchase of a product. If a proposed buying group accounted for a large enough share of the total purchases of a product to obtain market power, it might be able to extract unreasonable price concessions from suppliers. In such a case the buyer power of multiproduct retailers could potentially come into conflict with the Act.

Turning to the specific questions posed in the July 17, 1998 letter to delegates, the following has been the experience in Canada:

1) *"trends in manufacturing and retail distribution affecting retail buyer power, including the use of private brands."*

In recent years, there have not been substantial changes in the degree of concentration in food retailing. There are no major grocery retailers operating nationally; however, in each region of Canada there are two or three substantial chains of stores. Private brands have achieved significant market shares in a number of product lines over the last several years. One private label brand, President's Choice, originally produced for the Loblaw's grocery store chain, is now seen as a high-end branded product in its own right. President's Choice products are now available in competing retailers in Canada and USA.

There are also private brands in, amongst other undertakings, the national chain drug, hardware, automotive and department store markets. The expected expansion of private brands and the advent of retail "superstores" will likely mean a lessened dependence on suppliers of branded consumer products and an increase in retailer buyer power.

2) "actual and proposed provisions in competition or related statutes...(dealing with)...retailer buying power..."

As noted above, actual provisions could potentially include the abuse of dominance and conspiracy provisions of the Competition Act. The Act also prevents a merger or proposed merger to establish buyer power that will, or is likely to, lessen competition substantially. Planned amendments to the Competition Act are not aimed specifically at retailer buying power. No other statutes currently address the question in Canadian law.

3) "how your competition laws deal with groupings of retailers..."

The Bureau has occasionally been asked to consider under what circumstances groupings of retailers would be valid buying groups for the purposes of enforcement of the price discrimination provisions of the Competition Act.

Section 50(1)(a) of the Competition Act, the price discrimination provisions, applies to the practice of granting price concessions to one purchaser which are not available to competing purchasers in respect of a sale of articles of like quality and quantity. It is one of the criminal law provisions of the Act and could lead to imprisonment for a term not exceeding two years.

The theory behind s. 50(1)(a) is that competing purchasers, when they purchase articles of similar quality and quantity, should not have their ability to compete with one another negatively affected by unequal pricing treatment at the hands of the seller.

There are three characteristics that are critical to determine whether a buying group is a true purchaser: It should be a legal entity; the group should acquire title to the goods and it should be responsible for payment of the goods purchased. In a recent Advisory Opinion, the Bureau considered other criteria to determine whether a group was legitimate. Here, membership in the buying group was open to all Canadian companies in the industry sector involved on a non-discriminatory basis and the buying group had committed to take reasonable steps to advertise its existence to parties with a potential interest. Discounts would be conditional on the consumption commitments made by the group, although title to the goods and liability for payment would remain with the individual members. These commitments would have commercial value to suppliers and are a common form of price concession.

The Bureau concluded that the proposal qualified as a conditional discount and did not offend either the conspiracy provisions or the price discrimination provisions of the Act, provided similar concessions would be available to competing purchasers of like quality and quantity. Nevertheless, it was further noted that under s. 36 of the Act, any person is free to commence a private action to recover damages it can demonstrate have been suffered as a result of conduct that is contrary to the Act.

4) "interesting cases involving buyer power..."

There was one merger case involving buyer power. In September 1994, SmithBooks, and Coles Book Stores Limited, the two largest retail bookstores in Canada announced the proposed merger of the two bookstore chains. The parties owned approximately 420 stores combined. The transaction was the subject of an extensive examination under the merger provisions.

The evidence indicated that the merged entity would account for approximately half of the sales of Canadian publishers and exclusive agents in this market. The examination entailed an assessment of the effects of the mergers on the trading terms with suppliers and/or publishers i.e. discounts, rebates, advertising support, etc. The Director's examination also included the analysis of the book selling activities of non-traditional book retailers, especially mass merchandisers which include books as a product offering in their stores. These outlets have attained a considerable volume of sales in Canada.

The information did not warrant a conclusion that the merged entity would likely be able to exercise market power for any length of time without attracting competitive entry. However, given the fact that SmithBooks and Coles are the two largest retail book chains in Canada, the Director monitored the merger for the three year period provided for in the Act especially with regards to the buying power of the merged entity relative to publishers.

5) "*your agency's views on whether problems associated with retail buyer power should be treated primarily by competition agencies enforcing general competition law or by other agencies enforcing other laws.*"

There has been no indication that the present, generally-applicable competition laws are inadequate to deal with any problems which may arise in this regard in Canada.

CZECH REPUBLIC

1. Current situation in the retail sector in the CR

Retail concentration in the CR has in no way reached the level of the EU countries. The chain store share in total turnover has not exceeded 20 per cent in the CR. A few thousand retailers have been active in the Czech market and only in recent years foreign chains have emerged. These chains have been building up their market positions, the number of their outlets is increasing annually and so is their retail turnover. The following are some of the foreign chains active in the CR: Julius Meinl, Delvita (Delhaize), Euronova (Ahold), Globus, Plus-Discount, Penny Market (Rewe), Billa, Interspar, Tesco, Kaufland. It has almost become a necessity for producers to supply these supermarkets (chain stores), as they buy goods in bulk, usually in one or two central warehouses and they guarantee stability and reliability in paying invoices.

Know-how from their countries of origin and long sales experience have been introduced into Czech trade by chains with foreign participation. They have been contributing to the adoption of modern trading methods and are a motivating stimulus for producers (stressing the quality of production, lowering costs, reducing prices) and for other retailers.

However, despite these positive features, retail chains have also brought about some negative business practices, both in relation to suppliers, and in relation to other retailers. We can mention e.g. quality requirements, accuracy and quantity of supplies, pressure for longer payment periods of invoices, in some cases the necessity to pay a listing fee, paying fees for positioning goods in a frequented location, providing samples of goods or reduced prices during advertising campaigns. On the other hand, it has not been proved true, as often stated, that in chain stores with foreign participation more imported goods than home products are sold. Small retailers in the vicinity of big store chains thus feel threatened by the lower price levels which they are unable to match.

Nevertheless, it is necessary to state that the Office for the Protection of Economic Competition (hereinafter referred to as Office) has received no complaint from the suppliers about chain store actions. On the contrary, when asked by the Office, all randomly chosen producers have expressed satisfaction with their co-operation with the chains. In some cases small retailers complained that, supposedly, in some supermarkets particular sorts of goods had been sold at exceedingly low prices. The Office has looked into these complaints in order to assess whether this is a case of restricting competition through predatory pricing. In competition law, it is possible in case of dominant position of the respective competitor, to prosecute those who sell goods at extremely low (predatory) prices with the intention to exclude other competitors from the market. It has been found that some chain stores did sell some items of their range of goods at below-cost prices. This was a case of "cross financing".

Small retailers, following the example of supermarkets, are setting up business groupings comprising several independent retailers for the purpose of joint purchasing, advertising and organising of sales through advertising leaflets. The Office has so far dealt with business practices of these retailer groupings twice: in the first case, an exemption for the REMA 1000 franchising system was applied for, in the other case, the system of electronic appliance sales through the PROTON outlets was investigated. The exemption required for a network of food retailers has not been granted to REMA 1000 because it did not

meet the requirements for granting an exemption laid down in Article 5 of the Act on the Protection of Economic Competition because sales prices for all franchising outlets should have been set by the franchisee. An appeal was lodged against this decision but it has not been decided on yet. The other case (PROTON) has not yet been finalised.

1.1 Some Office Comments

- when dealing with particular competition cases in retail, both provisions of Article 3 (anti-competitive agreements), Article 8a (retail concentrations) and Article 9 (abuse of dominant position) can be applied. No other case, except the two mentioned above (REMA 1000 and PROTON), has been dealt with in administrative proceedings. The amendment to the Act on the Protection of Economic Competition should change Article 9 in such a way that it should make it possible to legally challenge a dominant position on the grounds of market power phenomena. Other legislation dealing with these problems includes the Act on Prices - in the jurisdiction of the Ministry of Finance - and regulations of the unfair competition law (commercial code) - dealt with by the courts. There is an internal regulation in the OEC setting the procedure for defining the retail trade relevant market, the procedure for looking into below-cost and initial prices, and cross financing;

- in January 1998 the Ministry of Trade and Industry issued a document for municipalities with a suggested procedure for planning retail networks in their territories entitled "Development and Optimisation of retail networks´ dimensions in a territory";

- article 18 of the Act on the Protection of Economic Competition refers to the procedures of state administration bodies and municipalities concerning economic competition (building permits for retail outlets, restrictions of range of goods). It is possible to restrict the sales of spirits and tobacco products in certain locations during certain hours on certain days, according to the act concerning alcohol and other toxic substances. The rules must be laid down consistently for all competitors in a non-discriminating fashion. The same holds for planning the construction of supermarkets;

- there is no *de minimis* rule for agreements on prices, which is in accordance with the EU approach;

- uniform prices are allowed across outlets in the same entity. However, any use of uniform prices by independent traders (by associations, franchising network, e.g. for advertising campaigns) would be interpreted as a prohibited agreement under Article 3 of the Act on the Protection of Economic Competition, except for cases where prices are marked as “recommended”;

- the above mentioned problems should be dealt with directly by OEC and not by any other body. In future, abuse of market power should be prosecuted on the grounds of the amended Article 9 of the Act on the Protection of Economic Competition. (The amendment should have a new definition of dominant position according to the principle of market power. The dominant position of a competitor will be derived from a combination of several aspects - its market share, vertical integration, existence of its own distribution network, ownership of a trade mark, market structure, etc.);

- the Office agrees with the earlier supplied (i.e. July 17th letter to delegations) OECD definition of buying power, nevertheless it should be added that comparable goods or amounts of goods should be taken into consideration;

- choice of shelves is a practice used also in the CR. It is necessary to pay for better positioning of goods in the shops (e.g. in the check-out area);

- the obligation of one supplier not to supply other retailers at lower prices has not occurred so far. On the contrary, we have experienced a supplier´s requirement of a retailer to set aside a certain part of the shop area for his products and to sell those at a price, which is 20 percent lower than that of comparable goods;

- the chains´ private brands - Supermarkets use their own brands in the CR: Julius Meinl - brand name Julius Meinl, Vít - brand name Vít, Delvita - brand name LEVNÌ, Interspar - brand name Spar and Euronova in its Sezam network - brand name Koruna. Also the franchising chain REMA 1000 is planning to introduce its own brand name. Usually a dozen products of daily use are sold under a retail brand. These goods typically have low prices at a comparable quality and a very simple packaging. In our view, at present, using one´s private brand names does not represent a significant competition advantage, though it may make other suppliers´ entry into the chain more difficult. Brand names as such have not found a widespread use in the CR, since consumers are only getting acquainted with this concept;

- buying power could cause producer mergers - this situation has arisen in the case of the Olpram Group merger (concentration of Milo and Seliko enterprises). One of the stated reasons for the merger was that the concentration would guarantee joint sales and supply the complete range of goods of both enterprises into supermarkets requiring the widest possible range of goods;

- is the retail market competitive enough? - At present the CR has a market of a few thousand competitors. The share (and sales) of chains are growing annually. The development seems to follow the western pattern, where most of the market is occupied by big chain stores. Small retailers will have to adjust to the new market situation, otherwise they may have to close down their businesses, especially those close to the big supermarkets. One possible solution is to introduce flexible opening hours according to customers´ needs, to concentrate on selling a special assortment of goods and fresh produce - i.e. to fill the market gaps that cannot be covered by the big supermarkets. Another option could be grouping retailers in networks and associations, with regard to the principles of economic competition. The Ministry of Trade and Industry is preparing new information handouts to help small retailers find their bearings in a market that is more and more influenced by the ever more powerful chains;

- joint leaflet campaigns of retailers (quoting common sales prices for a restricted range of goods at a particular time). What is the approach of other competition agencies?

- purchasing alliances have also arisen in the CR, based on the all-European purchasing alliances. They are the Czech Marketing Distribution (CMD) and a smaller purchasing association - Vega. They do not fall under the requirements of Article 8a of the Act on the Protection of Economic Competition and thus cannot be checked by the Office.

1.2 Conclusion

The present market share of chain stores and the current version of the Act on the Protection of Economic Competition make it almost impossible to apply Article 9, should some business practice of the chains be found to be discriminatory or otherwise abusive. The chains have no dominant position on the

market. It has not been found that the chains would, when setting their supply policy, act in agreement or have concerted practices. There are no concentrations either that could be dealt with under Article 8 of the Act on the Protection of Economic Competition. Preventing buying power is certainly cheaper than its treatment, but such prevention must be based on clear and practical underlying rules. It is impossible to prohibit buying power, it is necessary to fight against its abuse consistently. The question of regulating sales at below-cost prices by law, as it is in France and lately in Germany too, remains open. Below-cost prices are advantageous for the consumer in the first place. To sum up, we can state that a development in the field of retail similar to the development that had taken place in the West can also be expected in the CR. That is why it is good to exchange ideas about tackling these problems in different countries and look for an approach suitable also for the CR. So that we very appreciate if delegates could help to find the answers to the following questions:

1. are there co-operative purchasing alliances in other countries and are their activities regulated?

2. may these alliances issue joint leaflets with listed prices?

3. should there be an exemption from the ban on price fixing directly stipulated in competition legislation?

4. is it possible to prosecute behaviour of retailer who concludes “take it or leave it” agreements with its suppliers and who has not attained a dominant position?

DENMARK

This paper is based upon the questions raised by the Secretariat and will focus on recent developments in the Danish retail sector.

1. Introduction

The Danish retail trade - food as well as non-food - has become increasingly concentrated, but compared to other Nordic countries, concentration is still quite low.

The four largest retailers supply about 70 percent of the total market of food retailing. Competition between retailers has moved towards integrated trade. Unlike developments in other EU countries, co-operative societies remain an essential feature with above 35 percent share of food turnover. To meet competition, small and medium-sized independent retailers have begun joining forces.

The focus in food retailing seems to have shifted from discount stores that have had a substantial growth since the early 1980s towards specialist shops and convenience shops. Consumers are still price-conscious, but increased purchasing power has made consumers more quality-oriented with focus on fresh products and ecological products, which have become an important part of competition between food retailers.

The use of private brands in Danish retailing is still modest. An ACNielsen AIM survey estimates private brands in food retailing in Denmark to have a 12 percent market share measured by turnover. Private brands in non-food retailing have market share about 13 percent.

The number of cases involving buyer power is small and there haven't been any formal decisions by the Danish Competition Authority. Cases will be handled according to the Competition Act, which in principle is similar to the EU Competition Law.

2. Competition law and groupings of retailers

Grouping purchases can mean creation of a new competitor. Especially where small stores can use collaboration to obtain the same quantity discount afforded to larger retailers etc.

The new Danish Competition Act in force as from 1 January 1998 has adopted the EC block exemptions and an additional Danish block exemption for groupings of retailers. The purpose of the Danish block exemption is to exempt co-operation of smaller retailers from the general prohibition against agreements restricting competition. It was generally believed that most agreements between small retailers could be exempted according to an individual procedure. The block exemption aims to establish a "secure" framework for agreements between small retailers that do not restrict competition more than necessary.

The block exemption exempts groupings of retailers[1] from the general prohibition against agreements etc. between undertakings, which have as their object or effect the restriction of competition.

Thus agreements between independent enterprises (retailers) in order to form buying groups, central buying offices or voluntary chains are exempted.

The provisions of the block exemption apply to groupings of retailers with a joint turnover not exceeding 25 percent[2] of the total turnover in Denmark of the relevant products[3].

The provisions allow the grouping of retailers to (white list):

- develop a concept for a chain. This includes shop fitting, facade, product assortment, education and training of employees, aftersales services, use of credit cards and administrative systems etc.;
- engage in collective advertising (e.g. TV-commercials, advertising circulars);
- set maximum prices of goods (in connection with campaigns);
- impose non-competition clauses (as regards shares in other (competing) chains).

On the other hand the block exemption does not apply if (black list):

- the individual retailer is not allowed to buy products not included in the chain's product assortment;
- the individual retailer is precluded from individual marketing (local campaigns etc.);
- the individual retailer is precluded from fixing his own prices (except for joint campaigns where maximum pricing is allowed);
- application for membership is refused on a discriminatory or non-objective basis;
- more than six months' notice (to year end) is required to leave the

The Block exemption expires on 31 December 2000, unless the Minister of Industry prolongs it.

NOTES

1. Retailers are defined as commercial enterprises with sale to the final consumer from a fixed point of sale. Preparation of ready-made food products, e.g. in hotels, restaurants etc. are excluded.

2. Groupings exceeding 25 percent must submit a notification to the Competition Authority to obtain an individual exemption.

3. The relevant products (the groupings “core business”) must cover min. 80 percent of the turnover of the enterprises involved.

FINLAND

1. Trends in manufacturing and retail distribution affecting buyer power, incl. private brands

A distinct trend towards concentration is apparent in the foodstuffs industry. It may be the result of the use of buying power but at least in the 1990s it is also due to Finland's EU membership and the liberalisation of the import of agricultural products.

As a rule (coffee roasteries excepted), there is little backward integration by retailers, but this is now increasing as a result of different partnership arrangements and ECR (efficient consumer response) agreements. Integration may make it more difficult for small manufacturers to gain shelf space.

The daily consumer goods (DCG) retail trade has, for years, been concentrated among 4-5 trading groups whose joint market share is well over 90 percent. The share of independent shops has gradually decreased from 8.5 percent in 1980 to 5.1 percent in 1997. This basic setting altered slightly when the Commission forbade the Kesko/Tuko merger in DCGs in 1996, after which the Tuko Group disintegrated into the Spar and Wihuri Groups.

The main DCG players are Kesko (1997, 38 percent), the S-Group (25 percent), Tradeka (12.5 percent), Spar (11.3 percent), Wihuri (5.2 percent) and Stockmann (2.8 percent). The three last-mentioned have been able to retain a joint share corresponding to Tuko's share (in 1996, 19.6 percent) of the DCG trade market shares. It should be noted, when the market power of the trading groups is assessed, that the S-Group and Tradeka have a common buying organisation, INEX Partners.

Each of the big trading groups combines the buying power of its members and has several chains built around different concepts. All groups have both "high-low" and "every day low pricing" chains.

All the major trading groups have private label products (with Kesko in the lead - 640 labels), whose sales amount to c. 2-10 percent depending on the chain. The Finnish Competition Authority's attitude to private label products has so far been neutral, although their connection to the rise of buying power is evident. They have increased competition between the manufacturers by enhancing the entry of foreign foodstuffs into the markets and apparently also the competition between the trading groups.

2. Actual provisions (incl. Civil Codes) which may prohibit certain behaviour associated with buying power

The Finnish competition legislation contains no special provisions addressed to contractual relations between manufacturers and retailers. An exception is the common RPM ban.

However, the entire tool kit of competition legislation can also be applied to buying power. The Act on Competition Restrictions contains prohibitions against horizontal cartels, resale price maintenance and the abuse of market dominance. In addition, restrictions falling outside the scope of the prohibitions are assessed under the general clause contained in article 9 (rule of reason principle). From 1 October 1998, provisions on the control of concentrations have been in force in Finland.

The Finnish Competition Authority has no information on the applicability of the Civil Code to buying power. The relevant legislation exists and e.g. the Legal Transactions Act could provide the industry with tools in this respect.

3. How competition law deals with groupings of retailers - are these permitted to combine their market power

No special treatment is given to groupings of individual retailers on the legal level; all the prohibitions of the law are applicable. Thus, co-operation between independent retailers or regional co-operatives (e.g. the S-Group) in order to negotiate on purchase or sales prices is forbidden.

However, in the exemption practice of the Finnish Competition Authority, agreeing on common prices in joint marketing is allowed on the following principles.

A general exemption has been granted to chains whose market share remains below 30 percent. In order to prevent the circumvention of the threshold, all chains whose competitive behaviour is mutually co-ordinated shall be considered. The exemption allows the co-ordination of purchase prices only with respect to goods jointly advertised. To qualify for the exemption, retailers have to be allowed to undercut a price agreed upon and build their own campaigns even if they overlap with the campaigns of the chains.

Chains with market shares exceeding 30 percent must apply for an individual exemption. Such applications are considered on a case-by-case basis. In various exemptions, a special condition has been prescribed in order to increase the buying sources of the retail trade: the retailer shall have a genuine right to purchase the product from an outlet other than that indicated by the chain. The object of the condition is more versatile than merely complicating the use of buying power. It is an incentive to internal competition among the trading groups both in the procurement market and retailing.

4. Interesting cases involving buying power

In light of the decisions mentioned below, the policy concerning buying power problems could be summarised as follows:

- Finnish Competition Authority has refrained from intervening with the conditions of individual business relations;
- loss leading pricing is not specifically prohibited because it is not possible to satisfactorily control the phenomenon through competition legislation;
- the Authority emphasises interventions to reduce barriers to competition between the groups;
- incentives of individual retailers to compete are maintained by creating possibilities for the use of their own competition methods independent of group decisions;
- prevention of measures whereby the trading groups restrain competition through agreements with suppliers.

Reciprocal dealing of industrial sugar (decision in 1996). INEX Partners had requested that suppliers using sugar purchase it through INEX Partners in the same ratio that the company bought final products from the sugar user. Factually, it was a question of a slot allowance demanded from the industry

and a competition restriction concerning manufacturers who could not offer a reciprocal dealing of their raw material (import foodstuffs). The conditions of the relevant contracts were removed.

Recommended pricing of foodstuffs (1995). Fifty foodstuff manufacturers (bakeries, dairies, processed food manufacturers) had used recommended pricing for their products. At the Finnish Competition Authority's request, the recommended prices were removed when it transpired that recommended pricing had originally been born out of the trade's interests. This became evident already when the interest group of the foodstuff manufacturers lodged a request for action with the Finnish Competition Authority in which it demanded that recommended pricing be abolished.

Reciprocal purchase demands of Kesko (1995). In the Finnish Competition Authority's investigations, it had transpired that the executive bodies of Kesko had planned reciprocal purchase demands from suppliers in the agricultural and hardware and builder's supplies trade. No evidence was found on the practical application of the demands but Kesko announced that it would refrain from its demands.

Exclusive agreements between SOK and INEX Partners (1995). SOK and INEX had requested that the industry's deliveries to members of the group only be made via SOK or INEX. The restriction was seen as harmful as it limited the industry's distribution channels and prevented the co-operatives from tendering the supply and wholesale operations of the central company. Corresponding decisions had been made with respect to the K- and T-Groups in 1994.

A negative stand has been taken to requesting slot allowances both in the Finnish Competition Authority's (cf. the cases above) and the Competition Council's practice (cf. the Competition Council decision on the abuse of dominant position by the dairy association Valio of 24 October 1997 where the Council stated: "[slot allowances] may, in practice, prevent entry by small or medium-sized companies as suppliers of a central company or a trading chain and distort the competitive setting on the manufacturing, wholesale or retail levels.").

FRANCE

L'émergence et le développement de la grande distribution ont joué un rôle très important dans l'accroissement de l'offre et de sa diversité, ainsi que dans la réduction des coûts logistiques et commerciaux. Le grande distribution est ainsi à l'origine de la généralisation d'une offre de produits variée et largement accessible. Au fil du temps, les concentrations successives qu'elle a connues, ainsi que les rapprochements entre réseaux et affiliations de nouveaux magasins à des centrales, ont permis la constitution de groupes et groupements dont la puissance d'achat est importante. Cette évolution est susceptible d'avoir un impact concurrentiel sur les deux plans vertical et horizontal : en modifiant les conditions d'entrée et de maintien des producteurs sur les marchés amont d'une part, et en créant une distorsion vis-à-vis des autres formes de distribution d'autre part.

Malgré un frein légal aux nouvelles implantations d'hypermarchés, le poids de la grande distribution alimentaire (hypermarchés, supermarchés, magasins populaires) ne cesse de s'accroître. La grande distribution a vendu en 1997 près de 65 pour cent des produits alimentaires (contre 59 pour cent en 1992), 29 pour cent de l'équipement automobile et carburants (contre 25 pour cent), 27 pour cent des produits électroménagers (contre 24 pour cent) et 25 pour cent de l'ensemble des produits d'hygiène, parfumerie, livre, optique, photo, sport (contre 21 pour cent) (chiffres INSEE - Comptes du Commerce). Seul le secteur de l'habillement a vu une diminution de la part des grandes surfaces alimentaires. Sur tous les types de produits hors véhicules automobiles, le grand commerce en général (spécialisé ou alimentaire) a atteint une part de marché globale de 45 pour cent en 1997 (contre 42 pour cent en 1993). Il représente respectivement 63 pour cent et 58 pour cent des secteur de l'équipement du foyer et de l'aménagement de l'habitat. Quant aux nombres de magasins et aux surfaces, les progressions sont importantes également : 1 123 hypermarchés et 6.4 millions de m2 début 1998 contre 955 et 5.3 millions de m2 début 1993.

En termes de concurrence, les dispositions légales applicables aux relations producteurs-distributeurs proviennent pour l'essentiel de l'ordonnance du 1er décembre 1986 relative à la liberté des prix et de la concurrence, modifiée notamment par la loi du 1er juillet 1996 portant sur l'équilibre et la loyauté des relations commerciales. A ceci s'ajoutent bien sûr les articles 85 et 86, d'applicabilité directe, ainsi que le règlement communautaire de 1989 sur les concentrations et la loi du 3 juillet 1996 sur l'urbanisme commercial.

La loi du 1er juillet 1996 a eu pour double objectif de clarifier les relations verticales et d'équilibrer la concurrence horizontale entre distributeurs. Elle n'a pas modifié l'interdiction des pratiques discriminatoires non justifiées par des contreparties réelles. En revanche, pour contribuer à un meilleur équilibre dans les négociations entre producteurs et distributeurs, elle a libéralisé le régime du refus de vente. Dans le même temps, elle a encadré strictement les modalités de rupture des relations commerciales par les distributeurs. Désormais, ces derniers doivent faire précéder de telle ruptures d'un préavis raisonnable et ne peuvent utiliser la menace de rupture afin d'obtenir, de la part des fournisseurs, des conditions exorbitantes des conditions générales de vente. De plus, elle a limité strictement le recours aux "primes de référencement" : désormais, tout avantage financier négocié lors de la passation de commande doit être mis en relation avec un engagement écrit portant soit sur des volumes garantis, soit sur des services rendus. Enfin, elle a clarifié les règles de facturation et a permis aux producteurs d'éviter que leurs produits soient exagérément utilisés comme produits d'appel, en empêchant les distributeurs de réintégrer certaines remises commerciales dans le seuil de revente à perte.

La loi du 1er juillet 1996 s'est également attaquée au problème de la concurrence horizontale entre distributeurs de types différents en mettant un terme aux pratiques de revente à perte, notamment par une simplification des règles de facturation et une stricte limitation de l'exception d'alignement : désormais, seules les surfaces ne dépassant pas 300 m2 en alimentaire et 1 000 m2 en non alimentaire peuvent descendre en dessous du seuil de revente à perte afin de s'aligner sur les prix d'un concurrent direct : les grandes surfaces sont donc dans l'impossibilité de revendre à perte, même pour s'aligner. De même, a été introduite, à propos des produits fabriqués ou modifiés dans les magasins (pain, ...), une prohibition des prix abusivement bas ayant un effet prédateur. De tels prix ne pouvaient auparavant être combattus que dans le cadre de l'abus de position dominante. Or il est très rare que le Conseil de la Concurrence estime qu'une enseigne de la grande distribution, en particulier alimentaire, jouit d'une position dominante.

Parallèlement, la loi du 3 juillet 1996 a gelé l'ouverture de nouvelles grandes surfaces alimentaires ou l'extension des grandes surfaces présentes. Ce faisant, elle a augmenté la valeur des grandes surfaces existantes et a favorisé le mouvement de concentration de la distribution. D'une part, elle a rendu plus difficile la croissance interne des enseignes. D'autre part, le gel a contribué à affaiblir les groupements de détaillants au profit des distributeurs intégrés. En effet, ces derniers sont dorénavant tentés, pour croître, de racheter un à un les magasins des indépendants appartenant à des groupements. Les propriétaires indépendants, de leur côté, ont davantage intérêt à accepter les offres. Pour se protéger, les groupements ont donc recours à des clauses de préemption. La validité de celles-ci a été reconnue par le jurisprudence, même lorsque le bénéficiaire du droit de préemption n'est pas capable d'enchérir au même niveau que l'acheteur extérieur.

Que ce soit dans la distribution alimentaire ou dans la distribution spécialisée, les groupes intégrés coexistent en effet avec des groupements de détaillants. En particulier, les deux premiers distributeurs alimentaires (Leclerc et Intermarché) sont des groupements de commerçants indépendants qui centralisent leurs achats. Leurs centrales, de tailles voisines, représentent chacune environ 15 pour cent des achats de la grande distribution alimentaire, Leclerc étant d'ailleurs en cours de rapprochement contractuel avec un autre groupement de taille plus réduite (Système U, cinq pour cent).

Même si l'augmentation de la puissance d'achat a déjà partiellement été prise en compte par le législateur, la réflexion économique et juridique sur ce phénomène est toujours l'une des préoccupations importantes des autorités chargées de la concurrence. Actuellement, sept réseaux réalisent approximativement 85 pour cent du chiffre d'affaires de la grande distribution en France, le plus gros étant de l'ordre de 15 pour cent. Dans quelques années, ces sept réseaux pourraient n'en constituer plus que cinq, le plus gros étant alors de l'ordre de 20 pour cent. Une telle situation est caractéristique d'un oligopole.

Du côté de l'aval, c'est-à-dire des marchés de détail, un oligopole à cinq participants ne pose pas de problème spécifique. Cependant, les marchés pertinents sont de dimension locale, et il se peut donc que certaines zones de chalandise présentent une concentration bien supérieure à la concentration nationale. Il convient donc d'examiner ces zones une par une, en considérant les différentes formes de distribution, afin de s'assurer que les consommateurs gardent toujours un choix suffisant pour être capables de faire jouer la concurrence entre distributeurs. Cette analyse est classique, et elle n'est pas spécifique aux questions de distribution. Nous nous intéresserons donc plutôt à l'amont.

Du côte de l'amont, c'est-à-dire des marchés de gros, l'analyse précédente ne peut être transposée telle quelle. En effet, si le problème de l'acheteur est résolu dès qu'il trouve un vendeur de substitution, il n'en est pas de même pour le vendeur. Les fournisseurs ne peuvent en général se contenter d'être présents chez un ou deux grands distributeurs. L'expérience montre qu'il leur faut vendre à tous, ou presque tous, les distributeurs s'ils veulent rentabiliser correctement leurs investissements.

Les fournisseurs, ou tout du moins ceux qui sont d'une taille suffisante, doivent tout d'abord être présents sur l'ensemble du territoire, et non se contenter d'une ou deux régions géographiques. C'est par exemple une condition nécessaire de rentabilisation des investissements publicitaires, dans la mesure où ces derniers sont souvent financés sur une base nationale (télévision, grands quotidiens ou hebdomadaires, radios). Pour qu'ils soient pleinement rentables, il faut que tous les consommateurs touchés soient en mesure d'acheter le produit, ce qui suppose une couverture nationale par les réseaux de distribution. Or seuls deux réseaux peuvent actuellement garantir aux fournisseurs une présence nationale. En cas d'absence chez ces distributeurs, le fournisseur devra traiter avec plusieurs autres distributeurs pour parvenir au même résultat. L'absence du fournisseur chez un distributeur se traduit donc souvent par une très faible disponibilité du produit dans certaines zones, qui met en péril la rentabilité des investissements publicitaires.

Même au sein d'une zone unique, les reports de consommateurs d'une enseigne à une autre en cas d'absence d'un produit ne sont pas évidents, dans la mesure où les distributeurs peuvent le plus souvent proposer des produits substituables. De plus, il existe pour le consommateur un coût à changer d'enseigne. Si ce coût peut se révéler rentable lorsqu'il manque beaucoup de produits au distributeur, il ne l'est pas forcément lorsqu'il ne manque que quelques produits. Il faut alors que le consommateur soit particulièrement attaché à une marque pour être prêt à supporter l'ensemble du coût du changement (temps, déplacement, deuxième passage en caisse, incertitude sur la présence du produit dans le nouveau magasin, méconnaissance du nouveau magasin). Ainsi, on peut considérer que, même en présence de reports potentiels des consommateurs, un fournisseur qui se trouve absent des linéaires d'un grand distributeur subit le plus souvent une perte de volume. Cette appréciation est corroborée par une étude très récente de l'Insee, qui montre, à partir de l'analyse des comportements d'un panel d'environ 2 000 ménages, que, si la marque habituelle d'un consommateur est absente de sa grande surface principale, celui réagit essentiellement en achetant un produit équivalent au même endroit (56 pour cent des consommateurs), puis en reportant cet achat à une visite suivante au même magasin (24 pour cent), et, en troisième lieu, en allant dans un autre magasin (20 pour cent seulement).

La perte de volume induite par une absence des linéaires d'un distributeur peut se révéler très pénalisante pour le fournisseur. En effet, une perte de volume même modérée, de l'ordre de cinq pour cent par exemple, se traduit en général par une diminution beaucoup plus importante du résultat. Dans certains cas, c'est la santé financière du fournisseur elle-même qui peut être en cause. Dans ce cas, son lien avec le distributeur devient très délicat si le distributeur s'aperçoit qu'il peut, à lui seul, mettre en difficulté le producteur. Il est difficile de mesurer la fréquence de telles situations, car de nombreux paramètres entrent en jeu : marge du fournisseur, irréversibilité de ses investissements, taux d'utilisation de ses capacités, coût du stockage, comportement des banques... Mais le problème est réel, et mériterait d'être plus étudié. L'analyse pertinente, ici, est très loin de l'analyse classique de la théorie de l'oligopole. En fait, il faut s'attacher au cas où chaque distributeur est une porte d'entrée nécessaire, mais non suffisante, pour aller sur le marché. Il est probable qu'il existe un seuil d'intolérabilité dans le nombre de portes, mais les instruments actuels font défaut pour l'estimer. Il serait particulièrement utile que des travaux soient menés dans cette direction.

De même, il serait intéressant de mieux mesurer la place des marques de distributeurs dans la négociation entre fournisseurs et distributeurs. Elles permettent aux distributeurs à la fois de proposer des produits substituables à ceux des fournisseurs et d'acquérir ce qui leur a longtemps fait défaut : une différenciation entre enseignes. Cette différenciation est fondamentale car elle crée l'attachement du client à son distributeur, et diminue d'autant les pertes de clientèles lorsque certains produits de marque sont absents des linéaires. Les marque de distributeurs influent donc par au moins deux canaux (différenciation des enseignes, substituabilité des produits) sur les négociations entre producteurs et distributeurs. Il en existe peut-être d'autres, qui restent à élucider. En particulier, de nombreux producteurs de marques ont choisi de fabriquer des marques de distributeurs. Est-ce tout simplement parce que d'autres le feront si eux-

mêmes refusent, où y a-t-il d'autres raisons ? La négociation avec le distributeur est-elle facilitée si l'on est aussi fabricant de marque de distributeur ? De multiples questions restent ouvertes, et demanderaient des efforts de recherche.

De plus, les aspects horizontaux sont omniprésents dans les négociations verticales. En particulier, le degré de concurrence entre distributeurs est une variable clé de la négociation verticale. En effet, en prévendant leurs produits par de larges campagnes de publicité, les fournisseurs tentent de rendre de plus en plus coûteux les refus d'achats des distributeurs. En particulier, si le producteur possède une marque notoire, le distributeur ne sera pas en mesure de capturer complètement le consommateur, et l'amont pourra défendre son pouvoir de négociation. Cependant, le coût du refus d'achat pour le distributeur dépend aussi crucialement de la concurrence entre distributeurs. Dans cet esprit, toute mesure de blocage de la croissance ou de l'entrée tend à figer les positions acquises et favorise des comportements de collusion tacite. S'il n'y a pas de barrière à l'entrée, il est extrêmement difficile de s'entendre explicitement ou tacitement car tout accord peut à tout moment être remis en cause par un entrant. Une telle concurrence est le meilleur rempart pour que les linéaires ne deviennent pas une ressource essentielle, au sens de la théorie de la régulation. Il est donc important de laisser ouvertes des possibilités d'entrée et de croissance d'un réseau par rapport à un autre, et de ne pas figer les positions acquises. En effet, même si elles sont compréhensibles sur le plan de la concurrence horizontale entre formats de distribution, les mesures de blocage ou de gel des positions facilitent les comportements de collusion et risquent de renforcer les effets de la puissance d'achat.

Si les linéaires ne sont pas une ressource essentielle, ils sont évidemment une ressource importante, et qui plus est ils sont rares. Il semblerait en effet qu'il y ait plutôt plus de produits candidats que de mètres linéaires pour les héberger. Les distributeurs sont donc en mesure de faire des choix et d'arbitrer entre des produits concurrents, ce qui leur donne évidemment beaucoup de poids dans les négociations avec les producteurs. Ils restent cependant en concurrence entre eux, ce qui limite leur marge dans l'agencement de leurs rayons.

En d'autres termes, la loi simple de l'offre et de la demande, appliquée aux linéaires, donne à ceux-ci une grande valeur. Toute mesure tendant à limiter la croissance des linéaires renforce évidemment la rareté de ceux qui existent déjà et donc augmente leur valeur. Le linéaire est un patrimoine dont la rareté augmente la valeur.

Sur ce plan, les stratégies des producteurs consistant à élargir les gammes de produits et à multiplier les produits différents sont des éléments aggravants. Individuellement, cette stratégie de diversification et de différenciation pourrait être bénéfique pour un producteur dans sa relation avec les distributeurs s'il était le seul à l'appliquer : il obtiendrait ainsi une part plus importante du linéaire. Mais si tous les producteurs appliquent cette stratégie, ils ne gagnent pas d'espace sur les linéaires les uns par rapport aux autres. En revanche, ils augmentent la rareté relative des linéaires face à l'offre de produits. Cette stratégie est donc individuellement rationnelle mais collectivement nocive pour les producteurs. Elle est typique de ce que l'on nomme en théorie des jeux le "dilemme du prisonnier".

A court terme, la valeur des linéaires est essentiellement payée par les fournisseurs, qui doivent proposer d'importantes remises pour trouver leur place sur ceux-ci : la puissance d'achat se manifeste donc par un simple transfert monétaire des uns vers les autres. A long terme, le coût n'est pas supporté seulement par les producteurs, mais plus largement par l'ensemble de la collectivité. En effet, le transfert monétaire va avoir des effets en termes de capacité de recherche/développement : il va amoindrir les ressources disponibles pour le croissance des producteurs et le développement de nouveaux produits.

Le phénomène va de plus inciter l'amont à se concentrer à son tour. En se concentrant, l'amont crée de nouvelles barrières à l'entrée pour toutes les petites entreprises tentées par l'entrée sur le marché.

Celles qui sont déjà en place peuvent être les victimes de la concentration en étant soit rachetées, soit éliminées. Celles qui pourraient entrer risquent d'en être dissuadées par le poids de grands groupes dominants. La puissance d'achat peut donc se traduire par un problème de politique industrielle et générer des distorsions qui handicapent l'ensemble de la collectivité. La question de savoir si ces aspects doivent participer de la politique de la concurrence se posera à l'avenir de façon cruciale, car il est probable que les distributeurs seront à l'avenir tentés d'accroître encore leur puissance d'achat.

Il semble en effet que la puissance d'achat va continuer à croître et non pas se diluer dans un marché unique européen de l'achat. Ce n'est pas parce que les achats seront regroupés en Europe que la puissance d'achat, en termes concurrentiels, devra se calculer en parts de marché au niveau européen. Adopter une telle démarche reviendrait à dire qu'un hypothétique distributeur en monopole dans un petit pays européen et absent des autres pays n'aurait pas de puissance d'achat. En effet, sa part de marché au niveau européen serait plafonnée par la part de la consommation dans ce petit pays ramenée à la consommation européenne. Or il est évident qu'un tel distributeur en monopole pourrait profiter de cette position pour exercer une pression extrêmement importante sur l'ensemble des fournisseurs, puisqu'il aurait toute latitude pour les exclure d'un marché. C'est pourquoi le fait que les marchés finaux soit au plus nationaux, et souvent locaux, n'est pas sans incidence sur l'étendue géographique des marchés amont : en tout état de cause, cette dernière ne saurait être européenne.

GERMANY

1. Re. Question 1 (general trends)

The discussion in Germany on concentration and buying power in the retail sector generally concerns food retail. Both the low percentage return on sales as well as the current results of the Bundeskartellamt's (BKartA) investigations into major retail mergers show that there is more or less intensive competition on the distribution side in many retail markets at the present time. The market entries of foreign retail enterprises, even though still hesitant, also indicate that the interest of foreign suppliers in the German market is apparently growing again.

Against this background the discussion on potential retail buying power raises the following questions with regard to the situation in Germany:

Is the difference between the power of the leading retail enterprises and that of the manufacturers market-related, i.e. a result of progressive structural change and an expression of current competition processes? Or is it power-related, which would make it necessary to proceed against the buying power with competition law tools of structural and conduct control?

a) Intensive competition on the distribution side of the retail trade does initially support the presumption that the retail enterprises do not have dominant positions in their supply markets, since the price and condition concessions obtained from the manufacturers as a rule have to be passed on by the retailers to the final consumer. Also, in the course of its investigation into important mergers in the retail trade, the BKartA ascertained in 1998 that the leading German retailers do not form a dominant buyer oligopoly due to the distribution side competition existing between them and to the possibility manufacturers have of turning to other channels of distribution (see reply to question 4).

b) The current market situation, however, does not rule out the existence of buying power in a bilateral relationship between individual retailers and manufacturers. As a rule this does not involve market dominance but the relative market power of individual/particular buyers. The BKartA is for example currently carrying out an abuse control examination into the complaint raised by individual manufacturers that the largest German retailer (Metro AG) is unjustifiably demanding a co-operation bonus (without quid pro quo) from its suppliers in connection with its acquisition of a competitor (allkauf) (see reply to question 4).

c) An increasingly important question in the discussion on buying power in the retail trade is whether manufacturers are competing with the retail trade in the products or groups of products concerned. A certain degree of vertical product integration in the food retail trade may for example result in the manufacturer's first or second brands being ousted from the market in favour of the retailers' private brands. Such a strategy is being employed to a growing extent as a threat against suppliers who do not wish to grant the conditions demanded by the buyers. If, however, a manufacturer has strong first brands and corresponding price-setting power, it is unlikely that such strategies will be successful.

d) The BKartA sees another trend in the increasing - also international - co-operation between manufacturers and retailers to optimise logistics, flow of goods and exchange of information (see: ECR Efficient Consumer Response). This is meant to balance to some extent the conflicting interests between retailers and manufacturers. A final judgement cannot be made at present as to whether the strong negotiating position of the retail trade will enable it to harmonise conditions along the lines of a "most favoured company clause", or whether the product markets concerned will be less vulnerable to the incidence of buying power.

2. Re. Question 2 (legal situation)

Buying power is generally defined as "the scope of action of buyers which is not sufficiently controlled by competition, vis-à-vis suppliers in upstream stages of the economy ". Whenever buyers acquire or are likely to strengthen a dominant position as a result of external company growth, the BKartA intervenes by applying the instrument of merger control (*a*), which is geared to market structures. Existing dominant or powerful positions are subject to abuse control (*b*), which is linked to market behaviour. The 6th Act to Amend the Act against Restrains of Competition (6. Novelle des Gesetzes gegen Wettbewerbsbeschränkungen - GWB), which will enter into force on 1 January 1999, contains various statutory amendments that will also be of significance with respect to retail buying power (*c*). The question of the BKartA's role in examining the competition law aspects of buying power is answered in *d*).

a) In the course of the 5th Act to Amend the GWB in 1989 the structural factors listed in Section 22 (1), no 2 [4] [editor's note - these superscript numbers refer to the enumerated portion of the Annex at the end of the submission] as examples for examining whether an enterprise has a "paramount market position" were supplemented with two demand-related criteria i.e.:

- the "ability" of the given firm "to switch its supply or demand to other goods or commercial services" and
- the "possibility of the opposite side of the market to turn to alternative firms".

The legislator did not, as a result of this, separate merger control in the retail trade from the intervention threshold of market dominance, however. He merely presumed that, compared with the distribution side, dominant positions in supply markets may already be achieved with significantly lower market shares (flexibility of production of manufacturers < flexibility of product range of retailers). The legislator took the view that the manufacturer is not able to turn to other buyers if a considerable number of enterprises in the market concerned do not have sufficient and reasonable sales alternatives.

The extension of the definition of dominance does not in the end have any notable influence on the enforcement practice of the BKartA because the BKartA had already taken account of both criteria before they were explicitly referred to in the wording of the Act.

b) The statutory basis for combating the abusive practices of buyers is given in Sections 22 and 26(5) of the GWB. Section 22(4) of the GWB grants the cartel authority the possibility to intervene against the abusive practices of dominant buyers. Under Section 26(3), dominant and powerful enterprises within the meaning of Section 26(2) of the GWB are forbidden *inter alia* from using their market position to cause other enterprises to accord them preferential terms in the absence of facts justifying such terms.

c) The 6th Act to Amend the GWB contains the following amendments in respect of buying power:

- the abuse control of dominant enterprises has - in accordance with EC law - been transformed into an actual prohibitory provision (Section 19(1) [9)] GWB[new]). At the same time this opens up the possibility of taking civil action;

- the lawmaker is attempting by means of the 6th Act to Amend the GWB to solve the problem of how to encourage disadvantaged parties to name names. If retail enterprises want to cause their suppliers to effect certain payments, perform additional services or grant discounts, the abuse control proceedings of the cartel authorities are often faced with the problem that the suppliers concerned refuse to name these retailers [10)] GWB[new] provides for the cartel authority also to initiate proceedings without the name of the complainant appearing in the files from the very beginning. Furthermore, the cartel authorities' evidentiary rules have been relaxed in cases in which they wish to protect the anonymity of the complainant in the course of administrative proceedings (Section 70 [11)] GWB[new]). It remains to be seen whether these provisions will in fact contribute to a solution of the problem concerning the reluctance to name names.

d) The BKartA has sole responsibility for enforcing merger control in Germany. It must prohibit mergers which create or strengthen dominant positions in supply markets. The control of conduct under Sections 22 and 26 GWB is on the other hand exercised both by the BKartA and the cartel authorities of the Länder. The BKartA is (always) responsible whenever the effects of the restraint of competition extend beyond the borders of one Land. Abusive practices which are subject to Sections 22 and 26 GWB may be prohibited, those which fulfil the criteria of Section 26 GWB in addition can be subject to the imposition of an administrative fine.

Moreover, violations of Section 26(2) and (3) GWB have also become very important in civil proceedings.

In addition to the GWB, the Act against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb - UWG) provides protection against unfair or unethical competitive practices. The cartel authorities are not responsible for enforcing the UWG. Suspected violations of the provisions of the UWG are as a rule brought before the civil courts.

3. Re. Question 3 (joint purchasing)

Under German competition law, small and medium-sized retailers, in particular, are permitted to make joint purchasing arrangements in order to offset the structural disadvantages they suffer vis-à-vis large retailers and to limit the horizontal market power of large retail groups (Section 5c of the GWB). The exemption applies if the arrangement concerned violates the Section 1 [1)] GWB prohibition of cartels.

a) For a joint purchasing arrangement to be exempted from competition law it is necessary that the parties retain their independence. Therefore, concentration rebates and bonuses that act as genuine purchasing obligations are inadmissible. Purchasing commitments are admissible only if entered into for a limited period of time and a limited quantity. Stronger commitments in the purchase or sale of goods and services might result in the partners being heavily dependent on the central agency and losing their freedom of action. Joint purchasing arrangements as a rule raise no competition policy concerns as long as they serve to enhance

the competitiveness of small and medium-sized retailers and hence ensure their survival. However, Section 5c [3)] of the GWB does not allow the creation of structures within a joint purchasing arrangement which resemble those of a group of affiliated companies. Moreover, joint purchasing arrangements must not aggravate the problem of vertical buying power, i.e. the difference in power between the retailer and its suppliers, by further concentrating the demand of retailers. In that sense joint marketing systems may also raise competition law concerns. Such activities might be exempted in particular under Section 5b [2)] (cartels of small and medium-sized enterprises) or Section 38(2) No. 1 [6)] (recommendations of small and medium-sized enterprises) of the GWB. Under current law, joint purchasing arrangements under Section 5c of the GWB do not have to be notified. They are subject to abuse supervision by the cartel authorities.

b) The 6th Act to Amend the Act against Restraints of Competition will extend the substantive exemption provisions for joint purchasing in Section 4(2) [7)] of the GWB[new]. So purchasing obligations will be inadmissible only where they compel the participating enterprises to purchase from particular sources beyond individual cases. In the view of the BKartA, the new provision only just strikes a balance between keeping the parties independent and strengthening the competitiveness of joint purchasing *vis-à-vis* large-scale competitors.

In future, a - simplified - notification procedure applies to joint purchasing arrangements (Section 9(4) [8)] of the GWB[new]). The underlying rationale was that according to German legal tradition the exemption of cartels should be granted in a statutory examination procedure, to be conducted by the cartel authority rather than by means of statutory exemption. This alone allows abuse supervision to remain in place.

4. Re. Question 4 (examples)

The following gives examples of BKartA cases of (*a*) merger control and (*b*) abuse control in which buying power of retailers played an important part.

a) In its important cases of merger control in the retail trade Metro/Kaufhof (1983) and Coop/Wandmaker (1984) the BKartA based its prohibition inter alia on the presence of a dominant position in the national supply market for food. The six largest German purchasing companies (Aldi, Coop, Edeka, Metro, Rewe-Leibrand, Tengelmann) were considered to be a dominant buyer oligopoly. The BKartA defined the "product range that is retailable" as the relevant product market and thus adopted an approach based on the buyers' perspective. The retailers' buying power in the BKartA's opinion was characterised by the fact that by virtue of the quantities purchased and additional factors (nation-wide distribution, central purchasing, etc.) the leading retailers constituted such an important sales potential for manufacturers that the majority of manufacturers could not avoid these buyers, or only at the expense of considerable economic disadvantages.

In both cases the BKartA's prohibitory decision was reversed by the courts. The main reasons were:

- the court rejected the definition of the relevant product market. It held that the market had to be defined from the perspective of the opposite side of the market (food manufacturers). Therefore, all product groups of individual sectors of industry had to be included in the relevant market, taking account of supply-side substitutability;

- the court held that in calculating the market volume and analysing the food manufacturers' possibility of switching from one retailer to another all distribution channels of the manufacturers (wholesale and retail, restaurants, exports, etc.) had to be taken into account;

- in the court's view there was no sufficient evidence to suggest oligopolistic market dominance in the supply markets:

  - it argued that owing to an incorrect market definition and the resultant incorrect calculation of the market volume the BKartA had overstated the leading retailer's market share;

  - it held that bilateral dependence had to be examined in the context of abuse control, not merger control; only a buyer able to influence the overall market was dominant;

  - retailers lacked the possibility of turning to other manufacturers if products of branded goods manufacturers were "successfully sold in advance";

  - there was no empirical evidence to suggest that retailers were granted preferential terms.

Recent merger cases in the retail sector (Metro/allkauf, Schickedanz/Karstadt) have shown that buying power in the supply markets has tended to increase, but has not reached or exceeded the dominance threshold defined by the courts. In both cases the BKartA included different product groups in its examination (e.g. milk and milk products, confectionery, pre-recorded music) on the basis of the market definition used in court decisions. As for the relevant geographic market, the BKartA defined national supply markets for the relevant product groups. However, no single-firm or oligopolistic dominance on the demand side was found for any of the product groups examined. Some of the reasons were as follows:

- the shares of the five leading retailers in the overall volume purchased were below 50 percent;

- there is intense competition in the sales markets among the retailers. As success in competition significantly depends on the purchase of goods, the retailers are subject to horizontal competitive pressure as regards the most favourable purchasing terms;

- although the retail firms have negotiating power vis-à-vis their suppliers, their purchasing terms differ significantly and cannot be interpreted as a manifestation of non-competitive parallel conduct within the oligopoly;

- the merger-induced increases in the volumes purchased were insignificant; consequently, they did not result in a perceptible deterioration of market conditions.

b) Industry associations in particular have complained time and again about what they perceive as growing buying power of the leading retailers. Their criticism is directed mainly at retailers demanding retroactive advantages in the terms following a merger ("wedding bonuses") or listing rebates. However, the complainants are only rarely able to cite actual cases and figures. This may be due to the above-mentioned reluctance to name names. In cases where the BKartA acted informally, the practices objected to were as a rule abandoned.

Another complaint about retailer buying power is currently pending before the BKartA. After the Metro/allkauf merger was cleared, individual suppliers complained that Metro, in connection with its

acquisition of allkauf, requested its suppliers to grant an unjustified co-operation bonus (wedding bonus) without quid pro quo. They also complained that Metro demanded a retroactive adjustment of conditions in connection with Metro and allkauf cost prices. The BKartA is currently examining the facts.

5. Re. Question 5 (examining buying power - institutions)

The instruments for combating and controlling power-related buying power shown above are mainly designed to protect competition as an institution. (As to the competence of the BKartA and the cartel authorities of the Länder, see reply to Question 2 d). It has proved to be very successful that the Bundeskartellamt, i.e. an authority that is traditionally independent and makes its decisions according to competition criteria only, is responsible at federal level for competition matters in this sector of the economy. Transferring competition tasks in the retail sector to special authorities is not a matter for discussion in Germany. This sector of the economy cannot be compared with special sectors such as telecommunications, for example, where general competition law is overlapped by a sector-specific law. The retail sector is subject without restriction to the provisions of the GWB, which is enforced by the competition authorities.

Annex 1

Pertinent provisions of the competition statute currently in force (6th Act to Amend the Act Against Restraints of Competition - 6. Novelle des Gesetzes gegen Wettbewerbsbeschränkungen - GWB)

1) Section 1

1. Agreements made for a common purpose by enterprises or associations of enterprises and decisions of associations of enterprises shall be of no effect, insofar as they are likely to influence, by restraining competition, production or market conditions with respect to trade in goods or commercial services. This shall apply only insofar as this Act does not provide otherwise.

2. The term "decision of associations of enterprises" shall include decisions of meetings of the members of a legal entity, insofar as such members are enterprises.

2) Section 5b

1. Section 1 shall not apply to agreements and decisions whose object is the rationalisation of economic activities by a type of co-operation between enterprises other than that specified in Section 5a, if competition on the market is not thereby substantially impaired and the agreement or decision serves to promote the efficiency of small or medium-sized enterprises.

2. Section 5a(2) and (3) shall apply as appropriate.

3) Section 5c

Section 1 shall not apply to agreements and decisions whose object is the joint purchasing of goods or commercial services, without the participating enterprises being compelled to purchase, if competition on the market is not thereby substantially impaired and the agreement or decision serves to promote the competitiveness of small or medium-sized enterprises.

4) Section 22

1. An enterprise is market-dominating within the meaning of this Act insofar as, in its capacity as a supplier or buyer of a certain type of goods or commercial services.

2. it has no competitor or is not exposed to any substantial competition, or

3. it has a paramount market position in relation to its competitors; for this purpose, its share of the market, its financial strength, its access to the supply or sales markets, its links with other enterprises, the existence of legal or actual barriers to the market entry of other enterprises, its ability to switch its supply or its demand to other goods or commercial services, as well as the ability to the opposite side of the market to deal with other enterprises shall in particular be taken into account.

4. Two or more enterprises shall also be deemed market-dominating insofar as, in regard to a certain type of goods or commercial services, no substantial competition exists between them, for factual reason, either in general, or in specific markets, and they jointly meet the requirements of subsection (1).

5. It shall be presumed that:

- an enterprise is market-dominating within the meaning of subsection (1), if it has a market share of a least one third for a certain type of goods or commercial services; this presumption shall not apply when the enterprise recorded a turnover of less than DM 250 million in the last completed business year;

- the conditions specified in subsection (2) are met if, in regard to a certain type of goods or commercial services;

  a) three or less enterprises have a combined market share of 50 percent or over, or

  b) five or less enterprises have a combined market share of two thirds or over; this presumption shall not apply, insofar as enterprises are concerned which recorded turnovers of less than DM 100 million in the last completed business year.

As regards the calculation of the market share and turnover, Section 23(1), sentences 2 to 10 shall apply, as appropriate.

In regard to market-dominating enterprises, the cartel authority shall have the powers set out in subsection (5), insofar as these enterprises abuse their dominating position in the market for these or any other goods or commercial services. An abuse within the meaning of sentence 1 is present, in particular, if a market-dominating enterprises as a supplier or buyer of a certain type of goods or commercial services;

- impairs the competitive possibilities of other enterprises in a manner relevant to competition on the market in the absence of facts justifying such behaviour;

- demands considerations or other business terms which deviate from those which would result in all probability if effective competition existed; in this context in particular the practices of enterprises on comparable markets characterised by effective competition have to be taken into account;

- demands less favourable considerations or other business terms than are demanded from similar buyers on comparable markets by the market-dominating enterprise, unless there is a factual justification for such differentiation.

If the conditions laid down in subsection (4) are satisfied the cartel authority may prohibit abusive practices by market-dominating enterprises and declare agreements to be of no effect; Section 19 shall apply as appropriate. Prior to such action, the cartel authority shall request the parties involved to discontinue the abuse to which objection was raised.

Insofar as the conditions laid down in subsection (1) are satisfied in regard to an affiliated company (Konzernunternehmen) within the meaning of Section 18 of the Joint Stock Companies Act, the cartel authority may use its powers under subsection (5) in relation to each affiliated company.

5) Section 26

1. Enterprises or associations of enterprises shall not incite another enterprise or association of enterprises to refuse to sell or purchase with intent unfairly to harm certain enterprises.

2. Market-dominating enterprises, associations of enterprises within the meaning of Section 2 to 8, 99 (1) Nos. 1 and 2 as well as (2), 100(1) and (7), 102 to 103, and enterprises fixing prices under Sections 16, 100(3), or 103(1), No. 3 shall not unfairly hinder, directly or indirectly, another enterprise in business activities which are usually open to similar enterprises, nor in the absence of facts justifying such differentiation treat such enterprise directly or indirectly in a manner different from the treatment accorded to similar enterprises. Sentence 1 shall also apply to enterprises and associations of enterprises, insofar as small or medium-sized enterprises as suppliers or purchasers of a certain type of goods or commercial services depend on them to such an extent that sufficient and reasonable possibilities of dealing with other enterprises do not exist. A supplier of a certain type of goods or commercial services shall be presumed to depend on a purchaser within the meaning of sentence 2, if, in addition to the price reductions or other considerations customary in the trade, that purchaser regularly obtains special benefits not granted to similar purchasers.

3. Market-dominating enterprises and associations of enterprises within the meaning of subsection (2), sentence 1, shall not use their market position to cause other enterprises in business activities to accord them preferential terms in the absence of fact justifying such terms. Sentence 1 shall also apply to enterprises and associations of enterprises within the meaning of subsection (2), sentence 2, in relation to the enterprises depending on them.

4. Enterprises having superior market power in relation to small and medium-sized competitors must not use their market power to unfairly hinder those competitors either directly or indirectly.

5. If, on account of specific facts, it appears in the light of general experience that an enterprise has used its market power within the meaning of subsection (4), it shall be incumbent on such enterprise to disprove the appearance and to clarify such circumstances of its operations justifying legal action whose clarification is not possible for the competitor concerned or for an association as defined in Section 35(3) but is easily possible for and can reasonably be expected of the enterprise against which action is taken.

6) Section 38

Subsection (1) No. 11 and, where No. 1 applies, subsection (1) No. 12 shall not apply to:

1. recommendations issued by associations of small or medium-sized enterprises which are confined solely to its members, if such recommendations;

   a) serve to promote the efficiency of those involved vis-à-vis large enterprises or other large-scale forms of enterprise and thereby improve the conditions of competition, and

   b) are expressly declared to be non-binding on the persons to whom they are addressed, and no economic, social or other pressure is exerted to enforce them;

Pertinent changes in the competition statute - to be in force January 1, 1999 - G W B n e w

7) Section 4

1. Section 1 shall not apply to agreements and decisions whose subject matter is the joint purchasing of goods or the joint procurement of commercial services, but which do not, except in individual cases, compel the participating undertakings to purchase from that source, provided the conditions in subsection (1) nos. 1 and 2 are satisfied.

8) Section 9

1. The cartel authority shall be notified without delay by the participating undertakings pursuant to 2 of agreements and decisions of the kind described in Section 4(2). The notification shall take effect only if the by-laws or the partnership agreement are attached thereto, the information pursuant to subsection (2) nos. 1 and 2 is included; and the notification provides information on the sector of the economy concerned, on proposed institutional committees and on the current internal and external sales of the participating undertakings. Every two years after the notification the participating undertakings shall notify the cartel authority of any changes in the information specified in 2, in the by-laws or the partnership agreement and in the group of participating undertakings.

9) Section 19

1. The abusive exploitation of a dominant position by one or several undertakings shall be prohibited.

10) Section 54

1. The cartel authority shall institute proceedings *ex officio* or upon application. If so requested, the cartel authority may institute proceedings *ex officio* for the protection of a complainant.

2. Parties to the proceedings before the cartel authority are:

   – those who have applied for the institution of proceedings;

   – cartels, undertakings, trade and industry associations or professional organisations against which the proceedings are directed;

   – persons and associations of persons whose interests will be materially affected by the decision and who, upon their application, have been admitted by the cartel authority to the proceedings;

   – in the cases of Section 37(1) no. 1 or 3, also the seller.

3. The Federal Cartel Office shall also be a party to proceedings before the supreme *Land* authorities.

11) Section 70

1. The appellate court shall investigate the facts *ex officio*.

2. The presiding judge shall endeavour to have formal defects eliminated, unclear motions explained, relevant motions made, insufficient factual information completed, and all declarations essential for ascertaining and assessing the facts made.

3. The appellate court may direct the parties to file statements within a specified time on issues requiring clarification, to specify evidence, and to submit documents as well as other evidence in their possession. In the event of failure to observe the time limit, a decision may be made on the basis of the record regardless of evidence which as not been produced.

4. If a request pursuant to Section 59(6) or an order pursuant to Section 59(7) is challenged by way of appeal, the cartel authority shall substantiate the factual aspects. Section 294(1) of the Code of Civil Procedure shall be applicable. No substantiation shall be required insofar as Section 20 presupposes that small or medium-sized enterprises are dependent on undertakings in such a way that sufficient or reasonable alternatives of resorting to other undertakings do not exist.

ITALY

1. Trends in manufacturing and retail distribution affecting retail buyer power, including the use of private brands

For a long time, the structure of retail distribution in Italy was so fragmented that the problem of retail buyer power was empirically irrelevant. The situation was due a number of factors, including the urbanised nature of the country and a very restrictive regulation of retail distribution. Regulation was based on a national law, no. 426/71, and on subsequent implementing ministerial decrees. With special reference to grocery products, the law made the opening of a new outlet conditional on a licence given by the competent municipal government, on the basis of "commercial plans" which established, in each municipality, maximum thresholds for the global selling surface for each category of products. For outlets with a surface exceeding 400 m^2 in municipalities with less than 10 000 residents, as well as for outlets with a surface exceeding 1 500 m^2, the regional government had a veto power with respect to the municipal decision concerning the licence. Representatives of trade and commercial interests were involved in the licensing process.

Since the mid-eighties, however, some regional governments, especially in northern Italy, adopted a less restrictive attitude towards the opening of large outlets. Although the structure of retailing in Italy is still significantly more fragmented than, for instance, in France, a significant evolution towards higher concentration has already taken place. The process is continuing throughout the country, but the stage of development differs greatly across regions.

The regulation of retail distribution in Italy was significantly reformed by Law.114 of March 1998. With respect to the opening of new medium size outlets (i.e. between 150 m^2 and 1 500 m^2 in municipalities with less than 10 000 inhabitants or with a surface between 250 m^2 and 2 500 m^2 in municipalities with more than 10 000 inhabitants) the new law still maintains the requirement of a municipal license, but significantly simplifies the procedures for obtaining it. The same holds for larger outlets, for which the municipal license should be given with the consent of the regional government.

Table 1
Structure of retail distribution in Italy

	1985	1990	1995
Number of outlets	853 645	875 831	575 230
Number of large outlets (supermarkets +hypermarkets)	2 999	4 341	5 853
Outlets per 10.000 inhabitants	150	174	101*
Employees per outlet	n.a.	2.4	3.4*

*1994 values.

Sources: Ministry of Industry; D. Pilat (1997), "Regulation and performance in the distribution sector", OECD Economics Department Working Paper no. 180.

As a consequence of the aforementioned regulatory framework, in Italy associative/co-operative groupings of small retailers had a significant impact on the development of large scale retailing. These

associations usually operate as joint-purchasing entities and provide members with technical and marketing assistance. Often the association also promotes common private brands and advertising campaigns.

A few agreements have been stipulated between different associations of retailers, for jointly negotiating purchasing conditions for some of their supplies. The establishment of joint-purchasing groups ("*centrali d'acquisto*") has involved, in some cases, also large retail companies. At the national level, however, the shares held by the different joint purchasing groups in the modern distribution of grocery products are always lower than 15 percent (Table 2).

Table 2

Joint purchasing groups
(market shares at the national level in modern distribution of grocery products; first semester 1997)

Coop Italia	consortium of consumer co-operatives	13.2
Intermedia 90	includes some large retailers	12.2
Euromadis	between associative groups of retailers	10.5
Consorzio	between associative groups of retailers	10.5
Supercentrale	includes some large retailers	9.6
Sicon	between associative groups of retailers	8.7
Rinascente-Finiper	includes some large retailers	7.4
Crai	association of retailers	6.8

In Italy, a significant development of private brands started only in the nineties, when, as a result of increasing competition between modern retail outlets and of the opening of some discount stores, private brands became an important instrument for differentiating and optimising retail product assortments. While leading industrial brands are generally included in the assortment, the same is not true for secondary industrial brands; private brands, as well as minor specific (national or local) industrial brands, on the other hand, play a central role in differentiation strategies.

Recent evolution of the structure of Italian retailing has caused the buyer power of retailers with respect to manufacturers to become an issue in policy debate. Since the beginning of the nineties, the Italian association of branded goods manufacturers, Centromarca, which includes both national and foreign producers operating in Italy, has been lobbying Parliament and the Government for regulatory measures aimed at impeding loss leader sales and, more generally, sales below cost, and at preventing the imposition by retailers of excessively burdensome conditions on their suppliers. The association of large retailers (Federazione Associazioni Imprese Distribuzione), on the other hand, argued that the low prices which large retailers offered to consumers depended on their greater efficiency with respect to small retailers, and that in any case retail prices always covered costs because they were established so as to maximise profits.

2. Actual and proposed provisions in competition or related statutes (including general Civil Codes) which may prohibit certain behaviour associated with retailer buyer power

2.1 Competition law

In principle, the prohibition of restrictive agreements contained in Section 2 of the Competition Act, no. 287/90, may be applied to agreements between retailers aimed at increasing their buying power, if such agreements have as their object or effect a significant restriction of competition on the relevant market.

Also the prohibition of the abuse of a dominant position, contained in Section 3 of the Act, may be applied to the abusive exercise of buying power by an undertaking (or a group of undertakings) holding a dominant position on a relevant market.

Finally, in merger evaluation under Section 6 of the Act, the Competition Authority considers whether a concentration creates or strengthens a dominant position, eliminating or restricting significantly and on a lasting basis, competition on the relevant market; in principle, the law also allows consideration of dominant positions on the demand side, with reference to buying power.

2.2 Abuse of economic dependence

Responding to repeated requests coming from associations of branded goods producers and small retailers, in Act no. 192 of June 22, 1998 (concerning industrial sub-supplies) the Italian Parliament established the statutory prohibition of the abuse by an undertaking of the status of economic dependence of a supplier or a purchasing undertaking (Section 9). The rule, therefore, may be applied to the exercise of buying power.

Economic dependence is defined in the law as a situation in which an undertaking is able to determine, in its commercial relations with another undertaking, an "excessive unbalance of duties and claims", and should be evaluated taking the substitution possibilities existing for the claimant into account.

The illustrative list of conduct which might be considered as abusive under the prohibition of abuse of economic dependence includes refusal to deal, the application to trading partners of unjustifiably burdensome or discriminatory contractual conditions and the arbitrary rupture of existing trading relations. The Act specifies that an agreement resulting in an abuse of economic dependence is null and void. Moreover, it does not make any reference to the impact of the considered practices on the market, apparently focusing merely on the bilateral balance of power.

The enforcement of the rule was assigned to arbitration procedures within Chambers of Commerce (Law no. 192/98, Section 10). Since the Act has come into force only in October 1998, no examples of its practical application are available yet.

2.3 Sales below cost

Act no. 114/98, which recently reformed regulation of retailing in Italy, eliminating many of the pre-existing unjustified restrictions to competition, especially with respect to the opening of new outlets, contains a provision on "sales below cost". As with the abuse of economic dependence prohibitions, this

provision was also introduced upon request of the associations of branded goods manufacturers and small retailers.

Sales below cost are defined, in the law, as retail sales at a price below the sum of purchasing costs and indirect taxes, from which discounts and contributions relating to the individual product should be deducted. Purchasing costs are the ones resulting from bills of sale; discounts and contributions should be proved by documentary evidence.

Act no. 114/98 delegates the Government to adopt specific rules on sales below cost, and for cases of violations of such rules makes reference to the sanctions provided, for violations of antitrust rules, by the Competition Act no. 287/90. Moreover, the Law fosters the adoption of self-regulation codes by the representative associations of manufacturers and retailers.

In an opinion to the Government and Parliament concerning these aspects of the new law on retailing, the Competition Authority stressed that only an undertaking holding a dominant position on a relevant market with significant barriers to entry may, after having applied for a period of time prices lower than variable costs and having eliminated actual and potential competitors, be able to increase its prices so as to recover the previous losses, with prejudice to consumers. For this reason, the Italian competition law prohibits “sales below costs” only when such sales are made by an undertaking holding a dominant position and when the other conditions of “predatory behaviour” are met.

In its opinion, the Authority stressed that in some cases, sales of individual products at a price below cost may depend on promotional strategies aimed at increasing a retailer’s total sales. The profitability of these promotional strategies is directly related to the average size of the basket of products sold by each retailer. Therefore, they are particularly convenient for large retail outlets. On the other hand, the competitive impact of such strategies should generally be evaluated by taking the retail price of the whole basket of products into account. To this end, the Authority argued that the prohibition of abuses of a dominant position was sufficient to inhibit anti-competitive conduct, and no supplementary rule appeared to be necessary.

Moreover, the Authority stressed that the definition itself of sales below cost for an individual product gives rise to significant problems. The contractual relations between suppliers and retailers are complex, and usually include discounts (sometimes not emerging from bills of sale) and promotional contributions depending on a wide range of conditions (assortment, turnover, shelves devoted to the sale of the relevant products, total amount of sales in a given period of time). The price resulting from invoices does not indicate the true purchasing cost of a product, since it neglects a significant part of discounts and promotional contributions granted by the supplier; moreover, often these discounts and contributions cannot be related to an individual product, since they depend on the whole basket of products sold to a given retailer. Finally, some discounts are established at the end of each year, only after verifying the retailer performance. Therefore, it is extremely difficult to indicate, on the basis of documentary evidence as required by the Act, which discounts and contributions relate to each individual product. Indeed, the provision on “sales below cost” contained in the Act prevents such discounts and contributions being passed on to consumers in form of lower retail prices.

Finally, with reference to the regulatory and self-regulatory interventions provided by the Act, the Authority stressed that, from a competition protection standpoint, it would be dangerous to require undertakings to publicise their purchasing conditions, as well as to promote self-regulatory measures aimed at establishing price conditions. Indeed, these interventions would foster collusive behaviour by both retailers and manufacturers.

Up to October 1998, the Government had not adopted any implementing regulation on sales below cost, nor have the parties introduced self-regulatory measures.

3. Enforcement of competition law with respect to groupings of retailers

Usually groupings of retailers are considered as agreements under the Competition Act. The Authority evaluates on a case by case basis whether such agreements (including purchasing agreements and common promotional initiatives) have a significant anticompetitive impact on the relevant market(s) and therefore are prohibited under Section 2 of the Competition Act.

Since the history of regulation in Italy favoured the development of associative groupings of small retailers as a response to the existence of large integrated retail competitors, a more formal and less economics inspired approach to the competitive evaluation of retail groupings could lead to measures which unjustifiably distort competition between associations of retailers and integrated retail undertakings. The groupings of retailers evaluated so far were not found to significantly restrict competition on the relevant markets.

4. Interesting cases involving buyer power

4.1 Generale supermercati-Standa-Il Gigante/Supercentrale

In April 1997, the Authority completed an investigation into a joint purchasing agreement between Generale Supermercati (GS) Spa, Standa Spa and Il Gigante Spa. These companies, which operate retail chain stores, had given a joint-venture between GS and Standa, called “Supercentrale”, the task of negotiating favourable purchasing conditions on their behalf. Once common negotiated terms were agreed to, each of the three retailers planned to make its own independent purchases.

The Authority evaluated the agreement with reference to its impact both on competition among large retailers of grocery products and on suppliers of such products to retailers. For retailing service, the markets were defined as local markets for modern distribution retail services (the geographical area usually corresponds to individual provinces). For evaluating the purchasing power with respect to suppliers, the Authority made reference to the market shares of modern retail distribution of grocery products held by the parties both at the national level (as a proxy of the purchasing power with respect to national suppliers) and at the local level (as a proxy of the purchasing power with respect to suppliers of some fresh perishable products).

With respect to the impact on suppliers, it was pointed out that Supercentrale held only modest purchasing market shares (lower than ten percent at the national level, although they ranged between 20 percent and 35 percent in nine provinces), not larger than the ones held by other joint-purchasing entities; moreover, the counterparts were generally large suppliers, with a significant negotiating power.

With reference to the effect on the markets for retailing services, the Authority ascertained that the joint purchasing agreement had not led to more homogeneous commercial policies, and most of all to more uniform selling prices, by the three retailers. Moreover, the parties showed that in general, after the joint purchasing arrangement, they applied more competitive prices than they did before. On this basis, the Authority ruled that the joint purchasing arrangement did not appreciably restrict competition on the relevant markets.

The same reasoning was followed in other cases concerning agreements aimed at establishing joint purchasing groups (CONSORZIO C3, MODERNA DISTRIBUZIONE ORGANIZZATA/SOCIETÀ ITALIANA SUPERMERCATI ASSOCIATI). However, the Authority argued that the competitive evaluation of such agreements might change in the future if the development and widespread diffusion of joint purchasing groups significantly alters the current economic conditions on the relevant markets.

JAPAN

1. Introduction

While parties are generally free to set the terms of transactions, if a retailer with buying power, unfairly exploits its advantageous position in transactions, with the effect that it has the tendency of impeding fair competition among retailers or suppliers, or causing a substantial restraint of competition, such conduct constitutes violation of the Antimonopoly Act (AMA).

Multiproduct retailers with a large floor space and/or a large number of shops are likely to be attractive to customers, and so are able to sell in large volumes and so are also attractive to wholesalers. Although the retailers buy in large volumes it is likely that continuous transaction between these parties will have the tendency of increasing the wholesalers' dependence on the retailers.

In cases where a retailer with buying power, exploits its dominant position, by imposing on its suppliers unfairly disadvantageous terms, judged in the light of normal business practices, this produces anti-competitive effects at the supplier level of the market. In retail competition, the retailer with buying power can also obtain an advantageous bargaining position through factors other than competition on price or quality. Thus, when a retailer with buying power impedes fair competition, consumers cannot enjoy the benefits of competition. The same can be said of cases where retailers' actions constitute a substantial restraint of competition.

In Japan, convenience store chains and large-scale retail outlets now play a major role in the distribution sector. Under these circumstances, the sector must be monitored so that retailers with buying power do not engage in anti-competitive activities.

This paper explains the following issues:

a) facts on buying power in the Japanese distribution system;

b) treatment of buying power in the AMA;

c) cases related to buying power in AMA enforcement.

2. Facts on buying power in the Japanese distribution system

2.1 A survey on transactions between large-scale retailers and their suppliers (February 1995)

A fact-finding questionnaire was sent by the Fair Trade Commission (FTC) to suppliers of large-scale retailers, i.e. department stores, supermarkets and other retail outlets exceeding 1 500 square meters (3 000 square meters in metropolitan areas). Answers received pointed to the following problems:

a) coercion to purchase: many suppliers responded that they were requested to purchase the retailers' goods;

b) return of unsold goods: many suppliers responded that they have experienced the return of unsold goods due to retailers' stock adjustments;

c) request for dispatch of employees: many suppliers responded that they were requested to dispatch employees for tasks not directly related to sales, such as preparation for the opening of a new shop or a special sale;

d) coercive collection of contribution: many suppliers responded that they were requested to make a contribution, in a pecuniary form or other, that seems to have nothing to do with the promotion of sales of the goods they supplied;

e) imposition of costs for frequent delivery in small lots: many suppliers responded that retailers requested them to bear the costs for frequent delivery in small lots and other operations without sufficient consultation.

Thus it can be concluded that transactions between large-scale retailers and their suppliers still contain many problems from the perspective of competition policy.

2.2 Fact-finding survey concerning changes of the distribution structure and firms' responses (March, 1998)

According to this survey, many wholesalers think pressures from manufacturers are decreasing as regards price, territory and marketing. They argued, however, that the last seven years has seen generally increased pressure from large-scale retailers in the form of requesting rebates, fees for using a distribution center, or discounts. We can infer that large-scale retailers are urging wholesalers to co-operate with reducing costs and securing benefits threatened by fierce competition among retailers.

In order to deal with the changes in distributional structures, some wholesalers are forming alliances with retailers and thereby establishing comprehensive distribution systems. More such alliances are expected as pressure from retailers on cost reduction gets greater.

3. Treatment of buying power in the AMA

3.1 Regulation on abuse of buying power

Under the AMA, violation of Section 19 by way of "abuse of dominant position" is committed when entrepreneurs who have dominant bargaining position over another party exploit that position to impose an unfair disadvantage, as such practices tend to impede fair competition among entrepreneurs or among their suppliers or customers.

"Abuse of dominant bargaining position" is one of the acts prohibited under Section 19 of the AMA as "Unfair Trade Practice". The acts are defined in Section 2(9) of the AMA as follows:

> "any act coming under any one of the following paragraphs, which tends to impede fair competition" and which is defined by the FTC as such:
>
> the FTC specifies what constitutes unfair trade practices in the Designations;

in Article 14 of the General Designation (the Fair Trade Commission Notification No. 15 of 1982), abuse of dominant bargaining position is defined as any act which makes unfair use of one's dominant bargaining position over the other party in the light of normal business practices. The acts specified in the Designation include: (*i*) forcing the party in continuous transaction to purchase a commodity or service other than the one involved in the said transaction, (*ii*) forcing the party in continuous transaction to provide oneself with money, service or other economic benefits, and (*iii*) setting or changing transaction terms in a way disadvantageous to the said party.

Specifically, the FTC published "the Guidelines Concerning Distribution Systems and Business Practices" (July 1991), which was intended to help prevent firms and trade associations from violating the AMA and encourage them to pursue appropriate activities, by specifically describing the types of conduct which may impede free and fair competition and violate the AMA with respect to Japanese distribution systems and business practices. As regards abuse of dominant bargaining position, the Guidelines state that the following are most likely to pose problems under the AMA:

a) coercion to purchase;

b) return of unsold goods;

c) request for dispatch of salespersons to shops;

d) coercive collection of contributions;

e) request for frequent delivery in small lots.

3.1.1 Specific Unfair Trade Practices in the Department Store Industry

While Article 14 of the above-mentioned General Designation covers all industries, "Specific Unfair Trade Practices in the Department Store Industry" (Fair Trade Commission Notification No. 7 of 1954) shall be applied in addition to the General Designation to multiproduct retailers having a floor space beyond a certain size.

This specific designation rules the following retailers' acts as abuse of dominant bargaining position over their suppliers:

a) unjust return of unsold goods;

b) unjust coercion to discount;

c) unjust coercion to commission sale;

d) unjust discount of specific goods;

e) unjust refusal of supply of orders;

f) request for dispatch of salespersons to shops;

g) retaliatory measures.

3.1.2 Other unfair trade practice

In cases where a retailer abuses its power by committing the following acts, and if such conduct results in limiting competitors' business opportunities and makes it difficult for them to find alternative trading partners, this constitutes "unfair trade practices" and violation of section 19 of the AMA:

a) dealing with their suppliers on conditions which do not allow transactions with the retailer's competitors ("dealing on restrictive terms", Article 13 of the General Designation);

b) making their suppliers refuse transactions with the retailer's competitors ("concerted refusal to deal", Article 1 of the General Designation).

3.1.3 Private monopolisation and unreasonable restraint of trade

In cases where a retailer, whether individually or in a group, excludes or controls the business activities of competitors or engages in boycotts, thereby resulting in substantial restraints of competition in the market, such conduct constitutes unreasonable restraint of trade or private monopolisation and violates Section 3 of the AMA.

3.1.4 Mergers or acquisitions which cause substantial restraint of competition

In cases where retailers which have buying power abuse this power by forcing their competitors to merge and thereby substantially restrict competition in the market, the merger is illegal under Section 15 of the AMA.

4. Cases related to buying power in AMA enforcement

4.1 Mitsukoshi Co. (Consent decision on June 17, 1982)

1) Mitsukoshi Co., Inc. (hereinafter "Mitsukoshi") was the most prestigious department store in Japan, ranking first in terms of total sales in the department store industry in FY 1977 and second in terms of total sales in the retail industry in FY 1977;

2) due to Mitsukoshi's prestige, entrepreneurs who supplied their products to retailers were keen to establish and maintain business relations with Mitsukoshi;

3) under these circumstances, Mitsukoshi forced its suppliers:

   a) to buy goods or services promoted by Mitsukoshi;

   b) to pay a part of sales campaign costs, refurbishment costs, costs of remodelling etc., without giving specific standards.

Suppliers were obliged to comply with these requests in order to maintain business relations with Mitsukoshi.

The FTC issued a recommendation to Mitsukoshi for violation of Section 19 of the AMA (Abuse of Dominant Bargaining Position) (Article 14 of the Unfair Trade Practice) on April 16, 1979, and a consent decision in 1982.

4.2 LAWSON Co. (July 1998)

1) Lawson Co., (hereinafter "Lawson"), is a convenience store and headquarters of "LAWSON" franchise network.

   Lawson is engaged in the following business activities:

   a) control, advice and assistance of franchisees according to a unified rule on business management such as sales of goods and services;

   b) management of directly owned stores;

   c) selection of daily necessities sold by franchisees; and

   d) comprehensive management of purchasing the goods which are sold, such as deciding transaction terms and their purchase price.

2) Lawson was ranked second in the convenience store industry in terms of total sales and the total number of branches and fifth in the retail industry as a whole. Its sales in FY 1997 totalled about\1.1 trillion. Thus, manufacturers or wholesalers who supplied daily necessities to Lawson (hereinafter "the wholesalers") were keen establish and maintain business relations with Lawson. Most wholesalers were obliged to accept Lawson's requests even if these were greatly to their disadvantage, since interrupting of transactions with Lawson would cause significant damage to their business as a whole.

3) Under these circumstances, Lawson took the following measures with regard to the wholesalers:

   a) coercively collecting pecuniary contributions with no clear basis for calculations and no rational reasons for wholesalers to pay;

   b) requesting wholesalers to deliver daily necessities to Lawson for\1.

The FTC issued a recommendation to Lawson for violation of Section 19 of the AMA on July 16, 1998, and a recommendation decision in July 1998.

KOREA

1. Introduction

Buyer power allows a business or a group of businesses access to lower prices, compared to other businesses because of economies of scale and other economic factors. Such a lower unit cost can result in increased social welfare as consumers will be able to benefit from a lower price. However, in certain cases, buyer power can be abused to grant buyers non-economic benefits or to exercise dominance over suppliers.

Since the outbreak of economic crisis, there has been a great change in consumers' purchasing preferences and this has led to large discount stores' increasing their market shares. This increase in market shares has amplified discount stores' power over suppliers.

2. Current Trends and outlooks for Buyer Power : the Case of Korea

2.1 Trends in distribution industry which influences buyer power and the effects of use of private brands

2.1.1 Trends in Korea's Distribution Industry

Before 1989, Korea's retail sector mainly consisted of traditional, small retailers and a few department stores. Foreign retailers did not yet exist. In the mid 1990s, small retailers accounted for 80 percent of total retail sales whereas department stores, which have epitomised modern retail business since the 1960s, had taken only 14 percent of market share. Back then, large discount stores, category killers, non-store retailing did not fully establish themselves.

Traditionally, Korea's distribution industry had been more or less dominated by manufacturers affiliated to the *chaebols*. This phenomenon can be attributed to a manufacturing oriented growth strategy, low priority placed on distribution sector, lack of large entrepreneurs in the sector, and the widespread use of recommended retail price systems. However, when foreign retailers entered the market in 1989, the power balance began to shift in favour of the retailers. It should also be noted that in order to induce foreign investment and to cater to changes in customer preferences after the onset of the financial crisis, the government lifted the ban on building large discount stores within the "Green Belt". This should lead to the establishment of a number of new large discount stores.

Basically, buyer power is often exercised by retailers of substantial scale such as large supermarkets, supermarket chains, department stores, and large discount stores. As can be seen from Table 1, the share of sales by such large retailers in on the rise.

In 1993, Korea's first large discount store, E-mart had opened its first store. After four years, in 1997, the total number of discount stores amount to 80. In 1997, discount stores had only three percent of the market. However, it should be noted that this figure reflects a 90 percent increase per annum since 1994. Despite the current deep economic recession, sales are still expected to increase by 50 percent in 1998.

Table 1.
Market Share by Different Types of Retailers

Type	1995	1996	1997	1998
Department Stores	13.82%	15.51%	15.75%	14.19%
Super Markets	3.79%	3.77%	3.79%	4.29%
Discount Stores	0.89%	1.65%	2.85%	4.38%
Non-store Sales	0.45%	0.59%	0.69%	0.86%
Traditional Markets and Small Retailers	81.05%	78.49%	76.92%	76.29%

Source: The Yearbook of Distribution Industry, Super Chainstore Association, 97

The growth in market share of discount stores can pose problems regarding buyer power, as maintenance of low price is the most crucial element in competition and in order to secure low costs, these stores might exercise buyer power. It is expected in the future that the problem of buyer power will be centred around discount stores.

Something unique to Korea's distribution industry is that department stores rent out selling spaces. Some high-end department stores demand from their suppliers the dispatch of employees for selling and promotional purposes. Such exercise of abusive power is made possible by the fact these department stores are situated in downtown areas and are respected by customers for their high quality standards. The KFTC regulates department stores' abuse of dominant position towards their tenants.

It should be noted, however, that buyer power exercised by the department stores and discount stores varies significantly. The source of buyer power by the department stores seem to be non-economic, such as expertise and brand recognition, whereas discount stores rely on purely economic source.

The suppliers try to make up for the loss created from dealing on unfavourable terms and conditions with the large discount stores by seeking more favourable terms with smaller retailers. Therefore, it is possible to predict that smaller retailers will be in a weaker state in future. Thus, a competition authority must also stay alert for possible abuse of dominant position by the suppliers, not just by the retailers.

2.2 The use of private brands

In Korea, the use of private brands is not yet widespread. Only a few of the large department stores have private brands that are respected by consumers. Moreover, these private brands are not as popular as national brands and high-end customers of more luxurious department stores in particular do not opt for private brands. Many large discount stores deal in private brands as well, but have not been successful. Korean customers can be said to be brand conscious. However, decreased disposable income resulting from the financial crisis has made customers more conscious about value for money and this means greater popularity for private brands.

3. Current laws or laws that are to be enacted to prohibit certain practices regarding buyer power

In Korea, "Laws and Regulations Concerning Monopoly Regulation and Fair Trade" regulate retailer abuse of dominant position over manufacturers. In addition, The "Notification on the Types and Criteria for Unfair Business practices Relating to Large-scale Retailers", pursuant to both the Article 23,

"Prohibition on Unfair Business Practices" and its notification Article 36 "Designation of Unfair Business Practices" clauses 1 and 2 regulates in specific, practices regarding abuse of buyer power such as dispatch of employee, imputation of advertising fee, and other practices hindering business activities of a supplier.

4. Competition law's interpretation of group of retailers

Korea's distribution industry, is currently in transition, and the form of buyer power varies across different types of retailers. Whereas pre-modern small retailers organise themselves in groups to create trade associations to increase their buyer power, recently emerged large discount stores tend to rely on their own size to exercise buyer power.

Article 26 of the Fair Trade Act, "Prohibited Activities of Trade Associations", strictly forbids groups of retailers from engaging in unfair concerted acts and other competition-restrictive practices. There has been a recent trend in local supermarkets jointly investing to create discount stores to defend themselves from large discount stores. However, their size is not comparable to those of large discount stores, nor do they have the global network of supply that some global discount stores possess. Therefore, their chance of success cannot be said to be too great.

5. Cases regarding buyer power and their effects on suppliers, consumers, and competitors

As already explained, buyer power can be exercised by either a group of small and medium sized-retailers or an individual retailer of substantial scale. Here, two cases of such types shall be given and there will also be an examination of types of illegal practices recently seen with large discount stores.

5.1 Competition-restrictive practices of the North Chulla Province Kimje City Supermarket Co-operatives (1991)

The "North Chulla Province Kimje City Supermarket Co-operatives" is a trade association established for the benefit of business members and has 83.5 percent of market share in terms of sales. The co-operatives had concluded the "Contract for Supply of Products and Price" with its supplier Namyang Dairy which included unfair provisions such as pre-payment of end of the year settlement, pre-adjustment of price, dispatch of employees for promotion and management, and cancellation of contract without prior notification. The KFTC had given orders for correction, including nullification of the contract, and return of the pre-payment.

5.2 Grand Department Store's special unfair practice (1996)

The Grand Department Store had paid its suppliers 57 to 71 days after the due date and had made its 27 suppliers wait for payment for its purchase of 50 shopping trollies. The KFTC had ordered the Grand Department Store not to delay payments beyond the 40 day limit and not to make suppliers bear the cost of goods the department store itself consumed. The two cases described above both resulted in damage to the supplier by way of buyer power. Such practices constitute abuses of dominant position which distorts the fair market order.

5.3 KFTC's investigation on large discount stores on its own authority (1998)

In late August 1998, the KFTC carried out an investigation on its own authority as there had been reports of unfair business practices during the "price war" between large discount stores. The following types of violations were found in the investigation.

5.4 Coercion to lower price

In August 1998, discount store "A" claiming that its competitors were being supplied similar products at lower prices, purchased at prices 6.5 percent to 25.6 percent lower than the original contractual price from its ten suppliers.

5.5 Unfair reduction of price

In June, 1998, discount store "B" on "paper", returned refrigerators on display and re-purchased returned goods, thereby reducing expenditure for the following month.

5.6 Unfair return of products

In July 1998, discount store "C" returned products to its 92 suppliers because of excessive stock and low sales.

Apart from illegal practices disclosed during the KFTC's investigation on its own authority, there has been a recent case where a supplier filed a petition relating to a large discount store's abuse of dominant position. The supplier who filed the petition claimed that discount store "D" had demanded an advertising allowance for its 35th anniversary promotion, unfairly reduced prices, and cancelled transactions without regard to the contract

The KFTC plans to give warnings to businesses that have violated relatively few regulations. However, strict measures such as orders for correction and surcharges will be taken to retailers that have violated multiple regulations.

6. The rationale behind competition authority dealing with buyer power

As it has been previously mentioned, buyer power can be exercised by both a single retailer or a group of retailers. The cases given above can all be classified as unfair trade practices resulting from abuse of buyer power. Therefore, the main body responsible for maintaining a competitive market order, the Korea Fair Trade Commission, is the most appropriate institution for the task.

7. Conclusion

As previously noted, substantial increases in buyer power are creating noticeable changes in relationships between retailers and manufacturers. However, as in many other countries, the ultimate aim of competition policy is to protect consumer welfare. Therefore, the competition authority should not overlook the fact that buyer power can secure lower price.

However, buyer power can constitute an abuse of power over upstream industry, in other words, suppliers. Examples of such abuses were discussed in previous paragraphs describing the investigation conducted on KFTC's authority, and it was shown how they can distort markets by imposing unfair demands on suppliers. Therefore, it is desirable for the competition authority to continuously monitor the market to preserve and protect competition.

MEXICO

1. Market Power VS. Bargaining Power

It seems to be important to make a distinction between "market power of buyers" and "bargaining power of buyers" because the two concepts refer to similar but not exactly the same things and need not always go hand in hand. Market power of a buyer compares that buyer in a horizontal relationship with other buyers of the same product. The bargaining power of a buyer compares that buyer in a vertical relationship with the provider of a product.

The market power of a buyer allows that buyer to obtain better prices by reducing his demand. Bargaining power of a buyer allows that buyer to obtain better conditions than other buyers without the need to reduce his demand. Evidently, the threat not to buy (or to reduce his demand) is what gives him ultimately the bargaining power. In principle, there can be various buyers of the same product with bargaining power although the availability of different alternatives to the seller evidently increases its bargaining power. As a general rule, asymmetries in bargaining power between sellers and buyers are pervasive in commercial transactions and are in itself not all too worrying.

2. Mexican competition law

The Mexican Federal Law of Economic Competition (FLEC) only addresses the concept of market power not that of bargaining power. In fact, Article 10 of the FLEC defines as relative monopolistic practices, prohibited under a market power test, certain conduct that has the purpose or effect to unduly displace other agents from the market, substantially impede their access thereto, or establish exclusive advantages in favour of one or several entities or individuals.

Among the conduct considered to be relative monopolistic practices, there is price discrimination on the seller side. Article 7 of the Regulations of the FLEC, (RFLEC), defines a relative monopolistic practice considered under fraction VII of Article 10 of the FLEC "the establishment of different prices or terms of sales to different buyers under equal circumstances. However, in such cases it is the seller who must have market power not the buyer, whereas the concern of the present roundtable is rather buyers' power. In price discrimination cases, the plaintiffs are usually the buyers that buy at unfavourable conditions and the complaints are against the providers. In buyer power cases, the plaintiffs are the providers and their case is against the powerful buyer.

Evidently, in buyer power cases there may be a number of very complicated competition issues at stake as correctly outlined in the note by the Secretariat, but under Mexican competition law these issues would have to be analysed separately and there is not such a parameter as the bargaining power of the buyer that enters into the evaluation.

3. Country experience

Mexico's experience regarding complaints on problems arising from buyer power is quite limited. There has been, however, a case in which some form of buyer power was included.

The case involved an informal complaint against big supermarkets and department stores because of the unfavourable conditions they imposed upon their smaller suppliers. For example, contracts among supermarkets and small suppliers include provisions that establish very long periods between the time that a supplier delivers his products to the supermarkets and the time that such products are paid for by the supermarket, and that the supermarkets only accepted merchandise on a consignment basis. In this case, it was determined that, unless the supermarkets and department stores were engaging in monopolistic practices (i.e. exclusive dealing, discriminatory pricing, etc.) there were no grounds for the competition authority to intervene. However, even if the supermarkets or department stores were in fact engaging in monopolistic practices, Mexican Competition Law requires the existence of market power in order to sanction such conduct and this appeared to be difficult to sustain, as various supermarkets and department stores are in competition with each other.

4. Discounts as a disguised payment for promotion services

Another element that should be taken into account in the evaluation of buying power cases is that large discounts obtained by powerful buyers from small suppliers may be a disguised payment for the promotion of the merchandise provided by the powerful buyer to the small supplier.

When a big superstore is ready to deal in merchandise of a small supplier and makes scarce shelf space available for the involved products, it is promoting the involved products among its customers. This is a service with a cost for the superstore which in principle may be compensated. Discounts given by small suppliers to powerful buyers often correspond to that kind of promotion service and do not reflect anti-competitive behaviour. Such disguised payments become explicit when they take the form of slotting fees.

PORTUGAL

Since the mid eighties retail distribution in Portugal has seen its structure clearly changed with the establishment of the first large scale retailers (including both large surface discounters and hypermakets) distributing food and beverages and household products, creating a clear contrast with traditional retailing.

In the 1960s and 1970s power was typically concentrated in the manufacturers but it has shifted to the retailers in the last two decades. The economic relationship between suppliers and retail distributors began to be characterised by the growing power of distribution, particularly visible on the imposition of aleatory conditions, most of the time without any compensation. The lack of balance in power between manufacturers and retailers resulted in a transfer of costs and burdens to upstream suppliers, reducing their autonomy and sometimes even their economic and financial viability.

Manufacturers (especially of foodstuffs of mass consumption) required access to the hypermarkets because these could account for more than 30 percent of their total sales, but they became exposed to bigger risks since concentrated sales meant increased dependence on a small number of outlets.

One of most frequent expressions of retail buyer power is the intensive use of private brands, competing directly with the products supplied by manufacturers forcing the latter to improve their selling conditions.

This competition became more burdensome given the price policy usually adopted by retailers with buyer power which could sell private branded products at very low prices given the low levels of marketing or merchandising costs of these products.

The share of private brands in total sales is globally rising but varies from market to market: on discount markets, especially hard-discount markets, it can reach 35 to 40 percent; on hypermarkets the share of private branding represents only 10-15 percent of total sales.

Another common condition concerns the extension of payment delays in a very advantageous way to distributors with buyer power - an average of 60 days, sometimes reaching 100 days, without any interest charges for late payment.

Those types of commercial conditions caused, directly and indirectly, a reduction in competition among the economic actors operating in the distribution chain.

The first problems felt by upstream economic agents (producers and suppliers) began in the early 90s and led to two investigations by the Portuguese Competition Authority in 1993 and 1997, with the goal of checking the different types of difficulties felt by the economic agents. The enquiries focused on the main distribution groups and their principal suppliers.

These investigations were inconclusive, principally because none of the suppliers ever presented a formal complaint or expressed an intention to do so, despite a willingness to informally describe important problems.

Legal responses

1. Abuse of economic dependence (article 4 - Decree Law 371/93)

The last review of the Portuguese Competition Act (Decree-Law 371/93) was motivated by the need to adapt the legal framework to the deep transformations which had occurred in the structure of the Portuguese economy, following the liberalisation, privatisation and deregulation processes, plus the emergence of large distributors and retailers having buyer power which had changed the balance of power among the different market actors.

This subject started to be a problem due to the trend registered in the Portuguese entrepreneurial structure, showing a clear change in the balance of strength between the different actors. The growth of powerful distributors created the need to introduce a legal mechanism to re-balance relations between the new economic actors.

In the context of the above mentioned review, the concept of "Abuse of economic dependence" (article 4) was included in the chapter related to restrictive practices. Its main goal was to re-balance relations between economic actors, namely manufacturers and distributors/retailers, through sanctioning certain practices by powerful undertakings enjoying a clear dominance over another party, but not having a dominant position in the market.

The goal of this provision must be understood as sanctioning abuses, not behaviours dictated by an effective competition resulting from choosing better commercial conditions.

Article 4 of the Decree Law 371/93 prohibits the abuse by a supplier or a buyer of a situation of economic dependence wherein its counterpart lacks an equivalent alternative in its commercial relations. Economic dependence is taken to exist if the dependant party lacks an equivalent alternative. The concept of lack of equivalent alternative is currently understood to apply when a supplier or a buyer has to bear comparatively high and excessive costs if it switches selling or buying partners.

The abuse of economic dependence may assume different forms such as refusal to sell, imposition of tied selling, imposing discriminatory conditions, and refusal to deal as a sanction to a dependent partner refusing to submit to unjustified trade conditions imposed by the other partner. What is intended to be sanctioned is the abuse of a dependence situation, rather than practices and behaviours dictated by a desire to accept better commercial options.

It is impossible to oblige someone to keep a supplier or a client when the market offers better alternatives to sell or buy the same product. Moreover, restricting the ability to accept better terms would cut across the main principle of the market economy which is based upon the autonomy of the economic actors to define their own commercial policy. Such restraints would favour the maintenance of dependent undertakings and hamper the entry of potential competitors in the market.

Prior to the above described amendments, the abuse of economic dependence was only sanctioned under Portuguese competition law if it was practised by undertakings holding a dominant position in the relevant market of a product or a service. It was not possible to sanction abuses by undertakings with strong market power and a clear influence over its commercial partners but without dominant position.

2. Abusive bargaining practices (article 4 A - Decree Law 370/93 concerning Individual Practices)

Recently, some changes have also been introduced on the Portuguese legislation regarding individual practices affecting trade which are subject to a specific legislation (Decree Law 370/93). These kind of practices are prohibited "*per se*" that is to say they are not subject to an economic assessment test, taking into account its mainly private nature and limited effects on competition. For this reason the Competition Council has no jurisdiction over these practices. The concept of "abusive bargaining practices" has been recently introduced in the above mentioned legislation, with the goal of increasing the transparency and balance between economic actors.

The introduction of this prohibition as an individual practice, without the requirement of economic assessment, will facilitate the enforcement of prohibitions of abuse of economic dependence, which has been difficult to prove before the Competition Council given the difficulty of quantifying the market from the demand side in order to assess the lack of equivalent alternative, and the limited capability of the allegedly dependent undertaking to present a complaint without suffering any retaliation.

Article 4 -A of the above mentioned Decree Law prohibits obtaining from a supplier prices, payment conditions, selling conditions or commercial co-operation conditions which are exorbitant compared to its general selling conditions. Number 2 of the same article qualifies as "exorbitant" all selling condition, payment conditions or prices, which give a clear benefit to the buyer disproportionate to the size of its sales or to the value of the service supplied.

3. Trade unit with relevant dimension Decree Law nº 218/97

The Portuguese legislation does not foresee any kind of exception concerning a specific activity so that retailers with buyer power are not exempt from the application of the general Competition Law. Retailers are free to group together to get better commercial conditions provided they respect the general goals of Competition Policy. Some retailers already having buyer power are seeking to extend it through forming purchasing groups.

One of the priorities of the Portuguese Competition Authority is to proceed to an identification of Buyer Power Retailers or Wholesalers in order to survey compliance with competition provisions. During 1997, Portugal has adopted the Decree Law nº 218/97, of 20 August, and subsequent legislation -Portaria nº†739/97, 26 September - changing the rules concerning the authorisation procedures for trade activity. This new legislation introduces the concept of trade unit with relevant dimension (UCDR), focused not only on the dimension, but also on the selling and buying power of the undertaking.

Under this new legal regime, the UCDR subject to prior authorisation or communication, must be registered at the Directorate General for Trade and Competition (DGCC), through filing a specific form. This could constitute an important mechanism for surveying the activity of Buyer Power Retailers in complement with other existent legal provisions.

SPAIN

1. Introduction: Trends in manufacturing and retail distribution affecting retail buyer power

Over the last fifteen years the retail sector has greatly changed in order to adapt supply to new features of demand. Large retail groups and new retail forms (hypermarkets, hard-discounters, supermarkets) have expanded their market share and increased competition among establishments and among different kinds of establishments.

Consequently, a problem of a balance of power developed. The main frictions arose in sectors such as the Food Industry and traditional retailers.

Large groups, which played a key role in modernising the retail sector, have significant market power when negotiating purchasing conditions (prices, payment delays, delivery conditions, ...) with their suppliers. This is a consequence of the huge buying capacity of both hypermarkets and joint purchasing agencies. As a result of this, they have a strong position in a vertical context.

Traditional retailers have used several methods to face hypermarket competition. In many cases, small and medium-size retailers have pooled their purchasing power and even some of their resources and they have suceeded. In other cases, concentration has been the way out: mergers and take overs have taken place frequently in this sector and experts say that a great percentage of small and medium-size supermarkets (mainly family business) are up for sale.

In addition, some manufacturers/suppliers are now in a weaker position *vis à vis* large scale retailers. Another negative factor for suppliers has to do with private brands which are:

1. cheaper than the suppliers' products: they don't include marketing expenses; and

2. being used by hypermarkets to discipline both prices and supply conditions of brand manufacturers.

Private brands are reducing suppliers' market shares and, therefore, their negotiating power.

Summing up, the market power correlations between retailers and supppliers now depend on the following aspects:

- relative weight of the retailer and the supplier;

- general size of the retailer and its importance in the distribution of the product;

- supplier's portfolio and importance of its brands;

- supplier's dependence on the retailer which depends on the supplier's number of clients and the diversity of its product line.

Because of strong competition, retailers have tried to expand and secure their market shares through both growth and encouragement given to retail price maintenance.

In this way, retailers have obliged suppliers to reduce their prices so as to increase retail profit margins. In doing so, retailers can finance their growth and establish their desired price policy.

Powerful retail buyers often employ one or more of the following practices:

- Slotting allowances: As goods compete for scarce shelf space, suppliers usually must pay retailers in order to have a better place for their products.

  So, in some cases, suppliers have reduced prices by even ten percent to be able to place their products in a "hot zone" (more visited by customers). Sometimes, there have even been auctions among the suppliers to obtain the best shelves in the supermarkets.

  Selling at a loss: this practice consists of fixing prices lower than acquisition cost. It is banned by the Unfair Competition Act.

  Even if it's very difficult to prove that predatory selling exists, two years ago 90 000 small retailers gathered to complaint about it.

  According to them, a very well-known hypermarket was selling four specific toys under cost. Small retailers said that prices charged by the hypermarket were lower than those they had paid to manufacturers.

  The hypermarket argued that it had been able to obtain better acquisition prices because of its purchasing volumes. However, toy manufacturers said that their typical top discount was 25 percent while the difference between the hypermarket's prices and those of its competitors was greater than 25 percent.

  For the first time, a judge imposed a fine for selling under cost. The accused hypermarket appealed that decision. Nonetheless, the Provincial Court of Barcelona (Audiencia de Barcelona) confirmed the judge's decision.

- Conditional purchase behaviour: In this situation, when a purchaser has bargaining power over a supplier, the former can extract lower prices from the latter. That occurs when the supplier has no alternatives. In some cases, retailers can ask producers to cut 15 percent off their prices.

- Terms of business: Examples might include extra payments for merchandising, rules regarding sharing of promotional expenditure between buyers and sellers, modification *a posterior* of business conditions, and, overly favourable payment terms.

  Retailers have also asked suppliers to contribute to their business expenses. There are many examples. Thus, some retail chains, which had established a co-operation project, tried to make suppliers contribute to the operating costs associated with that project. According to the retailers, suppliers would benefit from the retailers' cooperation because they will now be able to negotiate with just one purchaser. The retailers demanded a contribution of around two percent of suppliers' sales turnover.

In another case, a hypermarket which had just taken over another chain, asked the suppliers of the merged out firm to grant some retroactive discounts.

Nonetheless, most cases relate to payment terms. Thus, suppliers usually claim that retailers (supermarket and hypermarket chains) take a long time to pay them (even more than 100 days). For this reason, they addressed the authorities to establish a maximum payment term regulation.

2. Regulatory framework

Act 16/1989 of 17th July for the Protection of Competition refers to distortion of free competition by unfair acts (Article 7): "The Court for the Defence of Competition will be competent to adjudicate, in the terms established by the present Law regarding prohibited conduct, those acts of unfair competition which affect the public interest by falsifying, in an appreciable manner, free competition in all or part of the national market".

Unfair Competition Act 3/1991 of 10th January refers to exploitation of economic dependence in article 16.2 as an unfair practice when suppliers or clients have no alternatives to accomplish their activities.

Law 7/1996 on Regulation of Retail Trade, which was approved on traditional retailers' initiative, deals with three important points:

- payment terms;
- selling at a loss;
- business hours.

However, from our point of view, this regulation is not able to solve the aforementioned problems for the following reasons:

1. the selling at a loss enforcement has put forward many problems: This practice has different meanings in both Unfair Competition Act and Law 7/1996 on Regulation of Retail Trade;
2. Law 7/1996 obliges to use a credit instrument when the delay payments are exceeded. Then, the use of banking documents has an important cost. In addition, banks could discriminate against the weaker firms (less financial capacity).

The question of business hours has much to do with the relative strengths of small retailers and hypermarkets.

3. Competition Authorities' views

Relations between suppliers and distributors present both frictions and problems. From the Competition point of view, when a situation of economic dependence exists, the most important thing would be to analyse whether the buyer, by exercising his buying power, can distort the market.

The Competition Act's Article 1 (prohibited conduct) or article 6 (abuse of dominant position) have not been applied to the retailing sector.

Retailers compete effectively and there is little possibility that an individual firm will attain a dominant position. It is very difficult to prove that a joint abuse of dominant position exists where there are no proofs of structural links among retailers.

For these reasons we think that problems arising in the retail sector relate to the following:

- the producer's dependence on the distributor (economic dependence);

- different power correlations between suppliers and retailers.

Generally speaking, in the retailing sector there is strong competition and consumers have recently benefited from it.

From a legal point of view, it is possible to apply Article 7 of the Competition Act to deal with economic dependence as an unfair practice. But, until now, there have been no such cases brought.

The problems associated with retail buyer power must be treated by competition agencies enforcing general competition law and not promoting specific regulations for the sector. Competition law must be enforced in an even handed way across sectors. Otherwise, there is a serious risk of market fragmentation.

Besides, specific regulations don't correct economic dependence or change the balance of power in the retail sector. By taking such measures, asymmetries don't disappear; they merely reappear in other forms.

To sum up, as we deal with dynamic markets, any intervention to change the correlations of forces between operators in retailing sector can bring about perverse effects such as barriers to entry, barriers to exit and less efficiency.

SWEDEN

On the different Swedish markets for food and non-food goods co-operation between retailers is rather frequent. Such co-operation may fall under the prohibitions of the Swedish Competition Act, especially so when the co-operation is of a certain magnitude and concerns prices. In many cases co-operation can be found advantageous to competition and to the benefit of the consumers. The Swedish Government has introduced a specific block exemption for chains of retailers.

The contribution will mainly focus on this particular block exemption.

1. Trends in manufacturing and retail distribution affecting retail buyer power, including the use of private brands

The Swedish retail market consists of different groupings, some specific for Sweden and important for the impact on competition in retailing. There are three different forms of groupings:

- multi-outlet companies, where the subsidiaries are wholly owned;
- voluntary chains, usually consisting of an association of independent retailers that are co-operating to reach advantages in integration; and
- franchising systems.

In more or less all the different markets for consumer goods in Sweden there exist such groupings of retailers. In the market for daily consumer goods the groupings consist mainly of multi-outlet companies and voluntary chains.

During the last decades the sector for daily consumer goods in Sweden has developed into high concentrations in both trading and manufacturing/supplying. In the trading sector wholesalers and retail outlets have become fewer and they have increased in size.

Characteristic for the sector of daily consumer goods is the horizontal co-operation between independent retailers in voluntary chains that are vertically integrated with wholesalers. This sector is dominated by three blocks - ICA, The Consumer Co-operative (KF) and the wholesaler DAGAB - with associated co-operating retailers. In ICA and KF wholesaling is integrated with retailing.

ICA is a voluntary chain, made up of more or less independent retailers who co-operate in order to achieve different advantages, especially in purchasing and marketing. The market share of the ICA retail outlets amounts to around 45 percent of total sales of daily consumer goods in retail outlets. The majority of ICA stores are covered by an agreement on the offer of first refusal. These rules mean that an owner wishing to sell his store must in the first instance give ICA the option of buying the store. Apart from the rules on the offer of first refusal, there are other factors tying the stores to the chain, such as financial support.

The Swedish Co-operative Union (KF) has incorporated most of the business, formerly carried out by consumer co-operative associations, into the KF-group. A few associations still operate retail outlets and use KF as their wholesaler. The total market share of the KF-group is approx. 25 percent of sales of daily consumer goods in retail outlets.

The third largest block consists of retailers having the wholesaler DAGAB as their main supplier. The total market share of the block amounts to around 20 percent of sales of daily consumer goods in retail outlets. Horizontal links between the stores of the block is weaker than the links within ICA and the Consumer Co-operative. Similar to ICA, there are controls concerning e.g. establishment through partial ownership of stores and the right of first refusal agreements.

Competition within the daily consumer goods sector does not only occur between the blocks or chains, but also between different stores within a block. The stores compete with each other with prices, business hours, product range and levels of service. Business hours per week may vary substantially between stores and special offers i.e. temporarily reduced prices are frequent. In addition, the presence of cut-price stores acts as a downward pressure on prices, particularly regarding non-perishables. No precise definition exists for a cut-price store, but in comparison to a traditional convenience store the service content is less as a rule. The third largest block arising from the stores having DAGAB as their main supplier has a strong position in the cut-price trade.

A problem from a competition viewpoint is that companies or stores choosing to remain outside the retail co-operation described above may face significant difficulties in obtaining deliveries. As a rule the vertically integrated wholesalers ICA and KF do not deliver goods to outlets which are not affiliated to their retail chain or deliver on considerably less advantageous terms than would otherwise be the case.

Since the Swedish market for daily consumer goods is characterised by a high level of integration potential competition from new wholesalers is severely hampered.

The use of private brands, especially by the leading retail chains, is increasing rapidly but still, Sweden is far behind for example Great Britain. About six percent of the total sale of retailing are private branded goods. The Consumer Co-operative chain KF early put efforts in developing private brands. The voluntary chain ICA has also clearly stated the importance of private brands. In terms of obtaining supplies of private branded goods, chains are currently turning away from self-production in favour of contractual relations with outside suppliers. Manufacturers possessing already well known brands normally refuse to produce for the chains' private brands. Therefore the chains turn to small manufacturers having difficulties to gain market shares for their products. Eventually the smaller trademarks might cease to exist, which would lead to a market with no new competitors gaining ground from the well known brands. A question that arises is whether the incentives from small and medium sized companies to develop new products will diminish. The fact that the leading chains aim to develop new private brands lessens their dependence of the suppliers and strengthens the chains' buyer power. As regards ICA, the major purchaser, this also means that the chain will be a competitor to the suppliers of branded products.

2. Actual and proposed provisions in competition or related statutes (including general Civil Codes) which may prohibit certain behaviour associated with retailer buyer power, including how these relate to one another and the role played by the general competition agency in their enforcement

The responsibility for the surveillance on the Swedish market of prohibited conducts that concerns buyer power rests with the Swedish Competition Authority. Such activities can either be identified on the Authority's own initiative or by complaints and notifications to the Authority.

The enforcement of the Swedish Competition Act is the responsibility of the Authority. The Act, which came into force in 1993, is based mainly on the same principles as those that apply in the EC. The two general principles, one against anti competitive co-operation between undertakings and one against abuse of a dominant position, are in their wording almost identical to Art. 85.1 and 86 in the EC Treaty. Exemption from the prohibition against anti-competitive co-operation may be granted if an agreement fulfils the conditions laid down in Art. 8 of the Swedish Act, which is modelled on Art. 85.3 of the Treaty.

Buyer power exercised by a vertical agreement, either between a retailer and a group of manufacturers or between a group of retailers and a manufacturer, on prices or discounts may constitute a restraint of competition in particular with regard to the horizontal co-operation. This can also be the case when a dominant buyer abuses his dominant position.

Such behaviour is, however, not always negative from an economic welfare point of view. When a supplier and a buyer have equal strength, the commercial negotiations would in principle result in conditions equal to those in a market with effective competition. The exercise of buyer power leads to cost reductions for the retailers that, on a competitive market, could benefit consumers. These cases must therefore be assessed on a case by case basis and may qualify for exemption from the prohibitions of the Competition Act or a negative clearance.

There are also certain provisions for agreements between retailers in the form of a block exemption described in the following.

3. How your competition laws deal with groupings of retailers - are they permitted to combine their buying power, at what point do such groups amount to a merged entity; and are such groups permitted to engage in common promotion including advertising a common price

The Swedish Government has issued a special block exemption for voluntary chains in retailing with a total share of the “market supply” (as defined in the block exemption) less than 35 percent.

The block exemption allows certain co-operation that takes place within the co-operating groups described above. This kind of co-operation is traditionally the most common way for small enterprises in retailing to work together under the same trademark. The retailers are members of the co-operating group and their activities on the market are more or less integrated. Some limitations have been set up with regard to high market shares and price co-operation. The block exemption distinguishes between small and large chains. A chain is considered to be small if the co-operation concerns less than 20 percent of the supply to the market within the product areas where the chain is operating. A chain is considered large if the co-operation concerns more than 20 but less then 35 percent of the supply.

For co-operating groups that have less than 20 percent of the supply to the Swedish market for the goods in question, the block exemption covers:

1. joint purchasing;

2. joint advertising;

3. fixing of prices when advertising together (the individual retailer must always be free to sell below the fixed price);

4. common price calculation (without fixing the sales prices);

5. a right to refuse to sell jointly bought goods to retailers outside the co-operating group;

6. co-operation on establishment, financial and administrative services, and other services for the development of stores/shops and staff.

Between small and large chains the difference concerns price co-operation and co-operation regarding assistance with calculation. Fixing of prices when advertising together could only take place when the goods are jointly purchased and the main reason for the consumer to buy the goods is the price. Common price calculation is permitted when it serves as help for the retailers to calculate their own specific prices. The support may not contain anything that could result in uniformity in such parts of the price calculation that are dependent on the individual circumstances for the individual retailer. The calculation support must give each member full freedom to determine the price with regard to his own specific conditions and to the demands of the local market.

To benefit from the exemption there are certain mandatory requirements that have to be fulfilled. The agreement between the members has to be in writing and the price co-operation when advertising jointly may not be binding. If the co-operation includes other agreements that might be anti-competitive and that are not covered by the block exemption, the chain has to apply to the Competition Authority for an individual exemption.

The block exemption came into force on 1 July, 1993 and is valid until 30 June, 1999 (the validity has been prolonged twice). The block exemption has been criticised in certain respects and is presently being evaluated by a working group, appointed by the Government. The working group has the duty to investigate the functioning of the Swedish Competition Act for co-operations between small and medium sized companies, among others in the retail sector. The working group will present its result on 1 November this year.

Representatives of different retail chains have criticised the block exemption as they consider it to be too narrowly shaped and that it hinders important co-operation that could increase their competitiveness. Comparison has been made with the block exemption for franchising agreements, which allows a more far-reaching co-operation. The prohibitions in the block exemption for retail chains, compared to the more liberal provisions of the franchising block exemption, distort the companies' effectiveness, investments and competitiveness in a way that it does not affect franchisees and multi-outlet companies. Furthermore it has been objected that the market share limits are too narrow and lead to inconveniences. Another objection from a competition legislative point of view against the block exemption is that the market definition does not correspond to the concept of relevant market in the Competition Act. This is said to lead to an underestimation of some chains' market share. The block exemption defines the market for the chains as part of the total market supply while the concept of relevant market share should refer to the actual product market.

4. Interesting cases involving buyer power, highlighting whether and how such power is being used to harm not just suppliers or retail competitors, but also the competitive process hence consumers as well

In the retail sector the Competition Authority has taken just one decision on negative effects of buyer power. In other sectors several cases on the effects of buyer cartels have been treated. In most of these cases the negative effect on competition were considered to be outweighed by chiefly positive effects on prices. In a couple of merger cases the subject has been part of the assessment.

The above mentioned case in the retail sector concerned a chain that had a conflict with a supplier regarding purchasing prices. The chain wished to get a long-term agreement on low prices for its members. When the parties could not agree the chain cancelled an existing agreement. In a letter, representatives of the chain informed members about the cancellation of the agreement concerning delivery of approximately 200 products from the supplier and reminded them of their duty towards their customers to purchase goods for resale at correct and trustworthy prices.

The Competition Authority found that a joint refusal from a large number of retailers to buy could lead to negative consequences for the supplier. The letter to the members, with regard to how it was formulated, could be seen as a request to act in a certain way (i.e. engage in a group boycott of the cancelled supplier), especially when the chairman and the vice president had signed the letter. A request of this kind, leading to a co-ordinated behaviour is an anti-competitive co-operation that is prohibited by the Competition Act.

Concerted actions like this do not fall within the provisions of the group exemption for chains. In this case, where it was not obvious for the chain whether the behaviour was allowed within the provisions of the block exemption, the Competition Authority decided to take no further action.

UNITED KINGDOM

1. Introduction

In a general sense, buyer power enables a firm, or group of firms, to obtain more favourable terms than those available to other buyers[1].Purely cost-related discounts, where large buyers receive a lower unit price due to the exploitation of economies of scale or scope, or where the seller values the security of having a large or early order, should not usually cause much concern. However, societal welfare may be adversely affected if buyer power is used to obtain non-cost related advantages over other buyers, or if cost-related discounts are used to enhance market power in the end-product market.

2. Theoretical considerations

Theory tells us that, in a static framework, if buyer power exists where there is no seller power, then the analysis of "monopsony" is analogous to the analysis of monopoly in an otherwise competitive setting. Welfare (as measured by the sum of producer surplus and consumer surplus) tends to be reduced by monopsony power, unless there are offsetting economies of scale or scope. One important feature to note is that, provided the monopsonist is a price-taker in the end-product market, then buyer power does not affect the price that consumers pay.

In general, the larger the buyer (or group of buyers acting together), the larger the order - in terms of both quantity and types of product - that the buyer can place with a single supplier. This can lead to cost savings for a variety of reasons. Consider four examples. First, when buyers are able to demand greater quantities of the same good from a single supplier, they may benefit from lower trade prices. This is because large orders may allow the supplier to exploit economies of scale. Second, when buyers are able to demand several different goods 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. For example, suppose that the larger the buyer, the larger the order that can be placed in advance with the supplier.[2] Suppliers can then offer a lower trade price, given that they value advance knowledge of the demand for their products.

Where both buyer power and seller power exist, then buyer power may offset seller power and be socially desirable. For this to happen, buyers must be able to secure significantly lower transfer prices and yet face substantial price competition in their end-product market to ensure that lower transfer prices are passed on to the consumer.

Where buyer power is distributed asymmetrically among firms - e.g. where firms differ by size, and the larger the firm, the greater the buyer power - there is scope for buyer power to be used

strategically. For example, a buyer that secures the largest discounts may be able to distort competition in the end-product market by using its cost advantage to predate against smaller firms.[3]

In a dynamic setting, it is possible that suppliers will adapt their own behaviour to the presence of buyer power. The overall effects are ambiguous and probably depend on the industry. On the one hand, sellers may be less willing to undertake specific or sunk investments where buyer power exists. This is because once the good is produced, the seller is in a weak bargaining position, since it has no alternative than to sell to the large buyer(s). This means that the large buyer may be able to renege on the terms initially agreed in the contract, to the detriment of the supplier. Thus buyer power can lead to less investment than is socially optimal and potentially undermine the viability of relatively weak suppliers.

On the other hand, in industries where specific investments are time consuming, a supplier may prefer to deal with a large buyer because, due to its size, the buyer is financially secure. In addition, the buyer may be unwilling to renege on the terms of a contract, since to do so would earn it a bad reputation and thus make it harder to secure specific investments in the future. This can lead to socially beneficial higher investment.

Buyer power can also refer to vertical restraints or other strategic behaviour imposed by the buyer on the seller. The literature suggests that these are best considered on a case by case basis. In some market conditions, notably when there is intense competition in both the upstream market and the end-product market, a vertical restraint imposed by the buyer may be benign. However, when the buyer has market power in its end-product market, there is scope for vertical restraints to be anti-competitive. For example, they can be used to enhance market power in the end-product market. Buyer imposed strategic behaviour is discussed further at paragraphs 13-14 below.

3. Practical considerations[4]

Buyer power can be hard to measure in practice. Usual measures of concentration refer to market shares of sales. Firms with a high market share in retail sales are often assumed to have a high market share of purchases from suppliers. However, to the extent that suppliers sell to markets other than the retail market (e.g. to wholesale or export markets), the data on retail market shares may exaggerate the potential for buyer power to exist.

In reality, manufacturing and retail structures may be quite complex - especially when there is oligopolistic competition at both levels. Thus, when assessing the effects of buyer power, the analyst must be aware of how market power at retail and manufacturing levels might interact with buyer power. For example, in some cases, not only can buyer power reinforce market power in the end-product market, it can also reinforce market power upstream, e.g. when manufacturers and retailers co-operate. It is also possible that the effectiveness of buyer imposed strategic behaviour will rely on there also being market power in either the upstream or the end-product market. In the latter sense, buyer power in itself may be relatively benign, with the real curse being the existence of market power.

Thus, the existence of different transfer prices does not necessarily imply that there is buyer power. It may do; on the other hand, it may reflect upstream market power - for example, where an upstream monopolist is able to price discriminate among buyers operating in different markets.

4. Strategic buyer behaviour

Strategic buyer behaviour deals with issues beyond pricing matters. It typically refers to actions that affect the structure of supply upstream - for example, when the buyer seeks to influence the terms of supply by imposing a vertical restraint. However, strategic behaviour can also refer to buyers acting together in groups, e.g. to benefit from bulk buying. A representative list of buyer imposed strategic behaviour is given below:

- conditional purchase behaviour, e.g. the buyer purchases goods only if:
  - the manufacturer provides a non-cost related discount or an upfront payment ("slotting allowance"); or
  - no other competitors are supplied as well - i.e. exclusive distribution; or
  - certain types of competitor, such as discount stores, are not supplied; or
  - the supplier produces own label products for the buyer to sell on downstream;
- exclusionary purchasing of inputs, e.g. the incumbent buyer purchases large amounts of vital inputs or vital facilities (such as key distribution outlets) with a view to raising barriers to entry for potential competitors;
- joint marketing, e.g. a retailer requires that the manufacturer contribute to the retailer's advertising expenditure;
- reciprocal dealing, e.g. a food wholesaler, that also sells basic food products, only deals with suppliers (e.g. food processors) which use its own basic food products as inputs;
- terms of business, e.g. where buyers tacitly collude by adopting industry standard terms of business with their suppliers. If all buyers adopt the same terms then, in effect, they act as one.

Depending on the context, strategic behaviour will serve one or more of the following purposes:

(i) strategic behaviour that benefits both retailer and manufacturer but not the consumer: a vertical restraint imposed by the retailer may benefit the manufacturer as well, but adversely affect the consumer. For example, consider what happens when a manufacturer agrees to a buyer's demands that the manufacturer does not supply any of the buyer's rivals. In effect, the manufacturer agrees to exclusive distribution. Exclusive distribution may help the manufacturer foreclose the market, or help generate rents by reducing intrabrand competition. Both of these are likely to reduce welfare;

(ii) rent sharing: a vertical restraint may be imposed by the retailer as a way of increasing its share of available rents. Suppose both the retailer and the manufacturer have market power - this will then usually generate rents for both of them. If the retailer has a relatively strong bargaining position vis-à-vis the manufacturer, it may be able to use a vertical restraint - such as slotting allowances - to appropriate some of the manufacturer's rents. If the end-product price does not change, then consumer welfare may not be affected (so long as the investment decisions and viability of manufacturers is not threatened in the long run), although we should note that the existence of rents implies that prices are above competitive levels;

(iii) distorting competition in the end-product market in favour of a buyer that has market power as a seller: for example, a vertical restraint may be used by the retailer to facilitate predation. Suppose a large buyer can secure goods at a discount (or secure slotting allowances, which are used to subsidise prices in the end-product market). The buyer - so long as it has market power in the end-product market - may then be able to drive other retailers out of the market. Having done so, both the favourable terms and aggressive behaviour used by the buyer may then act as a barrier to entry for potential entrants (who would not be able to secure discounts and might fear that the retailer would start a price war if they entered). In this case, the incumbent firm with buyer power could increase prices above competitive levels without attracting entry, so that welfare is reduced;

(iv) welfare enhancing behaviour: some behaviour may be welfare enhancing. Consider four examples. First, standard terms of business may reduce transaction costs between suppliers and retailers. Second, a vertical restraint may allow the retailer to provide better services. For example, conditional purchase behaviour may allow the retailer to raise prices a little in order to pay for pre- and post-sales services, which more than offset the welfare loss of higher prices. Third, a vertical restraint may allow a retailer to reduce the problem of successive mark-ups. This occurs where both the retailer and the manufacturer have market power and so both attempt to mark up prices on cost. The overall effect is that the total mark-up (and hence the price) is higher than it would be if they acted together. The vertical restraint is a way of co-ordinating their actions. Finally, joint marketing expenditure may secure a higher level of advertising, which - so long as the advertising provides useful information - may benefit consumers. The retailer may be unwilling to take on all of the advertising, since some of the benefits will probably accrue solely to the manufacturer, by generating sales in rival retailers' shops. Likewise, the manufacturer may be unwilling to take on all of the expenditure, since it may generate sales of a competing product in the retailer's store.

5. Conclusion

In sum, a case by case basis is the best way to approach the issue of buyer power. The welfare consequences of buyer power are context specific. In cases where lower transfer prices and benefits of economies of scale or scope feed through into lower prices for the consumer, buyer power may well be benign or beneficial. However, the key area of concern is whether buyer power interacts with market power (either in the end-product market or the upstream market). If so, then there is the potential for buyer power to be used strategically to enhance that market power.

Annex 1

1. Two examples of the consideration of buyer power by the United Kingdom Competition Authorities

Under the United Kingdom competition legislation, issues of buyer power may be addressed using the monopoly provisions of the Fair Trading Act 1973. Under the Act, the Director General of Fair Trading is able to make a reference to the Monopolies and Mergers Commission (MMC). When such a reference is made, the MMC is charged with determining whether a monopoly situation exists and, if so, whether it operates against the public interest. If the MMC thinks that it does, and so reports to the Secretary of State for Trade and Industry, the Secretary of State has power to order remedial action or to invite the Director General to seek appropriate undertakings.

References to the MMC may be made not only of single monopolists (so-called "scale monopoly situations"), but also of "complex monopoly situations". A complex monopoly situation exists where companies with a collective share of at least a quarter of the relevant market each follow a practice or practices which prevent, restrict or distort competition in some way.

This annex describes two examples of buyer power. In Example A (the electrical goods industry), buyer power was found to have an adverse effect on the public interest. In Example B (supermarkets), a 1985 report found that buyer power benefited the consumer. These two opposing conclusions on buyer power illustrate how it should be viewed on a case by case basis. The structure of grocery retailing has changed since it was last looked at, and the OFT is currently investigating whether this may have been to the detriment of consumers. Hence, Example B briefly describes the reasons for the OFT's current enquiry and the methodology it will use.

2. Electrical goods

The information in the first example is drawn from a recent MMC report on electrical goods.[5] In this industry two types of strategic behaviour were identified. This behaviour seemed to benefit the largest manufacturers and largest retailers by creating rents and distorting competition in their favour.

2.1 Market structure

The suppliers of "brown" electrical goods (televisions, camcorders, video cassette recorders and hi-fi systems) operated in an oligopolistic market where two groups (Sony and Matsushita) had some market power due to a strong brand image and customer loyalty. The retail market was also oligopolistic, with one or two firms (Dixons and perhaps Comet, to the extent that it tacitly colluded with Dixons) holding some market power. One firm (Dixons) appeared to have buyer power.

2.2 Strategic behaviour

This took two forms. First, the major suppliers nearly always set recommended retail prices (RRPs) and typically refused to supply discount retail shops. Secondly, the largest retailer had terms in its contracts with suppliers that allowed it to re-negotiate trade prices if a competitor set prices substantially below the RRP.

These two types of strategic behaviour reinforced each other, with the aim of securing resale price maintenance in the end-product market. In the first example, the refusal to supply discount retail shops meant that those retailers which were most likely to set prices below the RRP did not receive the goods at all.

In the second example, the largest retailer arguably signalled that if any other retailer tried to undercut the RRP, it would respond by demanding a lower trade price from its suppliers and then cutting the end-product price to match its competitors. This reduced the incentives of other retailers to try to undercut the RRP. It also reduced the incentives of suppliers to offer better trade prices to any of the largest retailer's competitors and thus provided them with a greater incentive to impose the RRP.

The ability of the largest retailer to obtain such terms in its contracts with suppliers is evidence that it had buyer power. In this case, the major suppliers appeared happy to sign the contract, presumably since it helped support their ultimate goal of resale price maintenance. Resale price maintenance was presumably set so as to maximise joint profits of the largest suppliers and the largest retailers. They then bargained over transfer prices to share the available rents. Competition was distorted since resale price maintenance seemed to ensure that prices remained above competitive levels, without there being any offsetting benefits.

2.3 Lessons from this example

Paragraph 14 of this paper identified four distinct reasons for adopting strategic behaviour. In practice, these reasons will often overlap with each other. In this example, there was evidence of rent sharing, the distortion of competition and buyer induced strategic behaviour that benefited manufacturers as well.

In reality, manufacturing and retail structures may be quite complex - especially when there is oligopolistic competition at both levels. Thus, when assessing the effects of buyer power, the analyst must be aware of how market power at retail and manufacturing levels interacts with buyer power. Thus, in this example, while the contract terms secured by the largest retailer were an attempt to bolster prices in the end-product market, their effect might have been much less significant if the manufacturing market had been more competitive. (For example, if brand image had not been as strong, the goods available in discount stores would have been closer substitutes to the electrical goods sold by the largest retailers.)

In this example, retail buyer power did not countervail manufacturing market power. On the contrary, it seemed to reinforce it.

3. Supermarkets

In July 1998, the OFT announced that it intended to undertake an investigation into the profitability of the four largest supermarket groups in the United Kingdom - Tesco, Sainsbury, Asda and Safeway. The central purpose of the enquiry is to establish whether the benefits that accrue from their buying power are being passed down to consumers through healthy competition.

3.1 Background

The issue of buyer power in this context was the subject of a 1981 report by the Monopolies and Mergers Commission (MMC).[6] Its central conclusion was that the buying power of the major supermarkets

enabled them to obtain substantial non-cost related discounts from their suppliers. These were being passed down to consumers as lower prices to the overall benefit of the public interest. Subsequent studies, in particular a paper published by the OFT in 1985,[7] tended to confirm the conclusion that competition among retailers ensured that consumers were the main beneficiaries of the supermarkets' buying power.

Since the 1980s the market share of the major supermarkets (and by implication their buying power) has grown inexorably, to the accompaniment of much public concern. This has focused largely on issues of public policy such as the impact of out of town superstores on the more traditional town centre shopping areas, but includes reservations about a reduction in competition. There have also been substantial changes to the range of products offered in terms of sophistication, for example prepared foods, and of own brands which have grown dramatically.

Concern about the market power of the supermarkets is a permanent theme, but over the last year it has exhibited a growing stridency. Farmers in particular have been complaining that while they have seen the prices paid by supermarkets drop dramatically, there has been no corresponding reduction in retail prices.

Given the level of publicly voiced concern, the increase in concentration and other changes over the previous 15 years or so, it was felt the time was right for another study of the supermarket sector. This is to focus on the profitability of the major groups in the products where they have a large collective market share. The term "groceries" is used for these products, by which is meant those goods that consumers normally expect to buy from supermarkets when they do their weekly shop. It includes food, drink, cleaning products, toiletries and household goods but excludes petrol, clothing, DIY and financial services.

3.2 Methodology

It has been taken as given that the major supermarkets are obtaining substantial non-cost related discounts from those supplying them and that this situation has intensified over the last 15 years. Nobody has attempted to argue that this is not the case and no attempt has been made to quantify the benefit the supermarkets are able to extract from their buyer power. The OFT enquiry starts from the assumption that there is a substantial benefit which will result in excess profits unless competition ensures that it is being passed down to consumers - it would be expected mainly in lower prices, but possibly also in higher amenity.

The ultimate concern is to establish that there is still vigorous competition in the sector - evidence of excess profits would be only one indicator, albeit a very significant one, that this was not the case. The OFT's initial enquiries are confined to the four largest groups. There are other substantial players in the sector, but if the "Big Four" are not excessively profitable then the fact that some of the smaller groups might be is unlikely to be a result of a failure in the competitive process.

The approach has therefore been to seek detailed, desegregated and highly confidential information from each of the Big Four about the margins, profits and costs associated with their UK grocery retailing operations. This is the stage which has been reached at the time of preparing this paper. The information which is obtained will be analysed in various ways to establish whether profit levels are above those consistent with a competitive market. Profitability will certainly be compared with the risk adjusted cost of capital within a Certainty Equivalent Accounting Rate of Return (CARR) framework, but other quantitative and qualitative analysis will be used as appropriate.

If it is concluded that there is no evidence of supra-normal profits (and no evidence of x-inefficiency) the exercise will end there, since this would indicate that competition was still working to the benefit of the consumer. If it were found that the sector was consistently yielding excess profits then there would be an in depth investigation to establish exactly where they were coming from, how they were being earned and why they were not being competed away. This would be likely to involve analysis of the profitability of different product areas within the grocery sector, regional variations, and might well extend beyond the Big Four to include other grocery retailers. In this case, the OFT would be looking to establish whether there was a complex monopoly at work that could form the basis of a competition reference of the sector to the MMC.

NOTES

1. There are various definitions of buyer power. An alternative definition is that a buyer has buyer power over a seller when that seller is more dependent on the buyer than that buyer is upon any other seller. The key point is that buyer power allows the buyer to benefit from prices, such as non-cost related discounts, that would not prevail under normal competitive conditions.

2. For example, suppose that buyers of a factor are subject to volatile demand for the good that they sell in the end-product market, and that some of the volatility is non-systematic (i.e. it averages out to zero across the whole industry). As a firm becomes larger, it may be able to internalise some of the fluctuations in demand for the end-product and thus be more certain of its demand for the factor.

3. It is interesting to note that in this instance, provided that the firm has enough market power in the end-product market, it may only need cost-related discounts to be able to predate successfully.

4 . Two empirical examples are discussed in the annex to this paper.

5. *Domestic Electrical Goods*, HMSO, Cm 3675-1, 1997

6. *Discounts to Retailers*, HMSO, HC 311

7. *Competition and Retailing*

UNITED STATES

In its background paper, the Secretariat proposes alternative definitions of "buyer power" which share certain core elements - the retail buyer(s) has certain attributes that enable it to receive special concessions from its supplier(s) that are not justified by any procompetitive efficiencies and have a significant adverse affect on competition. In the most recent decision in the United States dealing with the issue of buyer power, Toys "R" Us, [1] the Federal Trade Commission employed concepts similar to those core elements employed by the Secretariat. As discussed in depth below, the Commission found that Toys "R" Us, through its size and other attributes, secured agreements from its suppliers to disadvantage a retail rival to the detriment of consumers.

Only one antitrust statute, - section 2 of the Clayton Act as amended by the Robinson- Patman Act -has an express provision for buyer liability. However, the other federal antitrust laws apply equally to conduct by buyers and sellers that violate their broad prohibitions. The U.S. antitrust enforcement agencies - the Federal Trade Commission and the Department of Justice - bring appropriate enforcement actions against any person, buyer or seller, who exercises market power in a manner that injures competition.

Although buyer power has been an issue in the United States since the beginning of the century,[2] only recently has the increasing concentration on the retail side gained attention rivalling that received by its more prominent counterpart - seller power. Given the increasing consolidation in the retail sector in the United States, however, one can expect continuing interest in the consumer welfare implications associated with buyer power.

As discussed below, an antitrust analysis involving allegations of anti-competitive conduct by a buyer will focus on many of the same issues that inform an analysis of seller conduct. For instance, issues relating to "characterisation" may be at the forefront; that is, is the conduct subject to the *per se* rule or a more elaborate rule of reason analysis. Although this inquiry will focus, in the first instance, on whether the conduct is joint conduct, or unilateral, as with conduct by seller, the courts are increasingly rejecting a strict *per se* test for cases involving buyers. Where a rule of reason analysis is judged to be appropriate, it will not be unlike a case involving sellers: that is, issues relating to market definition, market power, proffered efficiency defenses, and anti-competitive effects may be significant issues. All of these issues were important to the Commission’s decision in Toys "R" Us.

This paper focuses on the legal principles underlying the Toys "R" Us case. It also reviews the buyer-induced price discrimination provisions of the Robinson Patman Act. Prior to discussing the Toys "R" Us case in detail, the paper discusses a number of cases where the courts found that a buyer’s conduct, whether joint or unilateral, was not subject to *per se* condemnation, but required a more searching inquiry into the purpose and effect of the conduct. These cases involve joint purchasing arrangements and non-price vertical restraints, which, under U.S. law, are judged under a rule of reason because they hold the potential to increase consumer welfare. The next section lays out the Toys "R" Us decision, explaining why the Toys "R" Us conduct was sufficiently different from these prior cases as to be unlawful under both the *per se* unlawful and a rule of reason analysis. Finally, we discuss U.S. law as it relates to buyer induced price discrimination.[3]

1. Joint Buyer Conduct - Cooperative Buying Groups

In Northwest Wholesale Stationers v. Pacific Stationery & Printing Co., the plaintiff complained that his expulsion from a buying cooperative constituted a *per se* violation of the antitrust laws as a joint refusal to deal by the cooperative members.[4] Rather than finding that engaging in a wholesale purchasing cooperative is "characteristically likely to result in predominantly anti-competitive effects," the Supreme Court found that joint purchasing arrangements often allow the participants to achieve efficiencies that can have procompetitive effects, including lower prices for consumers.[5] As a result, the Court concluded that the conduct should be analysed under the rule of reason.

Joint purchasing agreements in which purchase price is collectively set have been found lawful when the participants, individually and collectively, lack market power, and the buying group is necessary to achieve genuine economies of scale both in the purchasing and warehousing of supplies and in providing access to stocks of goods that might otherwise not be attainable by the members acting separately.[6] This approach mirrors the analysis found on the seller side, where the Court has been reluctant to attach a *per se* label to potentially procompetitive conduct.[7] Examples of lawful joint purchasing agreements at the retail level include small grocers purchasing foodstuffs in bulk, greeting card buyers using a buying corporation, and a non-profit organisation formed by a trade association of footwear retailers to negotiate transportation services for goods shipped to foreign countries.[8]

On the other hand, a joint purchasing arrangement will be found unlawful if it is a sham, designed not to achieve any efficiencies but simply to cloak a price-fixing or other cartel activity.[9] As discussed below, the Supreme Court’s discussion in Northwest Wholesale Stationers of when it is appropriate to apply the *per se* rule played a prominent role in the Commission’s recent Toys "R" Us decision.

2. Complaints Regarding a Competing Discounter

Unilateral buyer conduct, even more so than joint conduct, is likely to judged under a rule of reason analysis. Thus, while an agreement between a buyer and seller on prices or price levels (so-called resale price maintenance agreements) is illegal *per se*, the recurring fact pattern in which a manufacturer terminates a price cutting distributor after merely receiving complaints from one or more competing full price retailers is not subject to automatic condemnation.[10]

Some courts and scholars have recognised the danger when a dominant retailer coerces a single manufacturer.[11] Nonetheless, because of the difficulty of sorting out legitimate dealer complaints about free riding from those in which a powerful dealer is simply acting to restrain competition, the mere presence of a powerful buyer does not alter the analysis used in dealer termination cases where the defendant is the sole manufacturer. In other words, in the absence of proof of concerted action and some further agreement on price or price levels, complaints, coercion, or threats by a retailer - even one that might be characterised as a "power buyer" - followed by a supplier’s termination of a price-cutting retailer are insufficient to constitute *per se* unlawful resale price maintenance. The heightened standard explicit in a rule of reason analysis is necessary to ensure that an increase in interbrand competition that improves consumer welfare is not defeated simply because a large buyer is involved.

Although most vertical price fixing suits are brought only against the supplier, in several recent cases brought by terminated discount retailers, the defendants were both the supplier and large department stores with greater purchasing volume than the plaintiff retailer. For example, in Burlington Coat Factory Warehouse Corp. v. Esprit De Corp and Federated Department Stores,[12] Burlington, a discounter with over 30 outlets in several states, claimed that Federated Department Stores, Inc., one of the largest full-price

retailing organizations in the United States, conspired with Esprit, a manufacturer of a high-price clothing line, to fix resale prices in violation of Section 1 of the Sherman Act. Burlington also claimed that pursuant to this conspiracy Esprit discontinued sales to Burlington in violation of their contract. Esprit sold its clothing to both retailers, with Federated "being by far the larger purchaser." On one occasion Esprit refused to fill Burlington's most recent orders and informed Burlington that it would no longer sell to it. One month earlier, the chairman of Federated had made a speech on off-price retailing at a meeting attended by representatives of some 600 major retailers and garment makers in which he said that discounters were free-riding off the marketing efforts of full-price retailers and that Federated intended to stop dealing with manufacturers who sold current-season fashions to discounters. Burlington claimed this speech was the cause of Esprit's subsequent refusal to do further business with it. Esprit denied this claim, asserting that it had no knowledge of the speech and that Burlington's termination was based on its retail marketing requirements.

The trial court dismissed Burlington's antitrust claim and the Court of Appeals affirmed the dismissal, holding that there was no direct or circumstantial evidence of an illegal agreement as required under the Supreme Court's decision in the Monsanto case.[13] Quoting from that decision, the court stated the plaintiff must produce "evidence that tends to exclude the possibility that the manufacturer and non-terminated distributors were acting independently."[14] The court pointed out that the case was inherently weak because there was no evidence that Esprit and Federated ever discussed Burlington's discounting. In addition, because a direct complaint by Federated to Esprit about Burlington's discount would not be sufficient to make out a prima facie case under Monsanto,[15] the speech by Federated's Chairman, which was couched in generalities, was clearly inadequate to prove a conspiracy between Federated and Esprit, even if Esprit knew its contents.

Likewise, in Garment District, Inc., v. Belk Stores Services, Inc.,[16] the court found the evidence of price fixing insufficient to meet the evidentiary standards of the Monsanto case. The plaintiff was the only consistent discounter of Jantzen clothing in a particular locality. The defendants were, Matthews-Belk Company, a member of the Belk department store chain, Belk Stores Services, Inc., which provided purchasing assistance for the Belk chain, and Jantzen, a manufacturer of sportswear. The Belk chain had over 400 stores in the south-eastern United States, about 200 of which sold Jantzen clothing at the manufacturer's suggested retail price. Soon after Garment District opened, Belk pressured Jantzen to stop supplying the store by threatening Jantzen with the loss of all of Belk's business. Jantzen was not allowed to attend Belk's annual trade show. In addition, Matthews-Belk placed its Jantzen clothing in its budget basement and sold it at discount prices. Belk's officers also met with representatives of Jantzen and complained of their sales to discounters, naming Garment District. After these meetings, Jantzen terminated its dealings with Garment District on the grounds it did not present a suitable image for a Jantzen retailer. However, based on other evidence in the case, the court found that the reason for the termination was the pressure exerted by Belk.

Nonetheless, the court ruled in favour of the defendant, holding that retailer complaints to a supplier, even those that rise to the level of threats, are insufficient to prove that the manufacturer and distributor acted in concert to set or maintain prices. Of particular interest is the court's specific rejection of the plaintiff's argument for distinguishing Monsanto on the ground that this case involved co-ordinated pressure by Belk which threatened Jantzen with the loss of business of 200 Belk stores whereas Monsanto involved complaints by small, independent dealers.[17]

3. Exclusionary Conduct - Toys "R" Us

Some conduct by large buyers has more definite anti-competitive effects. The FTC decision in its administrative proceeding against Toys "R" Us, the largest retailer of toys in the United States and world-

wide, is the most significant case in point.[18] The case concerns alleged exclusionary conduct by a dominant buyer of toys. The Commission issued its administrative complaint against Toys "R" Us in May 1996. The Administrative Law Judge upheld the charges in a September, 1997 initial decision, which Toys "R" Us appealed to the Commission.

On October 14, 1998, the Commission issued its final decision upholding the charges that Toys "R" Us had violated Section 5 of the FTC Act by using its dominant position as the leading retailer of toys in the United States to organize a campaign to suppress price competition from warehouse clubs, which represented an innovative and growing class of discount competitors. The Commission found that, as alleged in the complaint, Toys "R" Us entered into vertical agreements with, and orchestrated horizontal agreements among, toy manufacturers to stop selling to warehouse clubs the same toys sold to Toys "R" Us in order to prevent consumers from making direct price comparisons of club prices and Toys "R" Us prices. The goal was to reduce the effectiveness of clubs as competitors and thereby to prevent Toys "R" Us's prices to consumers from falling. The Commission found that the Toys "R" Us campaign succeeded, as a result of which competition was restrained. Toys "R" Us' principal defense is that it provided valuable services to consumers that the clubs did not provide, and that it was only by saving on those services that the clubs could unfairly underprice Toys "R" Us. The Commission found this "free-rider defense" to be unsubstantiated by the evidence. The following summarizes the key findings and legal analysis in the Commission's final decision.

Commission Findings of Fact

Toys "R" Us rose to its current position as the largest toy retailer in the United States in part by offering a larger selection of toys than any other retailer at the lowest prices. The company buys about 30% or more of the large, traditional toy companies' total output and is usually their most important customer. Toy manufacturers would have great difficulty replacing Toys "R" Us.

Warehouse club stores are a relatively new type of retailer in the US and a growing outlet, as the number of other toy chain outlets has shrunk. The first warehouse club was founded in 1976 and by 1992 the warehouse club chains operated about 600 individual club stores. Because of a variety of cost savings techniques, the clubs are able to sell brand name merchandise at lower profit margins than even major discount retailers in the United States. Warehouse clubs' prices were substantially below those of Toys "R" Us. The Commission found that Toys "R" Us' average retail margins are close to 30 percent above cost, whereas the clubs sell at mark-ups as low as nine percent. By the late 1980's the clubs had become increasingly important toy retailers and could select and purchase from the toy manufacturers' full array of products.

Beginning in 1989, Toys "R" Us became concerned that warehouse clubs presented a threat to its low-price reputation and to its profits. Contemporary estimates predicted that clubs would continue to grow at an accelerated rate. Toys "R" Us had already lowered its prices to meet lower-priced competition from Wal-Mart and other regional and national discount chains, but the clubs' marketing strategy threatened to bring prices even lower. In 1989 and 1990, Toys "R" Us sought to eliminate the competitive threat from the clubs and began discussions with some of its suppliers about denying or restricting the club's supply of certain key toy products. Initially it made general representations about not buying from manufacturers that sold to clubs. After a prolonged and extensive period of negotiations between Toys "R" Us and toy manufacturers, Toys "R" Us formulated and announced its club policy calling for suppliers to sell to the clubs only highly differentiated products (either unique, individual products or more expensive "combo" packages of two or more toys) that were not offered to any other outlet, including Toys "R" Us and offer first to Toys "R" Us all specials and exclusives to be sold to the clubs.

Toys "R" Us did not just announce its policy but also met with each of its suppliers, seeking and receiving from at least ten toy manufacturers explicit oral commitments that they understood the policy and agreed to go along. The Commission found "an abundance of evidence of promises, negotiations, compromises and cooperative conduct with respect to the development, adoption and enforcement of the club policy."[19] For example, some suppliers presented proposed club products to Toys "R" Us for its preview and clearance and otherwise negotiated with Toys "R" Us about the appearance or content of club offerings. Toys "R" Us also engaged in extended negotiations with some reluctant suppliers to gain compliance with the club policy. In some instances, when breaches were detected, Toys "R" Us and the offending toy firm worked out a remedy to compensate Toys "R" Us and encourage future compliance or otherwise reached new points of agreement.

Toys "R" Us worked for over a year to convince the large toy manufacturers to discriminate against the clubs by selling to them on less favourable terms and conditions. The biggest obstacle Toys "R" Us had to overcome was the major toy manufacturers' reluctance to give up sales to this new, fast-growing, and profitable distribution channel, and their concern that they would lose market share if their rival competitors continued to sell to the clubs. Manufacturers indicated they would adhere to club sales restrictions only if their significant competitors did so. To ensure broad-based compliance by toy manufacturers, Toys "R" Us systematically brokered a horizontal agreement - essentially an agreement to boycott the clubs - among at least seven toy manufacturers by relaying assurances from one manufacturer to another that each would go along with the agreement to restrict club sales if the others did so.

Toys "R" Us was the communications hub and initiator of the boycott strategy. Toys "R" Us also requested and passed on complaints about breaches of the boycott agreement from one supplier to another.

By the end of 1993, Mattel, Hasbro and other major toy manufacturers had stopped selling to warehouse clubs any identical products that they sold to Toys "R" Us. The Commission found that, as a result of these agreements, competition was substantially restrained in the following respects: *1*) the no-identical products policy prevented consumers from making informed price comparisons; *2*) the special "combo" pack policy raised the average price of toys available at the clubs; *3*) the pattern of rapid growth of toys sales at the clubs was halted and reversed and individual clubs' toys business was hobbled and *4*) most significantly, competition from the clubs that would have driven Toys "R" Us to lower its prices was stifled.

The Commission also found no evidence of "free-riding" by the clubs, as asserted by Toys "R" Us as a justification for its conduct. The evidence showed that manufacturers compensate Toys "R" Us for advertising toys, warehousing and stocking toys made early in year, and stocking a broad line of each manufacturer's toys. There also was no evidence that club competition threatened to drive these Toys "R" Us "services" out of the market or otherwise harm consumers. Moreover, the Commission found no evidence that Toys "R" Us was concerned about "free-riding" when it developed its club policy.

Commission's Discussion of Law

The Commission found that Toys "R" Us entered into unlawful vertical agreements with at least ten manufacturers. It held that the doctrine of United States v. Colgate & Co., 250 U.S. 300 (1919) and its progeny that protects unilateral conduct from antitrust liability does not apply since Toys "R" Us overstepped the bounds of Colgate repeatedly and in several ways. As stated in the decision, "[w]e do not see how extended negotiations to change distribution policies, requests for and the granting of assurances of compliance, splitting the cost of a discount [Toys "R" Us] offered to meet a competitor's low price or presenting products for preview and agreed upon clearance by [Toys "R" Us] can in any way be understood as unilateral decision making by the toy manufacturers."[20] The Commission concluded that

Toys "R" Us' conduct and the toy suppliers' responses evidence agreements under the standard of Monsanto Co. v. Spray -Rite Serv. Corp., 465 U.S. 752 (1984) and other recent case law.

The Commission next concluded that Toys "R" Us organized and enforced a horizontal agreement based on the standards of proof set out in United States v. Parke, Davis & Co., 362 U.S. 29 (1960), Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939) and Ambook Enters. V. Time, Inc., 612 F.2d 604 (2d Cir. 1979) and also organized a horizontal agreement to enforce the club boycott, acting as a clearinghouse of information on non-compliance and the enforcement arm of the boycott, which is similar to that held illegal in United States v. General Motors Corp., 384 U.S. 127 (1966). In addition, following the general principles used to evaluate allegations of a hub-and-spoke conspiracy, the Commission found that Toys "R" Us' suppliers entered into an agreement: "Each manufacturer was told of the nature and the goal of [Toys "R" Us'] plan and each knew others were involved. They adopted [Toys "R" Us'] anti-competitive purpose by joining the boycott and by developing special club packs that would not force [Toys "R" Us] to lower its retail toy prices to meet lower prices."[21]

The Commission then determined that the agreements constituted a *per se* illegal group boycott, applying the approach set forth in Northwest Wholesale Stationers v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985). In Northwest Wholesale Stationers , the Supreme Court found that *per se* illegal boycotts often display certain factors: *1*) the purpose of the group boycott agreement is anti-competitive, in that it was designed to disadvantage competitors of one of the participants; *2*) the firms involved were dominant in their markets; *3*) the boycott cut off access to products and relationships needed for the boycotted firms to compete effectively; and *4*) lastly, the practice was not justified by plausible arguments that it enhanced overall efficiency. The Commission concluded from the evidence in this case that each of the factors is present. The Commission underscored the lack of any plausible business justification for the group's behaviour: "Looked at from the point of view of consumers, they got nothing at all out of the boycott organized by [Toys "R" Us]. Rather they were denied an opportunity to buy toys at low prices from outlets that many were coming to prefer."[22] While the Commission found market power, it held that a *per se* violation would be found even in the absence of such a finding, citing FTC v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986) in which the Supreme Court concluded that evidence of actual detrimental effects can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effects.

The evidence of Toys "R" Us' market dominance is worth highlighting in light of the focus of this round table. As a first step, the Commission explained that on the buyer side, the relevant geographic market was national, while on the retail side it was local.[23] The Commission then found that barriers to entry into toy retailing on a national scale are high.[24]

Having defined the relevant markets, the Commission's found that Toys "R" Us enjoys extraordinarily high market shares in the relevant markets when compared with other retail sectors.[25] In addition to market share evidence, the Commission found that for the various reasons discussed below, Toys "R" Us was viewed as irreplaceable by the toy company executives.[26]

The Commission discussed Toys "R" Us's unique role in toy retailing. For instance, Toys "R" Us purchases such a great share of all toys and of each toy manufacturer's output that no other retailer could make up for lost sales volume should Toys "R" Us decided to terminate its relationship with the supplier. In addition, Toys "R" Us maintains a uniquely broad inventory, and no other discount retailer carries nearly as many toys. It also is the only large buyer of some of its suppliers' older or low volume toy products , which significantly affect the manufacturer's overall profitability. The company is by far the largest retailer operating in overseas markets, which is an important ingredient in its influence over manufacturers. Without Toys "R" Us' support, many toy manufacturers will not pay for an effective marketing campaign

because they believe that they cannot attain the necessary volume of sales if products are not sold by Toys "R" Us.

Toys "R" Us' status as a multi-brand retailer was also an important factor in the Commission's analysis. In accord with an analysis put forth by the late antitrust scholar Professor Phillip Areeda, the Commission found that Toys "R" Us' ability as a very large multi-brand retailer to play, or threaten to play, favourites among suppliers amplified its own market power and is of great importance in understanding its success in organizing a boycott. As the Commission explained:

> With multi-brand dealers, a rejected or disfavoured product's shelf space will be given to that product's closest substitute with little (if any) loss to dealer. As a result, the manufacturing firm suffers a significant loss of sales and may lose even more in relative terms because its competitors will prosper as a result. Thus, a multi-brand dealer can shift from one product to another without incurring any cost, but manufacturers more often find it expensive to replace their large distributors.[27]

The Commission also examined the group boycott under a full rule of reason analysis and found that the boycott was illegal under this standard. "There was no business justification for a boycott that had a pronounced anti-competitive effect. The single justification offered - the prevention of free-riding - was a *post hoc* rationalization for a policy with an anti-competitive purpose and effect."[28]

The Commission further found that standing alone, even without the evidence of the horizontal agreement among many toy manufacturers, each agreement in the series of vertical agreements that Toys "R" Us induced or coerced from a number of toy manufacturers violated Section 1 of the Sherman Act under a full rule of reason. The Commission emphasized that Toys "R" Us gained agreements from key manufacturers accounting for roughly 40 percent of U.S. toy sales, and that this foreclosure effectively negated the clubs' ability to force Toys "R" Us to lower its prices. The clubs, even with their small market share, were not (as Toys "R" Us argued) "too small to matter" to the competitive process: "A policy that selectively eliminates effective competitors (or the ones most threatening to incumbent firms) harms the competitive process even though individual firms are the targets.[29] In summary, the collection of separate vertical agreements had profound anti-competitive effect; the collection of parties entering into these separate agreements had substantial market power; and there was no plausible business justification or efficiency.

Having found that Toys "R" Us violated the antitrust laws, the Commission adopted the proposed cease and desist order that the Administrative Law Judge issued in connection with his initial decision. The final order prohibits Toys "R" Us from:

- attempting or continuing any agreement or understanding with a supplier to restrict the supplier's sales to any discounter;

- urging or pressuring a supplier to restrict its sales to any toy discounter;

- requiring or encouraging any supplier to furnish information about any other supplier's sales or shipments to any discounter;

- facilitating or attempting to facilitate agreements among suppliers related to limiting the suppliers' sales to any retailer(s) by, among other things, transmitting or conveying complaints, intentions, plans, or actions, or other similar information from one supplier o another supplier relating to sales to such retailer(s); and

- for five years, announcing or communicating that Toys "R" Us will discontinue purchasing products from any supplier because the supplier sells to any toy discounter, or refusing to purchase from a supplier because that supplier dealt with any toy discounter.

Commissioner Swindle concurred in the majority's determination that Toys "R" Us entered into a series of anti-competitive vertical agreements with various toy manufacturers but dissented from the majority's conclusion that the company orchestrated a horizontal boycott. He found that the plausibility and strength of the evidence of the vertical theory undercut the finding of a horizontal conspiracy.

(A Commission decision may be appealed to a Circuit Court of Appeals, and, ultimately, to the Supreme Court.)

4. Discriminatory concessions in favour of large buyers

Another area of concern involving power buyers is the extraction of price or non-price concessions from suppliers that are not available to their competitors. As discussed below, such conduct may be unlawful under the Robinson-Patman Act or Section 5 of the Federal Trade Commission Act.

4.1 The Robinson-Patman Act

In 1936, section 2 of the Clayton Act -- the first U.S. statute that expressly prohibits certain forms of price discrimination - was amended by the Robinson-Patman Act. Congress took this step based on its concern that the growth of retail food and drug chains threatened the continued existence of independent retail and wholesale establishments. Congress believed that "power buyers," such as large retailers, could use their market power to extract price concessions from manufacturers and other sellers that were unavailable to their smaller competitors. As the Commission has stated:

> [t]he major legislative purpose behind the Robinson-Patman Act was to provide some measure of protection to small independent retailers and their independent suppliers from what was thought to be unfair competition from vertically integrated, multi-location chain stores.[30]

Although the origins of the Robinson-Patman Act thus are rooted in concerns about buyer power, its prohibitions are nevertheless constrained by the more general prohibitions of the U.S. antitrust laws. Indeed, the Supreme Court has held on several occasions that the Act must be interpreted consistently with the broader policies of the antitrust laws. In Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., the Court stated that the "Act condemns price discrimination only to the extent that it threatens to injure competition. Congress did not intend to outlaw price differences that result from or further the forces of competition."[31] Liability falls principally on the seller for granting such concessions; only one provision imposes liability on the buyer.

Although enactment of the statute arose primarily from concerns about buyer power, most of the Act's provisions focus on establishing seller liability for certain types of price and non-price discrimination; only one provision imposes liability on the buyer. In particular, section 2(a) of the Act, 15 U.S.C. 13 (a), prohibits a seller from discriminating in price between two or more competing buyers in the sale of commodities of like grade and quality where the effect of the discrimination may be to *i*) substantially lessen competition or tend to create a monopoly in any line or commerce, or (*ii*) to injure, destroy; or prevent competition with any person who grants or knowingly receives the benefit of the discrimination, or with customers of either of them.

The key issues in determining liability under this section are the type and extent of injury to competition that can satisfy the Act's requirements. Two types of injury are commonly alleged: *a*) "primary line", where the injury is to competition between the seller granting the discriminatory discount and other sellers; and *b*) "secondary line", where the injury is to competition between the favoured customer of the seller who receives the discriminatory lower price and the seller's disfavoured customers. Secondary line injury is more pertinent to this round table. Secondary line injury can be established either directly by evidence of displaced sales,[32] or by inference through proof of a substantial price discrimination between competing purchasers over time.[33] The latter inference can be rebutted by showing that the two purchasers did not compete, for example, at the same level of distribution or in the same geographic market,[34] or by evidence breaking the causal connection between the price differential and the lost sales or profits.[35]

The Act provides three statutory defenses - "cost justification," "meeting competition," and "changing conditions."The cost justification defense arises out of the provision in Section 2(a) that allows for price differentials based on "differences in cost of manufacture, sale or delivery resulting from differing methods or quantities" in which the commodities are "sold or delivered." Section 2(a) also allows price differences due to "changing conditions affecting the market for or marketability of the goods concerned," such as deterioration of perishable goods, obsolescence of seasonal goods, or distress sales under court process.[36] Section 2(b) permits price differences that represent a good faith effort to meet the competition of one or more other firms.

Sections 2(c), (d) and (e) are aimed at ensuring that firms do not circumvent the direct proscriptions of the Act by granting discriminatory discounts indirectly, through the provision of brokerage, advertising, and promotional allowances, or services. Section 2(c), 15 U.S.C. 13(c), prohibits sellers from paying to or receiving from a buyer certain commissions, brokerage fees, or other compensation or any allowance or discount in lieu thereof except for services rendered in connection with the sale or purchase of goods. Sections 2(d) and (e), 15 U.S.C. 13(d), (e), prohibit sellers from granting advertising or promotional allowances or services unless the same allowances or services are available to all competing customers or purchasers on proportionally equal terms.

Section 2(f), the so-called "buyer provision" of the Act, prohibits any person engaged in commerce from knowingly inducing or receiving a price discrimination that is prohibited by Section 2(a). Section 2(f) does not expressly mention power buyers and does not categorize the recipients of illegal price discrimination by size. However, as noted above, the legislative history makes clear that this Section is directed primarily against buyers, such as chain stores, who use their purchasing power to extract price concessions from their suppliers. Viewed in the context of U.S. antitrust enforcement policy today, Section 2(f) is aimed at preventing market inefficiency and ultimate harm to consumers that may result when, for example, an inefficient buyer with large market share is able extract discounts that are not cost justified..

To establish buyer liability under Section 2(f), the evidence must show that the buyer knew or should have known that the discrimination it induced or received was an illegal discrimination. Buyer liability is entirely derivative of seller liability under Section 2(a), and the defenses and injury to competition requirements of Section 2(a) apply to Section 2(f) as well. In Great Atlantic & Pacific Tea Co. v. FTC, the Supreme Court held that a "buyer cannot be liable if a prima facie case could not be made against a seller or if the seller has an affirmative defense." [37] The A&P case involved the efforts of a major grocery chain to obtain cost savings in the purchase of milk for its Chicago area stores by selling milk under its private label instead of a brand name. A&P first obtained a bid from its long term supplier, Borden, then received a lower cost bid from a competitor of Borden. A&P contacted Borden, telling them their bid was too high and suggesting a certain dollar range for improving Borden's bid. Borden then submitted a lower second bid which A&P accepted. Reversing the FTC finding of a Section 2(f) violation,

the Supreme Court explained that "a buyer who has done no more than accept the lower of two prices competitively offered does not violate § 2(f) provided the seller has a meeting-competition defense."[38] The Court found that because Borden's granting of the discriminatory price was justified under the "meeting competition" defense, A&P's solicitation of a lower price was not prohibited by the statute.

Section 2(f) applies only to price discrimination; it does not prohibit buyers from inducing or receiving non-price discrimination -that is, allowances or services that would be unlawful for a seller to provide under Sections 2(d) or 2(e), and there is no private right of action against buyers for either type of conduct. However, the FTC has ruled that buyer inducement or receipt of unlawful allowances or services is an unfair method of competition prohibited by Section 5 of the Federal Trade Commission Act ("FTC Act"). For example, in Grand Union Co. v. FTC,[39] the operator of a large chain of grocery stores entered into a contract with an Advertiser by which it obtained indirect payments from a number of suppliers that were not made available to its competitors. After first establishing in another proceeding that the suppliers' payments violated Section 2(d), the FTC charged that the buyer's receipt of these payments violated Section 5 of the FTC Act. The Court of Appeals agreed, finding that the Act's failure to hold buyers liable for discriminatory receipt of promotional or advertising allowances was an oversight, and that the conduct was plainly within the spirit of "unfair methods of competition" because the underlying conduct was already prohibited by Section 2(d) of the Act. The Commission's approach has been endorsed by several Courts of Appeal.[40]

In order to prove that a buyer knew or should have known of the illegality of the price discrimination at issue, a plaintiff (governmental or private) may introduce evidence of the buyer's expertise and "trade experience" from which its knowledge of an unlawful price discrimination can be inferred.[41] The sufficiency of this evidence is often a contentious issue in cases under Section 2(f) and Section 5. In the FTC's case against American Motors Specialities, Co.,[42] jobbers had formed group buying organizations for the express purpose of obtaining volume discounts from suppliers. However, these organizations were often only bookkeeping devices that combined the purchases of members but performed no distribution functions. The group members knew that they purchased in the same quantities and were served by the same sales methods as their competitors but still received substantial discounts through their buying organizations. The FTC and the courts found this type of trade experience to be sufficient evidence to establish the requisite buyer knowledge of illegality. In Boise Cascade Corp., the Commission found that the largest distributor of office products in the U.S. knowingly received discriminatory wholesale discounts based on evidence that it knew that its purchase price was lower than the other prices in published price lists.[43] Other examples of trade experience evidence sufficient to prove buyers' illicit knowledge include protests by sellers and pressuring by a buyer to obtain regularly recurring special allowances or price reductions.[44]

The Commission and the courts have ruled that the plaintiff has the burden of proving other elements of the violation, such as that the buyer knew or should have known that the price differential was not cost justified and that this burden can be met by inferences rather than evidence of the exact costs.[45] The Commission also has taken the position that once the plaintiff establishes a *prima facie* buyer liability case, the plaintiff does not have to prove also the absence of meeting competition and changing conditions defenses,[46] but the courts have divided on this issue.[47]

4.2 The Robinson-Patman Act and Slotting Allowances

The term "slotting allowance" typically refers to one-time payments that manufacturers make to a retailer for initial access to a retailer's shelves; these payments often, but not always, are associated with the introduction of new products. Less commonly, the term encompasses repeated payments to retailers for stocking established products, or for providing preferential shelf space. In about 1984, grocery retailers in

the United States began requiring slotting allowances, and the practice has become increasingly widespread; drug stores recently adopted the practice.

The payment of slotting allowances has been controversial since its inception. There are conflicting views among businesses, economists and lawyers as to their effects of these allowances on competition.[48] At the supplier level, manufacturers, especially small companies, claim that they cannot afford to pay the allowances and are denied retail outlets for their products because they do not pay allowances. Another complaint is that large suppliers use the payments to exclude competitors and to raise barriers to entry. At the retail level, small retailers who do not receive the allowances complain that these payments are a guise for otherwise unlawful price discounts or promotional allowances, allowing larger retailers to circumvent the Robinson-Patman Act. Others, however, offer procompetitive rationales for slotting allowances, such as that they lower the net price for the retailer and can facilitate price competition among manufacturers. In addition, where shelf space is scarce, the payments may be one way of auctioning a scare resource to its highest and best use. They may also compensate retailers for the costs of bringing a new product into inventory and the risk that the product may not be successful. Indeed, to the extent that the payments communicate a manufacturer's willingness to share such costs and risk, the slotting allowance can promote efficiency by providing valuable information to the retailer about the manufacturer's confidence in the product's likely success.

There are no Commission or federal court decisions ruling directly on the legality of slotting allowances. It could be argued that the use of slotting allowances could violate the Robinson-Patman Act.[49] If the payment is for access to the store itself, slotting allowances arguably may constitute a discriminatory discount on the price of the product covered by the prohibitions in Sections 2(a) and 2(f), discussed above. As noted above, unlawful price discrimination requires competitive injury. This may be shown at the level of the seller's disfavoured customers who compete with the seller's favoured customer(s). - "secondary line" injury.[50] The cost justification, changing conditions, and meeting competition defenses also would be relevant to determining liability.

If the payment is for preferential shelf space, the payment may constitute a discriminatory promotional allowance, provided that an express connection between the payment of these allowances and the resale of particular products can be established. In the FTC Guides for Advertising Allowances, the Commission states that the "discriminatory purchase of display or shelf space, whether directly or by means of so-called allowances," may violate the Robinson Patman Act[51] and Section 5 of the FTC Act.[52]

NOTES

1. Dkt. No. 9278 (Final Decision and Order, October 13, 1998).

2. Swift & Co. v. United States, 196 U.S. 375 (1905) (agreement among meat packers to refuse to bid against each other for the purchase of livestock held illegal under Section 1 of the Sherman Act).

3. The Secretariat has advised that this round table will not address simple monopsony or oligopsony power. In addition, we understand that the round table will not cover horizontal restraints, such as horizontal price-fixing and group boycott, since these topics have been addressed in other round tables.

4. 472 U.S. 284 (1985)

5. Id. at 295 ("arrangement permits the participating retailers to achieve economies of scale in both the purchase and warehousing of wholesale supplies, and also ensures ready access to a stock of goods that might otherwise be unavailable on short notice. The cost savings and order-filling guarantees enable smaller retailers to reduce prices and maintain their retail stock so as to compete more effectively with larger retailers").

6. See, e.g., id. at 286-87 ("The cooperative arrangement thus permits the participating retailers to achieve economies of scale in purchasing and warehousing that would otherwise be unavailable to them.")

7. See, e.g., Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979); National Collegiate Athletic Ass'n. v. Board of Regents of University of Oklahoma, 468 U.S. 85 (1984).

8. U.S. Department of Justice, Business Review Letter to FRA Shipper's Ass'n, 6 Trade Reg. Rep (CCH) 44,021 (Summary 88-7); Central Retailer-Owned Groceries, Inc. v. FTC, 319 F.2d 410 (7th Cir. 1963); Associated Greeting Card Distributors, 50 F.T.C. 631 (1954).

9. See, e.g., Timken Roller Bearing v. United States, 341 U.S. 593 (1951); Massachusetts Board of Registration in Optometry, 110 F.T.C. 549 (1988); Council of Fashion Designers of America, 120 F.T.C. 817 (1995).

10. Monsanto Co. v. Spray-Rite Co., 465 U.S. 752 (1984).

11. See, e.g., Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc., 824 F.2d 582, 594 (8th Cir. 1987), cert. denied, 484 U.S. 1010 (1988); VII Areeda, Antitrust Law 1453c at 144-45.

12. 769 F.2d 919 (2d Cir. 1985).

13. Monsanto, 465 U.S. 752. In a later case decided after the lower federal court cases discussed above, the Supreme Court further increased the plaintiff's burden of proof of what constitutes an agreement by requiring an express or implied agreement on the price or price levels to be charged. See Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988).

14. Id. at 764.

15. "Permitting an agreement to be inferred merely from the existence of complaints, or even from the fact that termination came about ?in response to' complaints, could deter or penalize perfectly legitimate conduct." Id. at 763.

16. 799 F.2d 905 (4th Cir. 1986).

17. Id. at 909.

18. In the Matter of Toys "R" Us, Inc., Dkt. No. 9278 (Final Decision and Order, October 13, 1998) ("Final Decision").

19. Final Decision at 22.

20. Id. at 50.

21. Id. at 60.

22. Id. at 82.

23. Id. at 68.

24. Id. at 69.

25. Id. at 70.

26. Id. Although Toys "R" Us accounts for approximately 20 percent of sales on a national basis, in local markets, Toys "R" Us often accounts for over 35 percent of sales. This is because Toys "R" Us does not do business in every local market where toys are sold. Id. at 74- 75.

27. Id. at 71. See 8 P. Areeda, Antitrust Law 1648C, at 535.

28. Id. at 87.

29. Id. at 84.

30. Boise Cascade Corp., 107 F.T.C. 76,210 (1986), rev'd and remanded on other grounds, F. 2d 1127 (D.C. Cir. 1988), on remand, 113 F.T.C. 956 (1990), appeal dismissed pursuant to stipulation.

31. 509 U.S. 209, 220 (1993).

32. Falls City Industries v. Vanco Beverage, Inc., 460 U.S. 428, 435 (1983); Chroma Lighting v. GTE Products Corp., 111 F.3d 653, 654 (9th Cir. 1997), cert. denied, 118 S.Ct. 357 (1997).

33. Texaco, Inc. v. Hasbrouck, 496 U.S. 543, 559 (1990).

34. See, e.g., Anaren Microwave, Inc. v. Loral Corp, 49 F.3d 62, 63 (2d Cir. 1995).

35. Falls City Industries, 460 U.S. at 435.

36. See, e.g., Comcoa, Inc. v. NEC Telephones, Inc., 931 F.2d 655 (10th Cir. 1991).

37. 440 U.S. 69, 76 (1979).

38. Id. at 81.

39. 57 F.T.C. 382 (1960), modified, 300 F. 2d 92 (2d Cir. 1962), cert. denied, 372 U.S. 910 (1963).

40. See, e.g., Alterman Foods, Inc. v. FTC, 497 F.2d 993 (5th Cir. 1994); Fred Meyer, Inc. v. FTC, 359 F.2d 351 (9th Cir. 1966), rev'd in part on other grounds and remanded, 390 U.S. 341 (1968).

41. See Automatic Canteen Co. of America v. FTC, 346 U.S. 61 (1953), which was the first Supreme Court case to consider § 2 (f). In a recent case, Walker v. Hallmark Cards, Inc., 1997-2 Trade Cas. (CCH) 71,999

(M.D. Fla. 1997), the court granted summary judgment in part because the plaintiff failed to produce evidence that the buyer knew, or should have known, that its competitors were not receiving similar terms and incentives.

42. 55 F.T.C. 1430 (1959), aff'd, 278 F.2d 225, cert. denied, 364 U.S. 884 (1960).

43. 107 F.T.C. 76.

44. See, e.g., Giant Food Inc. v. FTC, 307 F.2d 184, 187 (D.C. Cir. 1962), cert. denied, 372 U.S. 910 (1963); Fred Meyer, 359 F.2d at 363.

45. See, e.g., Fred Meyer, 359 F.2d at 364; Suburban Propane Gas Corp., 73 F.T.C. 1269 (1968).

46. See, e.g., Boise Cascade, 107 F.T.C. at 217; American Motor Specialities Co., 55 F.T.C. at 1446-47 (dictum).

47. Compare Mid-South Distributors v. FTC, 287 F.2d 512 (5th Cir.), cert. denied, 368 U.S. 838 (1961) with Thurman Industries v. Pay ?N Pak Stores, 709 F. Supp. 985, 995-96 (W.D. Wash.), modified on other grounds, 1987-2 Trade Cas. (CCH) 67,676 (W.D. Wash. 1987), aff'd, 875 F.2d 1369 (9th Cir. 1989).

48. See, e.g., Cannon & Bloom, Are Slotting Allowances Legal Under the Antitrust Laws?, 10 J. Public Policy and Marketing 167 (Spring 1991); Kelly, The Antitrust Analysis of Grocery Slotting Allowances: The Procompetitive Case, 10 J. Public Policy and Marketing 187 (Spring 1991).

49. Slotting allowances may also violate other antitrust statutes in ways not pertinent to the topic of this round table. First, rival suppliers or retailers might collude to allocate available shelf space or fix the amount of such payments in violation of Section 1 of the Sherman Act or Section 5 of the FTC Act. Second, suppliers or retailers might use their direct or indirect control of slotting allowances and access to shelf space to monopolize or attempt to monopolize a relevant product or geographic market in violation of Section 2 of the Sherman Act and Section 5 of the FTC Act. Third, slotting allowances may be provided in connection with an unlawful exclusive dealing arrangement that creates or maintains market power in violation of Section 3 of the Clayton Act and Section 5 of the FTC Act.

50. Injury at the manufacturer level -- "primary line" injury-- again is outside of the parameters of this round table because it involves elimination of competition at the manufacturing level.

51. Liability is imposed only on the seller for violations of Section 2(d) of the Act, as noted above.

52. 16 C.F.R. 240.9, n. 1.

COMMISSION EUROPÉENNE

Les conflits d'intérêts qui opposent les fournisseurs aux distributeurs conduisent parfois ceux-ci à réclamer, sous la menace de déréférencement, des avantages tarifaires discriminatoires ou non justifiés par des contreparties réelles. Tel est le cas par exemple des droits d'entrée, des primes de référencement ou des remises excédant les économies que pourraient réaliser le fabricant.

De tels comportements s'expliquent notamment par le fait que la grande distribution est souvent indispensable pour la commercialisation des produits de grande consommation[1], par la rareté du linéaire disponible dans les grandes surfaces[2] et par la situation de dépendance dans laquelle se trouvent de nombreux distributeurs par rapport à la grande distribution[3].

Diverses règles du droit communautaire permettent d'appréhender de tels comportements. Les autorités communautaires peuvent agir *a priori*, dans le cadre du contrôle des opérations de concentration, pour limiter le risque de tels comportements (II) ou *a posteriori*, sur le fondement du droit des ententes et des abus de position dominante, pour les sanctionner (III). Dans les deux cas, cependant, l'intervention des autorités communautaires ne peut être envisagée que dans le cas où le marché est susceptible d'être affecté de manière significative, marché qu'il convient dès lors de délimiter au préalable (I).

1. Marché pertinent

Les grandes surfaces vendent en général aux consommateurs mais, parfois, elles fournissent également des petites et moyennes entreprises qui se trouvent dans l'incapacité ou presque de recourir au commerce de gros “traditionnel”. Il s’agit pour l’essentiel de collectivités (hôtels, restaurants, hôpitaux, etc.) ou de commerce de détail de proximité. Elles peuvent donc exercer leur activité non seulement sur le marché de la vente au détail de bien de consommation courante, mais aussi sur le marché des ventes de biens de consommation courante en libre-service de gros. Elles exercent également leurs activités sur le marché de l’approvisionnement en biens de consommation courante. Il convient donc d’examiner ces trois différents marchés.

1.1 Marché de la vente au détail de biens de consommation courante

1.1.1 Marché de produits

Affaire Promodes/Dirsa[4]

Dans l'affaire Promodes/Dirsa la Commission a rejeté la suggestion des parties visant à définir le marché pertinent comme le marché de la distribution de détail de produits alimentaires. Elle a estimé au contraire que, dans l'activité de distribution, il convenait de distinguer les offres des petits commerces spécialisés, des petites surfaces de ventes, des moyennes et grandes surfaces :

- les petits commerces spécialisés tels que par exemple les boucheries, charcuteries, boulangeries etc. présentent un assortiment limité à une famille de produits laquelle résulte le plus souvent de l'exercice d'un métier d'artisan ;

- les petites surfaces de proximité inférieures à 400 m2 (autres commerces traditionnels, mini libre-service, supérettes) commercialisent un assortiment réduit dans différentes familles de produits et correspondent le plus souvent à des besoins d'achats réduits en quantité, de dépannage ou de complémentarité ;

- les moyennes et grandes surfaces (supermarchés et hypermarchés de plus de 400 m2) présentent un assortiment de produits beaucoup plus large tant par le nombre de familles de produits que par le nombre de références dans chacune d'elles. Elles correspondent à des besoins d'achat en plus grande quantité et plus diversifiés. En outre, cette plus grande variété des produits dans l'offre d'assortiment leur donne la possibilité de pratiquer des politiques de prix différenciées avec des prix faibles sur certains produits et un amortissement de cette baisse sur d'autres produits.

Affaire Kesko/Tuko[5]

Dans l'affaire Kesko/Tuko (il s'agissait de la fusion de deux groupements de la grande distribution en Finlande), la Commission a retenu que le marché en cause était constitué par la fourniture d'un panier de produits frais et de produits d'épicerie sèche, ainsi que d'articles ménagers non alimentaires vendus en supermarché (produits d'entretien, produits de toilette, produits en papier jetables et produits d'hygiène). Ce marché excluait les ventes en magasin spécialisé, en kiosque et dans les stations-service, ces points de vente assurant un service complémentaire de ceux des supermarchés. Pour parvenir à cette conclusion, la Commission avait notamment relevé que :

- "la concurrence en Finlande oppose (…), les supermarchés et les autres formats de magasin capables d'offrir au consommateur une gamme de produits étendue qui lui permette d'acheter la plupart des articles de première nécessité dans un seul et même magasin, en lui proposant des services annexes, tels que parcs de stationnement, chariots, etc." ;

- "bien que l'étendue du panier de produits offerts puisse varier considérablement d'un supermarché à l'autre, certains types de magasins plus petits, notamment les magasins spécialisés (qui sont assez peu courants en Finlande), les kiosques et les stations-service, n'offrent pas de services qui concurrencent directement le panier de biens proposé par les grandes surfaces. Les stations-service ont une surface de vente très inférieure aux magasins Kesko ou Tuko les plus petits et leurs ventes de biens de consommation courante concernent essentiellement des produits d'épicerie sèche (environ 70-80 pour cent de leurs ventes totales) alors que, dans les commerces traditionnels de biens de consommation courante, les ventes de produits frais représentent quelque 50 pour cent du chiffre d'affaires".

1.1.2 Marché géographique

Le marché de la vente au détail de bien de consommation courante est en général un marché local. Par exemple, dans l'affaire Promodes/Dirsa, la Commission a estimé que les consommateurs procèdent à leur choix entre les points de vente dans une certaine zone, limitée géographiquement par des contraintes de transport. Pour les achats en faible quantité, cette zone se réduit au quartier, pour les achats en grande quantité elle n'excède pas le cadre de l'agglomération.

Les professionnels du commerce de détail considèrent d'ailleurs, en général, que la zone de chalandise d'un supermarché est délimitée par le rayon qu'il faut parcourir pour se rendre au supermarché en voiture en une vingtaine de minutes tout au plus. Du point de vue du consommateur, une course en

voiture de vingt minutes donnerait accès à un, deux ou plusieurs supermarchés, selon le lieu de résidence du consommateur et la localisation des magasins considérés.

Dans l'affaire Kesko/Tuko, la Commission a néanmoins souligné les difficultés à délimiter des marchés locaux : "le chevauchement entre les zones de chalandise de différents supermarchés ainsi que la répartition de la population des consommateurs non seulement déterminent les interactions, sous l'angle de la concurrence, entre supermarchés géographiquement proches, mais provoquent également, jusqu'à un certain point, des réactions en chaîne sur les supermarchés plus éloignés. De surcroît, les décisions sur d'importants éléments de la concurrence, tels que la gamme de produits, l'origine des produits, leur qualité, les services offerts (heures d'ouverture, etc.), les actions publicitaires et promotionnelles, ainsi que les prix (par exemple, produits en promotion), ne sont pas prises au niveau local, mais régional voire national"[6].

Au cas d'espèce, même si divers éléments indiquaient que le marché géographique était relativement large, la Commission a estimé qu'il n'était pas nécessaire, pour pouvoir apprécier l'opération de concentration en cause, de délimiter de manière définitive l'étendue exacte du marché géographique en cause, puisque la part de marché cumulée de Kesko et Tuko était du même ordre de grandeur, quel que soit le niveau où s'effectuait le calcul : national, régional ou local[7].

1.2 Marché des ventes de biens de consommation courante en libre-service de gros ("cash and carry")

La Commission a retenu, dans l'affaire Kesko/Tuko, l'existence d'un Marché des ventes de biens de consommation courante en libre-service de gros. Elle a adopté cette position après avoir mis en évidence la spécificité de ce marché par rapport au commerce de gros "traditionne" : "Comme l'expression "cash and carry" (payer-prendre) l'indique, il s'agit d'un commerce de gros différent du commerce de gros "traditionnel", dans la mesure où ce sont les clients qui assurent eux-mêmes le transport et paient les marchandises comptant plutôt qu'à crédit. C'est donc une technique avantageuse pour les clients qui sont moins à même de prévoir la demande à long terme, ne disposent pas des installations nécessaires pour entreposer des stocks importants sur une longue durée ni des ressources financières pour garantir les crédits qu'exigent des achats de grandes quantités et qui, pour ces raisons, préfèrent des achats fréquents et portant sur de plus petites quantités. Les intéressés sont, en général, de petites entreprises, alors que les gros clients tendent à préférer les achats en gros (...). Le nombre de références disponibles dans les entrepôts de libre-service de gros (habituellement, quelque 10 000 références en stock), par rapport au commerce de gros "traditionnel", dont le nombre de références en stock est généralement beaucoup plus restreint (…), traduit bien la fonction distincte que remplit le libre-service de gros"[8].

1.3 Marché de l'approvisionnement en biens de consommation courante

1.3.1 Marché de produits

La Commission estime que chaque produit ou groupe de produits constitue à lui seul un marché distinct puisque, du côté de la demande, sa substituabilité à d'autres produits ou groupes de produits est inexistante ou imparfaite.

Elle a considéré toutefois, dans l'affaire Kesko/Tuko, que dans la mesure où, en Finlande, d'un groupe de produits à l'autre, la structure de la demande est largement analogue et concentrée, il n'y avait pas lieu d'apprécier les effets de l'opération de concentration sur chaque produit ou groupe de produits. Elle s'est donc contentée d'apprécier les effets du renforcement de la puissance d'achat, qui résulte de la nouvelle structure de la demande, sur l'ensemble des biens de consommation courante.

1.3.2 Marché géographique

Dans l'affaire Kesko/Tuko, la Commission a conclu que le marché géographique en cause était la Finlande. Cette position s'appuyait sur le double constat suivant :

- quelque 70 pour cent des produits vendus par Kesko et Tuko étaient des productions nationales. Les fabricants de ces produits réalisaient la majeure partie, quand ce n'était pas la totalité, de leur chiffre d'affaires en Finlande ;

- pour ce qui concerne les produits importés, il y avait lieu de définir les marchés géographiques en évaluant, tout particulièrement, la capacité des fournisseurs de passer d'un canal à l'autre pour l'acheminement de leurs marchandises jusqu'au consommateur final. Or si l'on considérait les fabricants des 30 pour cent de produits importés que vendaient Kesko et Tuko, l'accès à la demande, autrement dit à la clientèle des détaillants et des libres-services de gros, n'était possible qu'en utilisant les canaux de distribution (détaillants ou entrepôts de libre-service en gros) finlandais.

Les trois marchés de produits de consommation courante qui sont décrits plus haut sont liés par des relations d'interconnexion verticales telles que la position d'une grande enseigne de la distribution sur le marché de la vente au détail de ces produits détermine celle qu'elle détient sur les marchés des achats (c'est-à-dire par rapport à leurs fournisseurs). Réciproquement, sa position sur les marchés des achats influe considérablement sur leur position au stade du commerce de détail. Enfin sa position sur le marché des ventes en libre-service de gros est également liée à celle qu'elle détient sur les marchés des achats, dans la mesure où elles bénéficient, en achetant en grande quantité pour approvisionner leurs détaillants, d'un avantage concurrentiel supplémentaire par rapport aux petits exploitants locaux d'entrepôts de libre-service en gros.

2. Contrôle *a priori*

Conformément au règlement n°4064/89 du 21 décembre 1989, relatif au contrôle des opérations de concentration entre entreprises, les opérations de concentration qui créent ou renforcent une position dominante ayant comme conséquence qu'une concurrence effective serait entravée de manière significative dans le marché commun ou une partie substantielle de celui-ci doivent être déclarées incompatibles avec le marché commun (art. 2.3).

Conformément à cette disposition, la Commission s'est opposée au projet d'acquisition de Tuko par Kesko en Finlande. L'opération aurait en effet conféré une position dominante au groupe Kesko et aurait entravé le fonctionnement normal du marché.

2.1 Création d'une position dominante

L'acquisition de Tuko par Kesko aurait conféré à Kesko des parts cumulées de 55 pour cent du marché de la vente au détail de bien de consommation courante, ce qui laissait présumer l'existence d'une position dominante. Cette présomption était renforcée par les facteurs suivants :

- la position de Kesko et de Tuko en ce qui concerne les hypermarchés[9] : compte tenu de l'importance croissante des hypermarchés en Finlande, la position de force de Kesko et de

Tuko dans cette catégorie de grandes surfaces aurait renforcé encore la position dominante que leur conféraient leurs parts de marché cumulées ;

- le contrôle exercé par Kesko et Tuko sur une part importante des locaux commerciaux : Kesko et Tuko contrôlent toutes deux un grand nombre de locaux commerciaux consacrés à la vente au détail de biens de consommation courante et disposent d'une longue expérience de la gestion de ces locaux, ce qui leur aurait permis de maintenir et de renforcer leur position dominante sur le marché du commerce de détail ;

- les systèmes de fidélisation du client : l'opération se serait traduite par une augmentation importante du nombre de cartes de fidélisation de la clientèle émises par Kesko, ce qui lui aurait conféré un avantage considérable en ce qui concerne la connaissance des habitudes d'achat des clients et lui aurait permis, par le biais d'actions de marketing, de renforcer la fidélité de ses clients ;

- les produits vendus sous marque de distributeur : la position de force dont jouissent les produits sous marque de distributeur de Kesko et de Tuko aurait conféré à ces deux entreprises des avantages accrus en matière de fidélité de la clientèle (ces produits sont utilisés pour inciter les consommateurs à faire des visites régulières) ;

- les systèmes de distribution : l'acquisition de Tuko aurait multiplié les possibilités dont dispose Kesko d'influencer les conditions dans lesquelles les biens de consommation courante sont transportés en Finlande. Cette évolution aurait accentué la dépendance vis-à-vis de Kesko des détaillants tiers, des collectivités et, au moins, des petits et moyens producteurs de surgelés qui font appel aux services de l'une ou de l'autre de ces entreprises. Le nouveau groupe aurait également contrôlé les réseaux de distribution de produits surgelés en Finlande. Les surgelés constituant une part importante et intégrante du panier des biens de consommation courante, le contrôle que Kesko aurait exercé sur ce système de distribution aurait représenté un obstacle considérable à l'entrée sur le marché du commerce de détail.

2.2 Entrave au fonctionnement du marché

L'opération de concentration aurait eu les conséquences suivantes : la conclusion d'un accord avec Kesko aurait permis à un fournisseur de s'assurer du linéaire dans des points de vente qui représentent une part d'au moins 55 pour cent du marché finlandais ; Kesko aurait eu une puissance d'achat exceptionnelle, renforcée par la position des deux entreprises sur le marché du libre-service de gros ; la puissance qu'aurait engendré le contrôle de l'accès au transport aurait été encore accrue par l'effet cumulé des marques de distributeur très demandées de Kesko et de Tuko, qui pourraient être utilisées comme argument supplémentaire vis-à-vis des fournisseurs pour négocier de nouvelles concessions, notamment la réduction des prix ou l'amélioration des services d'assistance commerciale ; après la concentration, Kesko aurait donc été en mesure d'obtenir des producteurs des prix auxquels aucun de ses concurrents n'aurait pu prétendre, ce qui les aurait dissuadé d'autant plus à contrer activement Kesko, notamment sur les prix. Cette situation aurait rendu aussi l'entrée sur le marché plus difficile ; la puissance d'achat de Kesko lui aurait permis d'agir, dans une large mesure, indépendamment de ses concurrents sur le marché du commerce de détail.

3. Contrôle *a posteriori*

Le droit de la concurrence pourrait être appliqué aux abus de puissance d'achat commis par les grandes enseignes de la distribution. Les condamnations formelles sont cependant relativement rares. Plusieurs raisons pourraient expliquer cela :

- le caractère anticoncurrentiel des pratiques s'apprécie en principe au regard du bien-être des consommateurs. Or les abus de puissance d'achat s'exercent plus à l'égard de fournisseurs, victimes par exemple de sollicitations d'avantages tarifaires injustifiés, qu'à l'égard des consommateurs, qui voient en général un réel avantage dans les prix bas pratiqués par les grandes surfaces ;

- en droit communautaire, les pratiques telles que les prix abusivement bas, les discriminations commises par une entreprise ne peut être sanctionnée que si cette entreprise détient une position dominante. Certes, une position dominante pourrait être envisagée sur des marchés locaux. Mais alors il serait peut-être difficile d'établir l'affectation du commerce entre Etats membres, qui est une condition d'application de l'article 86 ;

- l'application du droit des ententes aux abus de puissance d'achat est rendue délicate par la difficulté d'établir un concours de volonté entre le distributeur et le fournisseur. Par ailleurs, les alliances internationales à l'achat ne font pas, en général, obstacle à ce que les membres de l'alliance s'approvisionnent par leurs propres moyens[10] et sont souvent conclus entre des distributeurs implantés dans des territoires différents, ce qui peut limiter le caractère anticoncurrentiel des pratiques.

A ces considérations, il convient d'ajouter que le droit des ententes ne s'applique pas aux pratiques qui n'affectent que de manière insignifiante le commerce entre Etats membres. Il importe par exemple d'établir que les activités en cause produisent des effets sensibles sur la position des fournisseurs sur les marchés des produits concernés. C'est parce que de tels effets n'ont pu être établis dans l'affaire SOCEMAS que la Commission a décidé de ne pas intervenir sur le fondement de l'article 85 à l'égard des statuts et de l'activité d'une centrale d'achats française, mandatée par ses membres pour acheter certains produits à l'étranger[11] :

- l'opacité et la complexité qui caractérisent souvent les pratiques tarifaires verticales constituent souvent un terrain propice aux comportements abusifs mais rendent également difficile la preuve de ces comportements ;

- même s'ils sont répétitifs, les abus de puissance d'achat sont souvent ponctuels, ce qui rend difficile l'établissement d'une affectation du marché ;

- contrairement à certaines législations, le droit communautaire ne comporte pas de dispositions spécifiques pour sanctionner les abus de dépendance économique. Au demeurant, l'expérience de divers membres de l'OCDE (Allemagne et France p. ex.) montrent que l'efficacité de telles législations est réduite.

NOTES

1. La Commission a montré par exemple le caractère indispensable des linéaires des grandes surfaces à propos des épices : "les principales marques d'épices destinées à la consommation domestique sont commercialisées dans le cadre d'une gamme qui comprend de très nombreuses variétés et (que) ce n'est que dans les grandes surfaces à libre service qu'une telle gamme peut être lancée, puis écoulée, d'une façon satisfaisante ; (que) la vente des épices dans les grandes surfaces à libre service offre, à cet égard, les conditions optimales, étant donné que c'est le seul endroit où un grand nombre de consommateurs peuvent voir, apprendre à connaître et acheter les variétés nouvelles et surtout les mélanges nouveaux ; (que,) de plus, la présentation d'une gamme de cette nature exige un espace et un équipement appropriés, des services (notamment une rotation) et un effort publicitaire qu'un détaillant indépendant est rarement en mesure de fournir ; (que,) étant donné, du reste, que les besoins de la clientèle de ce dernier se limitent à des petites quantités et aux variétés les plus courantes et que sa technique de vente est très différente de celle des magasins à libre service, il n'est généralement pas intéressé à disposer de la totalité de la gamme" (Com. CE 21 déc. 1977, JOCE 24 févr. 1978, n° L 53, p. 20

2. "Le linéaire de présentation disponible pour les nouveaux produits étant limité, les opérations, de plus en plus nombreuses, de lancement de nouveaux produits ne sont pas nécessairement compatibles avec l'objectif de rentabilisation maximale poursuivi par le détaillant. Ce conflit d'intérêts a conduit les détaillants à réclamer des primes de référencement (sorte de pas de porte) ou des remises excédant, dans certains cas, les économies de coût possibles pour le fabricant. La concurrence pour le linéaire est telle que les produits qui ne figurent pas en première ou en deuxième position risquent de plus en plus souvent d'être déréférencés et remplacés par les marques propres des grands distributeurs" (Com. UE, Livre vert sur la politique de concurrence communautaire et les restrictions verticales, n° 233, p. 76).

3. L'affaire Kesko/Tuko a par exemple révélé que les producteurs finlandais réalisent entre 50 à 75 pour cent de leurs ventes en Finlande avec Kesko et Tuko. Par ailleurs, les concurrents de Kesko et Tuko ne représentent que 40 pour cent du marché, ce qui exclut la possibilité d'envisager des solutions alternatives à court terme.

4. Com. CE, aff. IV/M.0027, JOCE C 321, 21 déc. 1990

5. Com. UE, aff. IV/M.784, JOCE L 110, 26 avr. 1997

6. pt. 21

7. pt. 23

8. pts. 26 et 27

9. plus de 1 000 m²

10. Ex. : Com. CE, déc. SOCEMAS (JOCE L. 201/4 du 12 08 68) et INTERGROUP (JOCE L. 212/23 du 09 08 75)

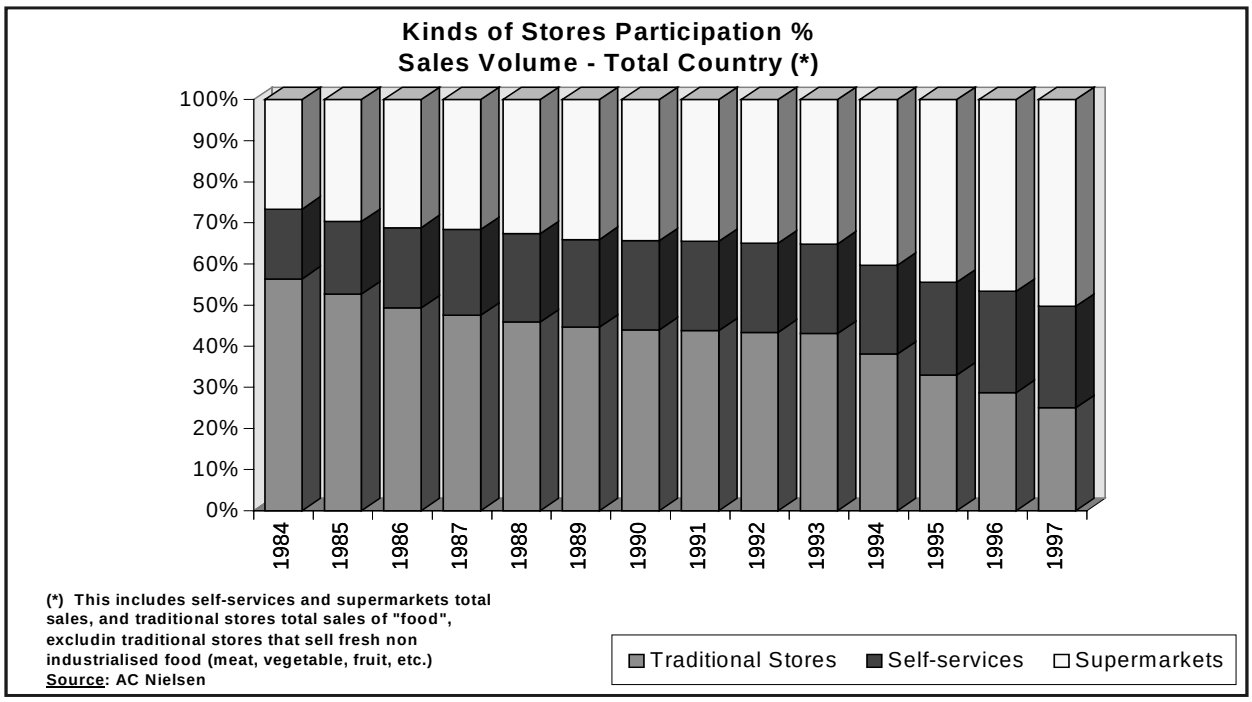
11. Com. CE, déc. SOCEMAS, préc. Cf. aussi Com. CE, déc. INTERGROUP, préc.

ARGENTINA

1. Characterisation of the Argentine retailing sector

In Argentina, the apparition and development of large supermarket chains is a relatively recent phenomenon and, according to distribution specialists, it has not yet reached its maturity and will probably be more intense in the next years. Though the first supermarket chains in Argentina appeared in the fifties most of them had already disappeared by the late seventies. Therefore, until 1970 traditional stores had almost 90 percent share of total sales.

By the late eighties, a number of important chains re-established in Argentina and began a process of large-scale growth during the nineties. Foreign companies like Carrefour (French), Wal-Mart (North American), Jumbo (Chilean) and Makro (Dutch) own some of those chains, while others (Coto, Norte, Disco, and Tía) are locally owned and managed. Therefore, traditional stores participation on total sales decrease to 53 percent in 1985, and down to 25 percent in 1997. The share of supermarkets in the number of retailing outlets by the end of 1997 in Argentina was around 1 percent**,** but their share in total sales was larger that 50 percent.



2. Supermarkets impact on retail market

The emergence and development of large supermarket chains in Argentina has had three main consequences on the behaviour of the retailing markets:

1. it modified the nature of competition among retailers, which went from a purely local scale to a much broader geographical scope;

2. it modified the relationships between retailers and suppliers;

3. it caused the loss of importance of wholesale distributors.

2.1 Competition among stores

The changes in the structure of the retailing sector that occurred in the last few years seem to have had important consequences on the level of competition among stores. According to a study by the Office of Prices and Markets that depends of the Department of Trade of Argentina, the most noticeable of those consequences can be seen in the evolution of prices[1]. While in 1992 the same basket of food and beverages cost 8 percent more in traditional stores than in supermarkets, in 1996 the gap had been reduced to five percent, in a context where the average price of that basket had dropped three percent in real terms.

2.2 Retailers and suppliers relationship

The main impact of supermarkets on the relationship between retailers and suppliers has been the emergence of firms with considerable buying power on the demand side. This situation modified the traditional interaction between suppliers and retailers, which had been largely managed by the supply side. The higher weight of supermarkets generated a scheme where prices seem to be the outcome of a bargaining process between suppliers and supermarket chains.

2.3 Wholesale distributors

Another noticeable change has been the loss of importance of wholesale distributors, whose role is usually replaced by direct sale systems between suppliers and supermarkets. This simplification in the commercial relationships has been pointed out as a source of cost savings associated with supermarkets, and it is probably a consequence of the scale economies that supermarket chains profit from.

3. Retail Structure impact on consumers

A study by an Argentine research institute, FIEL, concluded that there is evidence that the price evolution clearly indicates that the modernisation of the distribution channels benefited consumers:

1. there was an increase in the retailing margins in periods of high consumption and a reduction of those margins in periods of low consumption;

2. the increasing competition in retailing implied a reduction in the margins of traditional stores;

3. the poor benefited proportionally more from the changes in retailing and the lower prices, since the share of their income spent on food and beverages is higher than is the case for higher income groups.

4. Marketing practices associated with supermarkets

A common marketing practice of supermarket chains consists of selling certain products at reduced prices. In general, those reductions are advertised by the supermarket in order to attract consumers to the store, so they are analogous to investments in advertising designed to increase the sales of the supermarket as a whole (and not only the sales of the product on sale). In some particular cases, supermarkets sell those products at prices below purchasing cost, but their intention is usually the same: to act as an advertising device that improves their relative position in the global competition against the other retailers.

Prices below cost can nevertheless have an anti-competitive intention in cases where the aim of the supermarket is to use its higher financial capacity to force its competitors to leave the market, and therefore gain a position that allows it to exercise monopoly power in the future.

An apparently common practice in the relationship between supermarkets and suppliers has to do with the contribution of producers to the opening of new outlets. In this case, it happens that suppliers provide goods to supermarkets in order to finance part of the "investment in working capital" required to open new outlets. In exchange, they receive the right to a certain location on the supermarket shelves or a waiver to install their own promotion outlet inside the supermarket.

The relationship between suppliers and supermarkets has also pushed the higher development of more complex contracts related to commerce. As places where products are shown and sold, supermarkets also function as "windows" for products. Consequently, they are in a position of negotiating the position of those products in their shelves. A system that has apparently become popular is the "rental of exhibition space" in supermarkets, which makes suppliers bid for the best available locations as an advertising policy. It enables supermarkets to lower their purchase prices and allows suppliers to use retail outlets as part of their advertising policies.

The above mentioned practices have their origin in competitive phenomena that are very difficult to classify within the framework of the Argentine competition law. Notwithstanding, the interaction among suppliers, supermarkets and traditional stores may also exhibit some anti-competitive aspects where entry deterrence, collusion or abusive exercise of a dominant position is verified. Those hypotheses will be analysed in the following section.

5. Competition analysis of the retailing sector

The Argentine Competition Act (Act No. 22,262) contains rules about anti-competitive practices related to production and exchange of goods and services. Its basic provisions are contained in articles 1 and 2. Article 1 defines the aim of the law, which is to ban "the acts and behaviours (...) limiting, restricting or distorting competition or constituting abuse of a dominant position in a market, (...) which may result in a damage to the general economic interest". Article 2 completes such definition, since it establishes that a person possesses a dominant position in a market when he is the only supplier or purchaser or when, "without being the only one, he is not exposed to substantial competition". That definition can be generalised to a group of people among which "there is no effective competition, and there is no substantial competition by third parties".

To apply Act No. 22,262 to a concrete case, it is necessary to analyse four basic issues:

a) if the firm or firms who practice a certain commercial behaviour have a dominant position in the relevant market;

b) if they are abusing of that dominant position;

c) if the behaviour under analysis effectively limits or restricts competition;

d) if there may be damage to the general economic interest.

For a certain practice to be prohibited, condition "d" must necessarily be fulfilled, and it should also happen that either conditions "a" and "b" or condition "c" holds. Note that, while the requirements related to abuse of dominant position and restriction to competition must be established through concrete facts, damage to the general economic interest may be potential. The executive message that precedes the Argentine Competition Act, however, points out that such potentiality must refer to "a concrete danger, and not a mere logical and abstract possibility".

The nature of retailing makes the existence of a dominant position by an individual retailer a relatively rare phenomenon, especially in large cities. In smaller villages, dominant positions may appear in cases where we find a single supermarket chain and many small traditional stores. It is also possible in the retailing of items in which the majority of the transactions occur in specialised stores, and there is only one of those in the relevant geographic market. However, the mere existence of a high market share does not imply by itself a dominant position. In order to fulfil the requirement, the firm that possesses that market share must also be capable of somehow limiting the decisions of its competitors, making use of certain resources available only to itself (for example, storage, financial capacity, etc.).

Given a case of a dominant position, an abuse of that position implies a situation where the dominant firm exercises its market power with profit-maximising aims. In the context of retailing, those situations may occur in cases of price discrimination by a supplier between two equivalent transactions (where buyers are, alternatively, a supermarket chain and a wholesale distributor), imposition of abusive conditions to suppliers by a supermarket chain (for example, unreasonable prices or payment conditions), etc.

Even when we cannot find dominant positions, economic agents may violate the law if they practice acts that limit competition. Classic examples of this are intents to exclude competitors from the market, or price collusion among competitors.

In addition, the Argentine Competition law requires for the conduct to constitute a violation of the law, that it also implies a concrete danger to the general economic interest. This means that every practice must be evaluated using a rule of reason; there are no "*per se*" anti-competitive acts. Applied to the case of retailing, damage to the general economic interest is almost always synonymous with harm to consumers, be it through higher prices, reduction in the variety of available products or absence of existing products. The basic idea beyond this criterion is that any other harm that the other economic agents may suffer (i.e., damage to suppliers, distributors, supermarkets or traditional stores) is compensated by profits earned by somebody else. When consumers are harmed, conversely, this goes together with a reduction in trade, and the total surplus generated in the market becomes lower. If such reduction does not take place, all the changes in the levels of profit are mere redistribution of rents, which may affect individual interests but not the general economic interest.

5.1 Predatory pricing

The use of a rule of reason to evaluate anti-competitive practices makes violation of the competition act much easier to establish when we observe price increases than when we observe price reductions. That is why a strategy of lows prices by a supermarket, although capable of inflicting losses to its competitors, can only damage the general economic interest under certain circumstances, which are not common in the Argentine retailing sector:

- the supermarket must have a dominant position in the retailing market of the good that it sells below cost, or at least a reasonable possibility of achieving such position if its practice is successful;

- it must apply its policy to a sufficiently large set of items, so that it can effectively crowd out a whole group of stores;

- the supermarket must operate in a context where it is possible to deter the entrance of new competitors that may later challenge the dominant position gained as a consequence of the predatory pricing strategy.

Normally, firms that use low-price strategies only lower a reduced number of items that represent a small percentage of their total sales, and those are items over which they typically have a small market share. Items on sale rarely belong to the same category of products, and the possibility of deterring the entry of new competitors is even rarer.

Complaints about violations of the competition act that refer to predatory pricing, therefore, can only succeed in cases of relatively small cities where a supermarket with a dominant position engages in an aggressive pricing policy for a class of products which is protected against entry by other competitors.

5.2 Private brands

In Argentina, as it was already mentioned, the supermarket phenomenon is relatively new, so the development of private brands is also very new. Foreign companies, using their experience in other countries lead the process. Nevertheless, the national chains are also developing their own brands.

According to a report of the Department of Trade, the introduction of products with private brands has several advantages:

- it allows many small and medium suppliers to sell significant volumes in super and hypermarket chains with less selling and marketing expenses, which is a considerable improvement in their productive opportunities;

- it generates a higher diversification of the supply of available products in the market, benefiting consumers;

- consumers can buy products of certain standards of quality at lower prices, as normally private brands products are sold at lower prices, which represents a significant advantage for consumers.

Despite these advantages, it has also been argued that a variant of the private brands, the “own brand look-alike” can represent an unfair practice, which would, in turn, reduce consumer welfare. These

products, though not exact copies, are extremely similar to products of well-known brands, as size, colours and shape of labels, logo position, etc.

The same report from the Department of Trade remarks that this practice has two clear negative effects:

- possible consumer confusion, who have to dedicate more time in goods selection;
- as copies depreciate the quality signals associated with brands, they reduce the incentives of producers to invest in them, which in turn will end in a disadvantage to future consumers as a quality signal which allowed uncertainty reduction, and therefore, search costs, will be lost.

The wrong use of this practice has generated some problems. During 1997, the Office of Internal Trade fined Carrefour for violating Act N°19802 of Unfair Trade by selling a beer "Pryca" whose can was so similar to Heineken's that consumers could be cheated. The Court later confirmed the decision.

The arguments taken into account were the following:

- Pryca Dutch beer had a packaging with the same size, colours, logo position and shape label as Heineken's;
- a Dutch company, belonging 65 percent to the Carrefour Group in a 69 produced Pryca;
- both products were showed by Carrefour on the same shelf very close one to another;
- the National Institute of Industry Ownership stated that both cans of beer were very similar and declared that if the brand "Pryca" would have requested registration it would have been denied.

6. Grouping of retailers

In the Argentine Law there is no prior control of mergers nor are per se thresholds applied. Though limitation of competition by collusion among competitors is explicitly attacked by Act 22.262, an agreement signed by a group of retailers in order to reinforce their bargaining position against suppliers will not necessarily infringe the law if the purpose of that agreement is to countervail the market power that some suppliers may have. A combination of buying power should be judged case by case applying the rule of reason. In this context, an agreement among large supermarkets will be judged more strictly than one among traditional stores.

Moreover, in some jurisdictions, small and medium retailers grouping is promoted by local governments by means of specific tax exemptions which are designed to avoid double tax imposition, as it is the group who buys and then sells to each member. Retailers grouping is a frequent practice in different parts of the country, where a significant number of stores form them not only to strengthen buying power but also to ensure consumers certain quality standards, as members of the group.

In the case of acquisitions of outlets by competitors (and in the more extreme one of mergers and acquisitions of supermarket chains), the analysis should focus on market structure before and after the transaction. If the occurrence of the take-over implies that, in the relevant product and geographic area, the largest firm will significantly increase its market share, this becomes strong evidence of restriction of competition. That evidence can nevertheless be offset by the existence of other important competitors that

still limit the firm's discretion to set prices. In cases of mergers between competitors that strengthen the position of a firm that is not the largest in the market, conversely, the effect of consolidation may very well be pro-competitive, and in some situations they might be supported rather than dissuaded by competition policy.

7. Cases

The CNDC has received relatively few formal complaints against large supermarkets. This can be explained mainly by the fear that small suppliers have of being punished and not being able to continue selling. Notwithstanding, many informal complaints having been received, most of them about pressures for "voluntary" contributions towards the opening of new outlets, pressures to supply products without brands (for private brands), and the compulsory application of MFN clauses.

As the complaints have not been formal, the CNDC initiated investigations of the supermarket's practices *ex officio.* Among these investigations, one was about the difficulties that Wal Mart had to enter the market in 1995, as by public declarations, the manager complained that most of the suppliers were refusing to sell their products due to pressures from some of Wal Mart's competitors. However, no evidence of these pressures could be obtained, not even from Wal Mart, who after a short period of time declared that all their supply problems had been solved.

The CNDC is presently investigating if the practice of selling shelf space ("góndolas"), can constitute a restriction of competition, in the case that suppliers with market power buy an amount of space that is clearly in excess of their actual market share

Many small firms had gone to the private justice complaining about compulsory discounts due to volume "bonus", and to special locations in shelves. Judges decided in their favour as in these particular cases the discounts had not been previously negotiated.

Last year the Argentine Chamber of Stationers and Bookstores filed a complaint against Makro Supermarkets for abusing its buying power by implementing predatory pricing practices. Makro was offering a family pack of Rivadavia writing paper sheets at $5.90 when its purchase price was 8.88, implying a unit sale price approximately $3 below acquisition cost.

From the investigation that the CNDC carried out, it was concluded that Makro had a very small share of supermarket sales and an even smaller share in the market of family packs of Rivadavia writing paper sheets. In the light of this, the possibility of a dominant position was dismissed. It was also proved that the product's sale was offered only for 15 days.

The CNDC also verified that the share in the sales of Rivadavia writing paper within the total sales of the defendant was very low, which led to the inference that the below cost sale was a marketing strategy akin to advertising. This practice not only had not damaged the general economic interest but also had in fact benefited consumers, so Makro was not sanctioned.

8. Who should deal with problems associated with retail buyer power?

Under our present legislation, some problems dealing with retail buying power are treated by the Office of Unfair Trade (e.g. private brands' wrong use), others by the CNDC (MFN clause, sale of shelves space, etc.), and others by the ordinary justice (when public interest is not affected).

In our view, a closer relation between the Office of Unfair Trade and the CNDC would be useful, not only in these matters but also in many others.

9. Conclusion

The retail market is relatively deconcentrated and, though there are starting to be some local regulations, it still does not have important barriers to entry.

As has been shown, the change in the retail structure has been beneficial to consumers, as prices have decreased considerably not only in supermarkets, but also in traditional stores, who were forced to follow them or offer a different value adding service (i.e. delivery service).

However, there is a concern in some sectors of society about the possible negative impact of supermarkets. Not only from traditional stores, who feel that are in a disadvantageous competitive position, but also from suppliers complaining about the new buying power they face, especially about what they consider to be an abuse of such power. This concern has been reflected in one of the legislative projects for amending the present law, which forbids predatory pricing. It has also been reflected in the decision of some local governments introducing regulations for the installation of new supermarkets in their jurisdiction.

As it is a relatively recent phenomenon, the CNDC has not taken yet a position about the legality of certain practices used by supermarkets, such as the sale of shelf space, the MFN clause, etc.

NOTE

1. Dirección de Análisis de Precios y Evaluación de Mercados de la Subsecretaría de Comercio Interior: *Índices de precios en comercios tradicionales y supermercados,* marzo de 1997.

CONTRIBUTION FROM BIAC

RETAIL BUYING POWER

Large Retailers will claim that Global Manufacturers are larger than Global Retailers world-wide and that therefore, Global Manufacturers exert more power than Retailers on a global basis.

Theoretically, this may be correct, however, in practice a Retailer who has 15 percent to 25 percent of a relevant market can represent some 15 percent to 25 percent of a Supplier's sales in that market, whereas the Supplier, even the very largest, is unlikely to represent more than one percent to two percent of the Retailers purchases.

Retailers have absolute discretion as to what products are stocked on their shelves, at what prices they are sold, the amount of shelf space and promotional activity they receive, which of course includes manufacturer brands as well as private brands.

Suppliers live constantly under the threat of a total de-listing or withdrawal of support if they do not concede to the requests of Retailers.

If a Retailer withdraws support from a Supplier by reducing shelf space, increasing retail selling prices, withdrawal of promotional activity, refusal to list new products, the Suppliers business with that Retailer can reduce by 50 percent to 75 percent without adversely effecting the Retailer's business. Because the Retailer can concentrate their efforts on the Suppliers branded competitor and/or their own Private Label, which can be achieved without the adverse re-action of Consumers and little or no loss of business.

If a Supplier loses 50-75 percent of their business with a major retailer it has a dramatic effect on their overhead costs and therefore the Suppliers viability and/or the RSP's they can sell to competing Retailers.

Examples

Non cost related benefits demanded by the retailers:

1. increases in off invoice allowances e.g. promotional allowance, listing allowance, end of month, quarter, year, rebate allowance, without performance related targets;

2. special invoice price to allow the retailer compete with one or more of their competitors at RSP's and achieve a specific profit margin;

3. deferral of a price increase until their Competitor RSP's have increased on shelf;

4. un-approved extended credit terms;

5. return for credit to the Supplier of in store damaged product which was received by the Retailer in good condition.

All Suppliers have suffered from one or more of the above non-cost justified demands from time to time. They are, however, extremely reluctant to voice their experiences publicly as it is so easy for Retailers to re-act adversely to the Suppliers product range while doing little damage to their own assortment, as OECD has found out with the reluctance of individual Manufacturers/Suppliers to discuss this matter openly with them in front of their retail customers.

It is very difficult to control retailer buying power under Competition Law, it can be more easily controlled under Fair Trading Law as was suggested by IBEC Competition Council [Jan '97] to the Competition and Mergers Review Group which is also considering the Restrictive Practices [Groceries] Order 1987.

Annex 1

TESCO PSL buying power

In Ireland at present we have the extraordinary situation of Tesco taking over Power Supermarkets Limited. Power Supermarket had 25 percent of retail grocery business in the Republic of Ireland, however, the Tesco UK buying power means that the new Tesco Ireland and UK have a buying power 12/14 times the size of the total Irish market [population 3.5M]. Tesco are trying very hard to be good Irish corporate citizens, however, they hold the view, understandably, that the Tesco buying price for International Brands should be based on their UK buying price, adjusted for trading in Ireland.

In practice this means if the Power Supermarket price was cheaper than Tesco they demand a rebate on their UK business. If the Power Supermarket price was dearer than that of the UK they demand a discount on their Irish price. These negotiations by and large have taken place in the UK and the Manufacturer/Supplier finds it very difficult not to comply because of their significant buying power in both markets.

This buying power makes it extremely difficult for other Irish retailers to compete against Tesco whose buying power is some 50 times greater than their nearest retail competitor.

Extract from IBEC (Irish Business and Employers Confederation

Competition Council submission on the Groceries order

31st January 1997

Executive Summary

The Minister for Enterprise and Employment has asked the Competition and Mergers Review Group to consider the position of, inter alia, the Restrictive Practices (Groceries) Order, 1987.

The IBEC Competition Council considers that it is essential that the provisions of the ban on below cost selling and the requirement in relation to the payment of suppliers' accounts be retained. The Council wishes to also retain the other Fair Trade provisions in the Order.

This submission recognises that it may be desirable to incorporate the provisions of the Groceries Order in a new Fair Trading Groceries Act or as an amendment to the Competition Act 1991.

The IBEC Competition Council believes that the Competition and Mergers Review Group should recommend to the Minister that a Fair Trade Groceries Act should be introduced.

In our opinion, the beneficial effects of the Order and the effects of removing the Order are as shown below:

Beneficial Effects of the Order

1. the rate of increases in food prices in the first five years after the ban on below cost selling was introduced was lower than in any five-year period commencing with 1947 (Statistical Appendix 1);

2. the rate of increase in the food price index has been lower than the increases in the CPI since 1987 (Statistical Appendix 2);

3. the rate of increase in the food price index has been significantly lower than in the UK or the average E.U. since 1985 (Statistical Appendix 3);

4. the retailers margin on sales of food has not increased (Statistical Appendix 4);

5. since the Order was introduced, the production of the food and drink industries has increased by over 50 percent (Statistical Appendix 6). While there are many reasons for this increase, the Competition Council believes the stability brought about by the Order has made a significant contribution.

Employment in the food and drink processing industries fell from 1981 to 1990. Since 1990, employment has increased by 3 000 persons (Statistical Appendix 5). Similarly, the increased employment is, we believe, partly due to the fair trading environment brought about by the Order.

Effects of Removing the Order

1. our analysis shows that total employment in the retail sector and associated sectors could be reduced by up to 23 000 persons;

2. consumer prices, in time, would, we believe, increase by more than the "All Items" Index because the greater market concentration would lessen competition;

3. there would be a loss of competitiveness by Irish producers, leading to a reduction in exports of food products. This loss of competitiveness would be brought about by unfair trading conditions in the home market;

4. there would be harmful effects on other retail sectors as multiples would attract customers from hardware, gardening and similar outlets by below cost selling of food;

5. the entry of British multiples would be facilitated, with further harmful effects for employment in the food processing sectors and the development of food exports because British multiples require delivery of their goods to a warehouse in Britain for delivery by them to their Irish outlets. This would seriously disadvantage Irish suppliers and producers.

CONTRIBUTION FROM THE US FEDERAL TRADE COMMISSION

FTC TOYS "R" US DECISION PRESS RELEASE*

FTC upholds charges that Toys "R" Us induced toy makers to stop selling desirable toys to warehouse clubs. Nation's largest toy retailer ordered to stop illegal practices which have injured competition and consumers

Toys "R" Us, the nation's largest toy retailer, was ordered today by the Federal Trade Commission to stop engaging in illegal practices that keep toy prices higher and reduce choice for consumers. Toys "R" Us, the FTC said, was concerned that warehouse clubs - with substantially lower prices - presented a threat to its low-price image and its profits. The Commission determined that to eliminate this threat, Toys "R" Us used its dominant position as a toy distributor to extract agreements from and among toy manufacturers to stop selling to warehouse clubs the same toys that they sold to other toy distributors. The Commission's opinion, authored by FTC Chairman Robert Pitofsky, explains that Toys "R" Us wanted "to prevent consumers from comparing the price and quality of products in the clubs to the price and quality of the same toys displayed and sold at Toys "R" Us, and thereby to reduce the effectiveness of the clubs as competitors."

"Toys "R" Us rose to its current position as the largest toy retailer in the United States by offering a larger selection of toys than any other retailer at the lowest prices," said Chairman Pitofsky. "Indeed, a remarkable irony of this case is that if the law were as Toys "R" Us contends - if a large [retailer] could cut off or encumber a new or innovative [company's] source of supply by exercising market power against suppliers - then Toys "R" Us, itself an innovative marketer resented by larger and less dynamic [companies] a generation ago, could have been denied an opportunity to compete on the merits and win in the marketplace."

Toys "R" Us, based in Paramus, New Jersey, has about 650 stores located throughout the United States and roughly another 300 stores in foreign countries. Toys "R" Us offers an assortment of about 11 000 individual toy items throughout the year. The company also buys about 30 percent or more of the large toy companies' total output and is usually their most important customer. Toy manufacturers who participated in the boycott account for 40 percent of all toy sales in the United States and therefore have market power, the Commission determined. According to the Commission, no other toy retailer carries as many toys or purchases such a large percentage of the toy manufacturers' output.

The Commission noted that retail margins enjoyed by different types of retailers vary widely. Toys "R" Us' average margins are close to 30 percent above cost. Warehouse clubs sell toys at prices as low as nine percent above wholesale cost.

In the past, when Toys "R" Us faced new, lower-priced competition from Wal-Mart, Target and other regional and national discount chains, Toys "R" Us responded by lowering its own toy prices and improving the presentation of toys in Toys "R" Us stores. The Commission found, however, that Toys "R" Us behaved quite differently when confronted with the dramatically lower prices of the warehouse clubs.

* Submitted as a room document at the roundtable discussion.

By the end of the 1980s these clubs had emerged as increasingly important toy retailers in much the same way that Wal-Mart and the other discounters had done before. The warehouse clubs - by reducing costs, selling branded products at low prices and increasing product turnover - soon became the fastest growing retail outlet of toys. Contemporary estimates predicted that they would grow to occupy a significant percentage of the toy market, bringing down retail prices in all channels of distribution as they grew.

Fearing that warehouse clubs presented a greater threat than Wal-Mart and Target had to Toys "R" Us' prices and profits, Toys "R" Us planned to restrict or cut off the clubs' supply of key toy products. The Commission found that Toys "R" Us did this by inducing its suppliers to sell to the clubs only toys that were unique and highly differentiated - most often so-called "combo" packages of two or more toys - from the toys sold to Toys "R" Us. According to the Commission, beginning in 1992, Toys "R" Us entered into vertical agreements with ten manufacturers to restrict their sales to clubs. (The ten toy manufacturers who entered into vertical agreements are: Mattel, Hasbro, Fisher Price, Tyco, Little Tikes, Today's Kids, Tiger Electronics, VTech, Binney & Smith and Sega.) Toys "R" Us also used the acquiescence of one manufacturer to obtain that of others, orchestrating a horizontal agreement among at least seven manufacturers to adhere to Toys "R" Us' restrictions. (These seven manufacturers are: Mattel,

Hasbro, Fisher Price, Tyco, Little Tikes, Today's Kids, and Tiger Electronics.) "Through its announced policy and [these] related agreements, Toys "R" Us sought to eliminate the competitive threat the clubs posed by denying them merchandise, forcing the clubs' customers to buy products they did not want, and frustrating consumers' ability to make direct price comparisons of club prices and Toys "R" Us prices," the opinion states.

The Commission further found that Toys "R" Us enforced the agreements by fielding complaints from toy manufacturers about their competitors' sales to warehouse clubs. When manufacturers complained that a competitor was selling to warehouse clubs, Toys "R" Us again threatened to stop buying that competitor's products and got its renewed acquiescence to the sales restrictions.

The FTC announced its complaint against Toys "R" Us in May 1996. The charges were upheld by Administrative Law Judge James P. Timony in a September 1997 decision. Toys "R" Us appealed, and the Commission heard oral argument on February 19, 1998.

The Commission agreed with Judge Timony that Toys "R" Us "halted a pattern of rapid growth of toy sales at the clubs" and noted that the "boycott hobbled individual clubs' toy business." Citing warehouse club Costco's experience, the Commission found that "while its overall growth on sales of all products during the period 1991 to 1993 was 25 percent, Costco's toy sales increased during the same period by 51 percent. But, after the boycott took hold in 1993, Costco's toy sales decreased by 1.6 percent despite total sales growth of 19.5 percent." The Commission also pointed out that reversal of the clubs' success as toy retailers can also be seen by examining individual toy manufacturer's sales to the clubs. For example, Mattel's sales to warehouse clubs declined from over $23 million in 1991 to $7.5 million in 1993.

The opinion underscores that the most significant effect of the agreements was to eliminate competition that would have driven Toys "R" Us to lower its prices had Toys "R" Us not taken action to stifle the competitive threat posed by the clubs.

The Commission found that Toys "R" Us' only asserted justification for its conduct - that the agreements were necessary to prevent free riding on its advertising and "showroom" status - was entirely without merit. The toy manufacturers and not Toys "R" Us (or any other retailer) promote toys to consumers, primarily by designing and purchasing television advertising, and Toys "R" Us is compensated for any services it does provide the toy industry, the Commission found.

The Commission used a four prong test that the Supreme Court has set out to provide guidance as to when boycotts are per se illegal under the antitrust laws. The Supreme Court found that these boycotts generally display four common factors. The opinion states that "[w]e conclude from the evidence in this case that each of the factors ... is present." First, the purpose of the group boycott agreement was anti-competitive, in that it was designed to disadvantage competitors of Toys "R" Us. Second, the firms involved (both Toys "R" Us and the manufacturers) were dominant in their markets. Third, the boycott cut off access to products and relationships needed for the boycotted firms to compete effectively. Lastly, the practice was not justified by plausible arguments that it enhanced overall efficiency. "Toys "R" Us and its reluctant collaborators set out to eliminate from the marketplace a form of price competition and a style of service that increasing numbers of consumers preferred", the Commission said.

The Commission also examined Toys "R" Us' conduct under the full rule of reason and found that its behaviour would also be illegal under this more elaborate mode of analysis. The additional factors that the Commission examined were whether Toys "R" Us' behaviour had a significant anti-competitive effect and whether any such effect is outweighed by legitimate business justifications. The Commission found that Toys "R" Us' orchestrated boycott "had harmful effects for the clubs, for competition, and for consumers" and that there was "no business justification for a boycott that had a pronounced anti-competitive effect."

The Commission's order prohibits Toys "R" Us from continuing, entering into, or attempting to enter into, vertical agreements with its suppliers to limit the supply of, or refuse to sell, toys to a toy discounter. The order also prohibits Toys "R" Us from facilitating, or attempting to facilitate, an agreement between or among its suppliers relating to the sale of toys to any retailer. Additionally, Toys "R" Us is enjoined from requesting information from suppliers about their sales to any toy discounter, and from urging or coercing suppliers to restrict sales to any toy discounter. According to the Commission, "[t]hese four elements of relief are narrowly tailored to stop, and prevent the repetition of Toys "R" Us' illegal conduct."

The Commission vote to issue the opinion and order was 4-0, with Commissioner Orson Swindle concurring in part and dissenting in part. Commissioner Swindle concurred in the Commission majority's determination that Toys "R" Us ("TRU") entered into a series of anti-competitive vertical agreements with various toy manufacturers. However, he found that the evidence in the record was insufficient to support the majority's conclusion that TRU orchestrated a horizontal boycott among the manufacturers. According to Commissioner Swindle, "it is precisely the plausibility of the vertical theory and the strength of the evidence underpinning that theory that undercut the majority's finding of a horizontal conspiracy among toy manufacturers." Swindle further stated that "[t]here is a paucity of evidence - direct or circumstantial - that the manufacturers developed among themselves a scheme to boycott the clubs." Indeed, "TRU's hammerlock on the manufacturers made [any such] horizontal agreement among the manufacturers simply unnecessary." He observed that "TRU's very indispensability gave each toy manufacturer every incentive - every unilateral incentive - to knuckle under to TRU's demands regarding the clubs." In Swindle's view, "No inference of horizontal agreement is necessary to make sense of the manufacturers' actions."

Swindle contended that rather than there being "hub and spoke" arrangement directed by TRU or some other type of horizontal conspiracy among manufacturers, the "glue that held TRU's scheme together was each manufacturer's individual decision not to cross its most important customer's interests." The Commissioner concluded: "I am simply unable to find a horizontal boycott on the basis of this evidence. The gaps and ambiguities in the record require that I dissent from the conclusion that TRU orchestrated an anti-competitive horizontal agreement."

The order will be effective 60 days after it is served on the respondent. Under the Commission's rules, ex parte communications regarding this matter are barred until the Commission has disposed of any petition for reconsideration, or until the time for filing such petitions (14 days after service) has elapsed. Copies of the opinion and order and other documents associated with this case, are available from the FTC's web site at http://www.ftc.gov and also from the FTC's Consumer Response Center, Room 130, 6th Street and Pennsylvania Avenue, N.W., Washington, D.C. 20580; 202-FTC-HELP (202-382-4357); TDD for the hearing impaired 202-326-2502. To find out the latest news as it is announced, call the FTC NewsPhone recording at 202-326- 2710.

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(Docket No. 9278)
(toysftc)

CONTRIBUTION FROM THE US FEDERAL TRADE COMMISSION

THE FTC "STAPLES-OFFICE DEPOT" MERGER DECISION*

At the end of June, a federal district court in Washington, D.C. granted the Federal Trade Commission's (FTC's) request for a preliminary injunction blocking the Staples-Office Depot merger[1] The proposed transaction would have combined Staples and Office Depot, two of the three leading office superstore chains. The FTC presented extensive documentary evidence from the merging firms' files at the hearing. These documents demonstrated that the two superstore chains charge lower prices for consumable office supplies in cities where they directly compete relative to prices in cities where the merging firms do not face each other head-to-head. The documents also showed that superstore competition is the main reason for this pricing policy. For example, the merging superstore chains each moved stores into "price zones" with lower prices in response to entry by rival superstores, but not in response to new competition by other retailers.[2] Indeed, Office Depot placed those locations free from competition from another superstore in a price zone termed "non-competitive" (without regard to whether other retailers nearby sold office supplies).[3] The court relied heavily on this documentary evidence in explaining its decision.

Econometric evidence was also an important part of the case for both sides in the litigation. The FTC confirmed what the documents showed through a systematic empirical study of Staples' pricing presented in court by Professor Orley Ashenfelter, our econometric expert. The FTC also presented an econometric study of the rate that Staples historically passed through cost savings to consumers in the form of lower prices. For their part, the merging firms offered alternative statistical analyses of pricing, as well as econometric studies of the determinants of Staples price-cost margins and the effect on revenues at Staples stores of nearby store openings by possible rivals. My remarks today describe the motivation and methods behind the FTC's econometric analyses.

1. The importance of the Staples case

The Staples litigation was important because it put into play the four main initiatives in merger analysis undertaken by the federal antitrust enforcement agencies over the past decade. First, to explain how the merger would harm competition, the Commission looked to the unilateral competitive effects theory for mergers among sellers of differentiated products, set forth in the Merger Guidelines.[4] Second, the litigants proffered extensive econometric analyses, primarily going to the importance of localised competition between the merging firms and the constraint they place upon each other.[5] Third, the extensive courtroom discussion of the significance of efficiencies alleged by the merging firms was conducted against the background of newly-released revisions to the Merger Guidelines, which set forth a new analytical approach to answering that question.[6] Finally, the Commission and the merging firms contested whether new competition, particularly product line extension by non-office superstores selling office

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* "Econometric Analysis in FTC V. Staples", prepared remarks of Jonathan B. Baker, Director, Bureau of Economics, Federal Trade Commission before American Bar Association's Antitrust Section, Economics Committee, Willard Hotel; July 18, l997, revised: March 31, 1998. The views expressed here are those of the author, and not necessarily of the Federal Trade Commission or any Commissionner.

supplies, would solve the competitive problem from merger - thus implicating the "entry likelihood" analysis in the Merger Guidelines, which some courts have misunderstood.[7]

These four government initiatives emerged unscathed in Judge Thomas F. Hogan's opinion. Although they were largely not treated explicitly in the written decision, the opinion that one might say hides behind the words Judge Hogan wrote bolsters each. First, although the court did not refer to the unilateral effects theory by name, Judge Hogan employed its logic in explaining why he found an office superstore submarket and why the merger would have harmed competition.[8] In defining the product market, the opinion recognised that office superstore chains provide the primary competitive constraint on each other's pricing. "While it is clear to the Court that Staples and Office Depot do not ignore sellers such as warehouse clubs, Best Buy, or Wal-Mart, the evidence clearly shows that Staples and Office Depot each consider the other superstores as the primary competition."[9] And in explaining why the merger would lead to adverse competitive effects, the court adopted the reasoning of the localised competition theory for mergers among sellers of differentiated products set forth in the Merger Guidelines. Judge Hogan observed that "direct evidence shows that by eliminating Staples' most significant, and in many markets only, rival, this merger would allow Staples to increase prices or otherwise maintain prices at an anti-competitive level."[10] Thus, when the written opinion appeals to the "practical indicia" for defining submarkets listed by the Supreme Court in Brown Shoe,[11] the hidden opinion treats this approach as a legal hook for reaching unilateral competitive effects from a merger among the sellers of close substitutes.[12] Judge Hogan did not return to the past by defining a narrow market; he instead used the old construct of a submarket to help articulate a contemporary perspective.

Second, Judge Hogan's hidden opinion supports the government's use of econometric evidence, though the court did not trumpet doing so. The opinion never uses the term, presumably in a conscious effort to downplay novelty in order to avoid creating an issue for appeal. Yet Judge Hogan demonstrably relied on econometric evidence in one instance,[13] when he stated that "in this case the defendants have projected a pass through rate of two-thirds of the savings while the evidence shows that, historically, Staples has passed through only 15-17 percent."[14] The sole basis in the record for the 15-17 percent figure is the testimony of the FTC's econometric expert as to the conclusions of his statistical analysis of the pass-through rate.

Third, Judge Hogan approached efficiencies in a diffident way, by first pointing out that if old Supreme Court precedents control, the efficiency defense may not be viable.[15] But the opinion hidden behind this unassuming approach supports the government's methodology for reviewing claimed efficiencies. After nodding to the old Supreme Court cases, Judge Hogan examines efficiencies with an approach that tracks the recent Merger Guidelines revisions. The court refused to accept alleged cost savings when "the defendants did not accurately calculate which projected cost savings were merger specific and which were, in fact, not related to the merger."[16] Judge Hogan dismissed much of the defendants' projected cost savings on the ground that they are "in large part unverified, or at least the defendants failed to produce the necessary documentation for verification."[17] And in finding "that the defendants' projected pass through rate - the amount of the projected savings that the combined company expects to pass on to consumers in the form of lower prices -- is unrealistic,"[18] the court followed the Merger Guidelines in focusing on whether consumers would obtain the benefit of the efficiencies.

Finally, in supporting its conclusion that entry would not solve the competitive problem, the written opinion emphasized the factual basis for that finding and the weaknesses in the defendants' evidence. Yet, in a matter-of-fact way, the court adopted the perspective of the Merger Guidelines. Judge Hogan recognised as the legal standard whether entry "would likely avert anti-competitive effects" from the acquisition by acting a constraint on the merged firms' prices.[19] Here the court accepted that entry matters under Clayton Act §7 insofar as it would solve the competitive problem from the merger. Unlike some other courts, Judge Hogan did not see his task as assessing the height of barriers to entry in the

abstract, unrelated to the transaction before him.[20] Rather, Judge Hogan properly compared how the office superstore market would likely look after the proposed transaction (including the competitive significance of any additional entry that the merger would call forth) with the likely evolution of the market absent the proposed acquisition. This perspective on entry was reinforced by similar comparisons of the market with the merger to the but-for world in Judge Hogan's analysis of efficiencies - by refusing to accept efficiency claims that were not merger-specific - and in his analysis of competitive effects. In the latter context, the court pointed out that when the opinion discusses "raising" prices it makes that comparison "with respect to where prices would have been absent the merger," regardless ofwhether the prices represent "an increase from present price levels."[21]

The remainder of my remarks will highlight the second of the four government initiatives by describing the use of econometrics by the FTC in the Staples litigation.[22] I will first discuss the FTC's econometric studies that examined the extent of localised competition between the merging firms. I will then turn to the Commission's econometric analysis of the extent to which the merged firm would pass on cost savings from the acquisition to buyers. I will conclude by drawing out some tentative lessons for antitrust policy, and for the process of relying on econometric evidences in merger investigations.

2. Pricing Studies

Most of the econometric effort in the investigation and litigation focused on studies of pricing. Indeed, the pricing documents of the merging firms are what first attracted the FTC staff's attention. We saw, and later introduced into court, documents that demonstrated that Staples and Office Depot each set prices and created price zones primarily based on competition from other office superstore chains (its merger partner and OfficeMax). The documents showed that Staples expected that the merger would ease competitive pressure from Office Depot, allowing Staples to increase margins by an amount that the FTC's primary economic expert, Dr. Frederick Warren-Boulton, later translated into an average 5-10 percent price increase on office supplies in overlap markets.

The non-econometric evidence further demonstrated that Staples prices were significantly lower in cities where Staples competed with Office Depot than in what Staples termed "non-competitive" price zones, where Staples faced no other superstore chains. Similarly, Staples prices were lower in three-superstore chain cities than in cities where Staples and OfficeMax both had a presence but Office Depot did not. As the FTC's economic expert later testified, this pricing data suggested that the merger, by removing Office Depot from the market, would raise price on average by more than nine percent in overlap markets.[23]

Our initial econometric estimates, made during the investigation, were aimed at confirming systematically what we thought we had learned from the party documents: that Staples prices were lower when Office Depot had a greater presence nearby. We had weekly data from the parties, covering more than 400 Staples stores (spread over more than 40 cities) for over eighteen months. The data included prices for a number of individual office supply products (defined by stock keeping units (SKU's)) as well as a price index for consumable office supplies created by the merging firms' economic expert. We conducted most of our analyses on monthly aggregates, in part because we initially were unable to sample on a weekly basis some variables we wished to add to the model.[24]

The main idea of the econometric analysis of pricing was to look at how Staples' prices varied from one store to the next or over time as the number of nearby Office Depot stores varied.[25] We used the results of that analysis to simulate the effect of the merger in two alternative ways. One procedure was proposed by the defendants' economic expert: treating the merger as closing down Office Depot stores near

to Staples stores. The alternative approach took the view that the merger would convert Office Depot stores into Staples stores.

2.1 Cross-section vs. fixed effects estimates

Our initial internal analyses pooled what could be learned by comparing prices across the stores in our sample with what could be learned by comparing price changes over time as more superstores enter a market.[26] In the data, pricing across markets varied more than pricing over time, so the estimates using pooled data were dominated by comparisons across markets. Accordingly, we were essentially employing a "cross-sectional" statistical approach that adopted the perspective of the merging firms' documents: we determined the effects of competition between Staples and Office Depot by comparing the price Staples charged at stores facing competition from nearby Office Depot stores with the price Staples charged at stores free from Office Depot rivalry.

The FTC staff's internal cross-sectional estimates were similar to the cross-sectional estimates that the FTC's econometric expert later reported: prices were substantially lower where Staples competed with Office Depot, and a merger between the two would likely allow Staples to raise the average price of consumable office supplies by more than seven percent.[27] Moreover, the average simulated price increase for a price index limited to what Staples termed "price sensitive items" (such as copy paper, popular brands of pens, and 1/3 cut file folders) was more than double the predicted increase for the consumable office supply price index as a whole.[28]

The main criticism of this approach offered by the merging firms and their economic expert was that the cross-sectional comparison was biased toward finding a greater price effect of head-to-head competition than actually existed.[29] They insisted that Staples prices were high in single superstore markets and other markets where Office Depot did not compete because, on average, costs other than those we could measure and control for in our equations - perhaps resulting from local zoning provisions or congestion - were high in those markets. They asserted that these higher costs simultaneously led Staples to raise price above what it charged elsewhere and discouraged Office Depot from entering.

On the surface, this argument seemed plausible. It is a common criticism of cross-sectional studies to question whether the results are biased because the econometrician is unable to observe and control for important differences across markets and those differences are correlated with the variables whose effect is at issue.[30] And if prices were at cost in all markets - as the merging firms contended - then the only way we could observe higher prices in markets with less superstore competition, as we did, is if the costs we were unable to control for were higher in those markets. Unfortunately for the parties, this theoretical possibility had negligible support in their documents. Our extensive review turned up no evidence of important unobservable cost variables affecting pricing, except in one city. Based on these documents, which did not support the merging firms' claims, we believed that omitted variables did not bias our cross-section econometric analyses.

The merging firms' economic expert sought to test the omitted variable bias hypothesis statistically, notwithstanding the absence of support for that theory in the pricing documents. He proposed to compare the cross-section estimates with those derived from a "fixed effects" model. The fixed effects model incorporates "indicator" (or "dummy") variables for the individual stores. It controls for the possibility of omitted variable bias because the unobservable costs - whose variation across regions were allegedly affecting both Staples pricing and rival entry decisions - were likely not to vary over time at any one location. That is, if roads were congested or zoning approvals difficult to obtain in some area at the beginning of the sample, these local features were likely to continue to be observed eighteen months later. Under such circumstances, the effect of rivalry from Office Depot on Staples pricing can be isolated by

looking at what happened to Staples prices in locations where Staples stores were free or largely free from such competition at the beginning of the sample but faced more nearby Office Depot stores at the end of the sample. By including store fixed effects, comparisons of prices across stores are effectively removed from the sample; the estimated effect of Office Depot rivalry on Staples pricing comes solely from pricing variation within markets over time. Accordingly, if the fixed effects model gives similar estimates to the cross-section model, then the relationship observed in the cross-market comparisons is unlikely to have been biased by the failure to control for unobservable cost variation across stores.

This test could not be definitive, however, because the difference between the cross-section and fixed effects estimates may not measure cleanly the magnitude of the omitted variable bias in the cross-section regression. Fixed effects models tend to exaggerate "errors-in-variables" bias - the difficulty in detecting statistically the influence of an explanatory variable when that variable is measured with error.[31] The measurement error at issue could be technical (e.g. recording the wrong opening date for Office Depot stores) or conceptual (e.g. weighting nearby and distant Office Depot locations improperly in computing a variable intended to reflect the intensity of rivalry with Office Depot).[32] Thus, if rivalry from Office Depot appeared to have less influence on Staples pricing in the fixed effects regression than in the cross-section regression, there were two possible explanations: that the cross section results were biased upward because cost variables correlated with Staples pricing and Office Depot entry were omitted from the cross-section equation, or that the fixed effects results were biased downward because the variables controlling for the extent of rivalry from Office Depot measured that rivalry with error.[33] Under the first explanation, the test of the omitted variable bias hypothesis is accurate, revealing a problem with the cross-section estimates. Under the second explanation, the problem is with the test not with the cross-section result.

Well before the Commission decided to challenge this transaction, the defendants' economic expert reported that the simulated effect of the merger was just under one percent when the effect of rivalry from Office Depot on Staples prices was measured with a fixed effects model rather than a cross-section model. This fixed effects estimate was nearly an order of magnitude less than the cross-section estimates obtained by the Commission staff. At this point, the interpretation of the pricing data appeared to shape up as an argument about whether to prefer cross-section or fixed effects models for estimating the price effect of rivalry between the merging firms. The cross-section results were consistent with the documents, while the fixed effects results may have controlled for omitted variables that might bias the cross-section analyses at the price of exacerbating an errors-in-variables bias. Given the powerful evidence in the merging firms' documents about the price-depressing effect of rivalry between the two - the same evidence later highlighted by Judge Hogan - and the absence of any indication in the documents of important omitted variables influencing Staples pricing and Office Depot entry, we interpreted the lower fixed effects estimates as reflecting measurement error - as a flawed test of the omitted variable bias hypothesis - rather than as disproving the cross section estimates.

Through further data analysis, our interpretation was shown to be correct. At the trial Professor Orley Ashenfelter, the FTC's econometric expert, described simulations of the impact of the merger on Staples prices based on his fixed effects regressions that were similar to those based on cross-section analyses.[34] He highlighted two main problems with the fixed effects study presented by the merging firms' expert; correcting these problems moved the simulated average nation-wide price increase from just under one percent to the range of 7-9 percent (depending on how the transaction was modelled in the simulation).[35]

The first problem was a type of conceptual measurement error.[36] The merging firms' expert had measured the presence of Office Depot (and, similarly, the presence of all other actual or potential rivals to Staples) in three non-overlapping concentric circles: one 0 to 5 miles from a Staples store, one 5 to 10 miles away, and one 10 to 20 miles away. This was not on its face an implausible approach for capturing the competitive significance of rivalry from Office Depot, but it did not share the perspective of the

documentary evidence that the merging firms established price zones commonly encompassing entire metropolitan areas within which prices were nearly uniform.[37] Our econometric expert showed that it was statistically important to do what the price zone documents suggested: include in addition a variable based on the number of Office Depot stores within the metropolitan statistical area (MSA).[38] Adding the MSA-based variable along with the concentric circle variables had the effect of tripling or quadrupling the simulated price effect of the merger - moving the simulated price increase from just under one percent to a range between 2.5 percent and 3.7 percent (varying with certain technical differences in the method of simulation).[39]

The other problem with the fixed effects study presented by the merging firms' expert was a sample selection bias. This bias resulted from the arbitrary exclusion of observations in California, Pennsylvania and certain other areas.[40] When the excluded stores were included, the simulated price effect of the merger nation-wide more than doubled from the 2.5 percent to 3.7 percent range, now reaching a range between 6.5 percent and 8.6 percent.

The main response of the defendants' economic expert was to argue that the FTC's expert had inappropriately included data for California stores in the same regression model with the data for the rest of the U.S., given that a statistical test (Chow test) showed that the two subsamples behaved differently.[41] The FTC's econometric expert agreed in principle, but demonstrated that this criticism did not overturn his conclusion that simulations of the merger using the fixed effect regression model suggest that prices would rise on average more than six percent in overlap markets. Indeed, when he adjusted his methodology to address this concern, he actually found to higher simulated price increases than before. The adjustment involved estimating the regression model separately for the two relevant groups of stores (the California locations in the subsample identified by the defendants' expert, and the rest of the U.S.), simulating the price effect separately for each subsample, and computing a nation-wide average as a weighted average of the two regional estimates. For example, the FTC's expert originally reported simulations using one regression model that generated a 7.6 percent average price increase. Using the alternative methodology that responded to this criticism, the same model implied a nation-wide average price rise of 9.8 percent, over two percentage points higher.[42]

2.2 Other econometric issues

Three other econometric issues involving the pricing studies were raised but not fully addressed by both sides under the time pressures of litigation. The first was the reliability of simulations out of sample, an issue with the simulations both sides conducted based on fixed effects models.[43] Over the less than two years in the data, any given Staples store might see the entry of a small number of Office Depot stores nearby, but rarely as many as five. Yet Office Depot has more than five locations in many metropolitan areas (including substantially more than five locations in Los Angeles). In order to simulate the merger in MSAs with large numbers of Office Depots using a fixed effects model, it is necessary to extrapolate the regression model out of sample, adding to the uncertainty of the predictions.[44]

The second issue was the potential endogeneity of entry. The regression model treats the addition of a store by Staples or any of its potential rivals as an exogenous event, unrelated to the price Staples charges. Yet it is possible that a high Staples price encourages expansion and entry by Staples and perhaps other firms as well. The defendants' economic expert raised this possibility as one reason the FTC expert's results might be biased, but did not press the point.[45] For our part, the FTC staff had preliminary results, not part of the trial record, correcting for this problem by using instrumental variables to estimate the regression model. This correction led to simulated price increases roughly double those based on regressions estimated using ordinary least squares.[46]

The third issue was whether fixed effects are the best way to account for the possibility of omitted store-specific cost variables correlated with both Staples prices and Office Depot entry. Both sides relied on models that used store fixed effects for this purpose. This modelling strategy assumes that any such omitted variables do not vary over time. On the eve of trial, the defendants' economic expert proposed instead accounting for omitted variables in a new way, with store-specific time trends along with store fixed effects. This is a more stringent test of whether the cross-section results are biased as a result of omitted cost variables than the fixed effects model, but it places an even greater premium on measuring the independent variables properly.[47]

3. Pass-through of cost changes

The FTC's econometric expert also testified to a statistical analysis of the rate at which Staples historically passed on firm-specific cost reductions to consumers. The merging firms' expert had framed the issue by asserting that Staples typically reduced price by two-thirds of any cost reduction, though he did not present a data analysis in support of this conclusion. In response, the FTC's economic expert, Dr. Frederick Warren-Boulton, pointed out the importance of distinguishing between firm-specific and industry-wide cost shocks. He argued that pass through rate for industry-wide cost savings was likely greater than the rate for firm-specific savings; in the former case competition would force prices down. Yet the lower firm-specific rate was the more relevant for analysing a prospective merger, because merger-specific efficiencies should generally be viewed as firm-specific.[48]

The FTC's econometric expert, Dr. Orley Ashenfelter, working with the FTC econometrics team, developed a way to isolate empirically the firm-specific pass through rate.[49] The data set we employed included a measure of average variable cost by stock keeping unit ("sku")[50] and store for thirty products sold by both Staples and Office Depot.[51] Two regression models were estimated. The first related the Staples price to its own costs and fixed effects for store, sku, and time.[52] The coefficient on the Staples cost variable in this model was 0.57. Because variables were expressed in logarithms, this coefficient seemed to imply that when Staples' costs fell by ten percent, it historically reduced price on average by 5.7 percent - close to the two-thirds pass through rate suggested by the merging firms. But this historical average is not the right pass-through rate for analysing the price effect of merger-specific cost savings because it combines the effects of industry-wide and firm-specific cost reductions.

To isolate the firm-specific pass-through rate, a measure of Office Depot costs was added to the regression model. Here, the Office Depot cost variable is thought of as a proxy for industry-wide costs -- after all, if costs fell for all firms in the industry, regardless of the market definition, they would surely fall for both of these firms.[53] With the Office Depot cost variable in the equation, the Staples cost variable would pick up only the effect of Staples-specific cost reductions. The results were striking: the Staples-specific pass-through rate was only 15 percent, much lower than the 57 percent figure suggested by our first model or the 67 percent figure claimed by the merging firms. In other words, if Staples costs fell ten percent but its rivals' costs did not change, we found, Staples would lower price only 1.5 percent. As previously noted, Judge Hogan relied on this estimate in concluding that the cognizable efficiencies from the proposed merger would largely not be passed on to consumers.

4. Lessons

4.1 Lessons for antitrust policy

It is unlikely that the FTC would have brought the Staples case had the theory suggested by the documents not been confirmed with systematic empirical evidence. The anti-competitive theory had to

overcome the natural presumption that defendants would be able to show that they were small players in a broad office supply retailing product market characterised by easy entry, and that they were merging merely to achieve greater scale economies more rapidly than internal growth would permit. Even though the party documents were inconsistent with this view, it was useful to confirm the anti-competitive theory with a systematic study of industry pricing. Moreover, we believed that our pricing studies undermined defendants' ability to rebut the evidence in their own pricing documents by asserting that the relationship the Commission alleged between Staples prices and rivalry from Office Depot was merely a "nonsense correlation" reflecting "cherry-picking" anecdotes.

While the result in Staples does not discourage the continued use of econometric studies of pricing (and cost pass-through rate), it does not mandate any specific form for the pricing analysis. In particular, future pricing studies may involve simulations based on reduced form price equations (the methodology employed by both sides in Staples), but they may instead involve simulations based on the estimation of demand elasticities. Reduced form price equations are attractive for expositing in court the systematic determinants of pricing because they relate price to market structure (concentration);[54] this methodology is sympathetic to the structuralist perspective of the case law. On the other hand, demand estimation is attractive because it is more sympathetic to the logic of the localised competition analysis central to the unilateral theory of adverse competitive effects of merger among sellers of differentiated products.[55]

4.2 Lessons about the use of econometric evidence

The FTC economic staff has conducted and reviewed econometric studies and simulations (predictions) derived from regression results in many merger investigations, including Staples. This experience gives rise to three observations about the process of reviewing econometric studies submitted to the Commission by the economists working with outside parties.[56]

The first observation grows out of a view of econometric analysis as a way of summarising data. From this perspective, regression results presented by interested parties are an invitation to the FTC to interpret the data in a particular manner, much as briefs and white papers submitted by outside parties synthesise a view of the documentary and testimonial evidence. When interested parties quote documents and testimony in a brief or white paper, they are in effect asserting that if we go back to the original source material - the full documents from which the quotes were selected, and the evidence not mentioned along with the cited evidence - we will view the body of facts in the way they propose. That assertion is the most trustworthy when we have access to the documents and testimony that the parties reference, so we can see for ourselves the context in which statements were made, study internal indicia of credibility, and confirm key factual assertions.

This analogy suggests why it is important that interested parties submitting econometric studies make it possible for us to understand what they have done, reproduce it, and satisfy ourselves that results are not sensitive to alternative specifications. When outside parties submit regression results, they are in effect asserting that if we go back to the raw data, we will summarise it the same way they see it. That claim is the most credible when we have access to the raw data; understand how the data was collected and "cleaned";[57] understand which observations were included in the analysis; understand how variables used in the study (e.g. price indices) were created and transformed; understand how the regression model that relates the variables was specified; determine what statistical techniques were employed; study the full regression output (not just the coefficients of interest but also all estimated parameters, diagnostic statistics, and goodness of fit measures); understand how the regression results were interpreted (as bearing on the questions at issue in the investigation); and have the opportunity to "pressure test" those interpretations by reworking the study in our own way.[58] Thus, econometric studies and simulation

analyses should receive little weight when submitted without the data, explanations, and other assistance we need to understand and replicate the parties' methodology in a timely manner.[59]

Sharing this information facilitates the development of a dialogue between the Commission staff and the parties about theory and evidence - which we welcome. During a merger investigation, before a complaint has been issued, we routinely discuss our concerns with the merging firms, based on the documentary, testimonial, and empirical evidence we have reviewed.[60] Doing so helps us test possible theories, and it helps the firms identify additional evidence that might bear on our concerns.[61] This is manifestly in the staff's interest: we neither want to harm the economy by holding up pro-competitive transactions nor learn about exculpatory evidence only after the Commission has decided to take a case to court.

From another perspective, econometric analysis is more than merely a way to summarise data. Econometric modelling almost necessarily requires methodological choices, including decisions about the measurement of variables; specification of functional form; assumptions about error structure; selection of an appropriate time period for the study (or other restrictions on what data to include); and choice of instrumental variables. This leads to a second observation: econometric analyses are more persuasive when key modelling choices are consistent with economic theory, informed by quantitative or qualitative information about the market, and tested against plausible alternatives. In the Staples litigation, for example, we preferred regression equations that included MSA-based competitor variables along with concentric circle variables, both because doing so was consistent with the documentary evidence about price zones and because the MSA-based variables contributed statistically to reflecting the intensity of competition. Similarly, we preferred simulations based on regression equations accounting for all the Staples stores to simulations based on regressions that excluded certain observations because we found the reasons defendants' expert offered for excluding the data unconvincing.[62]

The third observation about the process of evaluating econometric studies and simulations applies when the process for doing so is adversarial, regardless of whether the decision-maker is an enforcement agency deciding whether to challenge a merger or a court deciding whether to sustain such a challenge. In an adversarial setting, each party may present both its own analysis of the data and a criticism of the other side's analysis. Under such circumstances, the adversaries should be charged with assisting the decision-maker by narrowing the issues to those that matter to the ultimate conclusion. Thus, criticism of an econometric or simulation methodology should be treated with scepticism absent a demonstration that a reasonable alternative leads to a substantially different result, where such an analysis is possible.[63] In situations where the effect of the questioned methodology cannot be determined quantitatively, the party criticising the other side's analysis should explain both why the other side's approach is inappropriate and why it is plausible that the difference between the inappropriate and preferred approaches is substantial. The FTC appealed to this principle in the Staples litigation in responding to the merging firms' criticism that it was inappropriate to pool observations nation-wide when estimating a regression model. As previously noted, the Commission's econometric expert demonstrated that the nation-wide simulation results were substantially similar - indeed, more favourable to the Commission's position - when the model was estimated regionally to address this criticism.

NOTES

1. Federal Trade Commission v. Staples, Inc., 970 F. Supp. 1066 (D.D.C. 1997) (Hogan, J.).

2. Staples, 970 F. Supp. at 1077-78.

3. Staples, 970 F. Supp. at 1077.

4. U.S. Dept. of Justice and Federal Trade Commission, Horizontal Merger Guidelines §2.21. See generally, Jonathan B. Baker, Unilateral Competitive Effects Theories in Merger Analysis, 11 Antitrust 21 (1997).

5. See generally, Jonathan B. Baker, Contemporary Empirical Merger Analysis, 5 Geo. Mason L. Rev. 347 (1997); cf. Jonathan B. Baker & Timothy F. Bresnahan, Empirical Methods of Identifying and Measuring Market Power, 61 Antitrust L.J. 3 (1992). For more general discussions of the role of econometrics in court, see Daniel L. Rubinfeld, Econometrics in the Courtroom, 85 Columbia L. Rev. 1048 (1985); Daniel L. Rubinfeld, Reference Guide on Multiple Regression, in Reference Manual on Scientific Evidence 416 (Federal Judicial Center 1994).

6. Horizontal Merger Guidelines §4 (revised April 8, 1997).

7. Horizontal Merger Guidelines §2.212 n.23 (indicating that the timeliness and likelihood of repositioning responses will be analysed using the same methodology as is employed to analyse committed entry if repositioning requires significant sunk expenditures); see Jonathan B. Baker, The Problem with Baker Hughes and Syufy: On the Role of Entry in Merger Analysis, 65 Antitrust L. J. 353 (1997); Janusz A. Ordover & Jonathan B. Baker, Entry Analysis Under the 1992 Horizontal Merger Guidelines, 61 Antitrust L.J. 139 (1992).

8. For other discussions that highlight the opinion's links with traditional legal approaches to merger analysis, see William Baer, New Myths and Old Realities: Perspectives on Recent Developments in Antitrust Enforcement (Nov. 17, 1997) http://www.ftc.gov/other/bany.htm ; Robert Pitofsky, Staples and Boeing: What They Say About Merger Enforcement at the FTC (Sept. 23, 1997), http://www.ftc.gov/pitofsky/STAPLESspc.htm. Robert Pitofsky

9. Staples, 970 F. Supp. at 1079-80.

10. Staples, 970 F. Supp. at 1082.

11. Staples, 970 F. Supp. at 1075, citing Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).

12. For another example of a court using the submarket concept to reach unilateral competitive effects, see Olin Corp. v. FTC, 986 F.2d 1295, 1303-04 (9th Cir. 1993) (recognising market limited to dry swimming pool sanitising chemicals within a broader all pool sanitizers market), cert. denied, 510 U.S. 1110 (1994). Indeed, many of the "practical indicia" set forth as a basis for defining submarkets in Brown Shoe can be understood from a contemporary perspective as directly related to the question of whether localised competition within a broad market is important. These include industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, distinct customers, and sensitivity to price changes.

    It is worth noting that the Brown Shoe factors also anticipate another recent agency initiative in merger analysis, the idea of price discrimination markets, which define markets not just by the scope of the product and geographic region but also by the identity of the targeted buyers to which a hypothetical monopolist would raise price. See, e.g. Horizontal Merger Guidelines §1.12; cf. Avnet, Inc. v. FTC, 511 F.2d 70, 78-79 (7th Cir.), cert. denied, 423 U.S. 833 (1975) (upholding FTC market definition of the sale of new

components for automotive electrical units to production-line rebuilders rather than custom rebuilders (repair shops)).

13. The opinion does not discuss the extensive econometric evidence on pricing in the trial record, however.

14. Staples, 970 F. Supp. at 1090.

15. Staples, 970 F. Supp. at 1088.

16. Staples, 970 F. Supp. at 1090.

17. Staples, 970 F. Supp. at 1089.

18. Staples, 970 F. Supp. at 1090.

19. Staples, 970 F. Supp. at 1086, quoting United States v. Baker Hughes, 908 F.2d 981, 989 (D.C. Cir. 1990).

20. See Jonathan B. Baker, The Problem with Baker Hughes and Syufy: On the Role of Entry in Merger Analysis, 65 Antitrust L. J. 353 (1997).

21. Staples, 970 F. Supp. at 1082 n.14.

22. This paper focuses on the empirical studies introduced by the FTC's econometric witness, so does not discuss the stock market "event study" prepared by the Commission's economic expert. Nor does it discuss two econometric analyses relied upon by defendants' economic expert: an analysis of the relative reduction in revenues at the average Staples store when office superstores and non-superstores opened locations nearby and an analysis of the way Staples' gross margins varied with the extent of rivalry from Office Depot.

23. The harm to competition was not limited to markets where the merging firms currently compete. Many non-overlap markets would predictably have become overlap markets in the absence of the merger as Staples and Office Depot continued their aggressive pre-merger expansion plans.

24. The key parameter estimates did not in general vary with the frequency of the data.

25. The pricing models we employed internally and those that the econometric experts for both sides adopted were reduced form price equations, explaining Staples prices by variables treated as exogenous or predetermined. These included variables reflecting the number and identity of nearby office superstore rivals, variables reflecting the number and identity of potential non-superstore rivals (discount mass merchandisers, warehouse club stores, and computer superstores), and variables accounting for exogenous determinants of cost and demand (such as paper prices and "fixed effect" indicator variables for each sample period). When seeking to identify price effects of changing market structure from variation in pricing over time, we included fixed effects for each store.

26. Our data set was a panel: it followed individual stores over time and thus included multiple observations on each store.

27. Similarly, analysis of pricing data from Office Depot showed that competition from Staples kept Office Depot's price low.

28. Because demand elasticities differ across products, prices for some goods would be expected to rise by more than the average price increase of seven percent while prices for other products would rise by less. Similarly, prices in some geographic regions would be expected to rise by more than this nation-wide

average, as was found in the econometric results described below, while prices would rise by less than average in other regions.

29. The merging firms also pressed another point: that in determining the effects of Office Depot on Staples pricing, it was necessary to control for potential rivalry by non-superstore vendors of office supplies such as discount mass merchandisers (e.g. Wal-Mart), warehouse club stores (e.g. Price Club) and computer superstores. This was not actually a criticism of the FTC's approach because we had evaluated that possibility from the start, notwithstanding the extensive documentary evidence that the merging firms treated non-superstore rivalry as only secondary in importance to superstore rivalry. Indeed, all of our regression models -- those specified internally as well as those specified by our econometric expert -- included variables to account for potential rivalry by firms other than superstores.

    With such models, we found that firms other than superstores provided little competitive constraint on Staples pricing. At the trial, our economic expert relied on simulations performed for him by our econometric expert to make that point as one justification for excluding consumable office supplies sold through non-superstore retailers from the product market. These simulations included estimates of the price effect of reducing the market presence of each potential non-superstore rival individually, and simulations of the price effect of merging all three superstores into a hypothetical monopolist.

30. See, e.g., Cheng Hsiao, Analysis of Panel Data 206-08 (1986).

31. Zvi Griliches, Sibling Models and Data in Economics: Beginnings of a Survey, 87 J. Pol. Econ. S37 (no. 5, pt. 2 1979); Zvi Griliches & Jerry Hausman, Errors in Variables in Panel Data, 31 J. Econometrics 93 (1986); Orley Ashenfelter & Alan Kreuger, Estimates of the Economic Return to Schooling from a New Sample of Twins, 84 Am. Econ. Rev. 1157 (1994).

32. Moreover, the timing of the effect of entry is difficult to date conceptually even if the day the first Office Depot store opened is known. On the one hand, Staples may lower price at a store in anticipation of an Office Depot opening nearby. On the other hand, Staples may delay reducing price until many Office Depot locations have opened nearby and the rival superstore chain achieves a substantial local presence. This difficulty could mean that fixed effects estimates that treat the appearance of a sole nearby Office Depot store as entry with full effect on the day of the store opening would appear to have far greater precision than they in fact possess. The other variables in the data set associated with a Staples store newly facing Office Depot competition would typically not change between the week or month before the Office Depot entry and the date that entry is recorded. In consequence, the fixed effects model could improperly treat the difference in the price at the nearby Staples store over that week or month as an extraordinarily powerful natural experiment revealing the significance of Office Depot rivalry.

33. The merging firms' economic expert offered a specification test purporting to show that a cross-section analysis was biased. The test in effect operated by comparing cross-section results to those derived from a fixed effects model assumed to be correctly specified. However, the fixed effects model employed by the merging firms' economic expert was incorrectly specified, as discussed below. In consequence, the proposed specification test could not test whether cross-section regressions were appropriate.

34. The simulation based on the cross-section regression predicted a 7.1 percent price increase from merger. The simulation based on a similar fixed effects model predicted a 7.6 percent price rise. As a technical matter, the cross-section estimates were obtained by recovering the estimated store fixed effects from a regression of price on store and time dummy variables, and employing those fixed effects as the dependent variable in a model that included measures of rivalry from superstores and potential non-superstore competitors as independent variables.

35. The FTC's expert presented estimated price effects exclusively for overlap markets. The defendants' expert calculated price effects both for overlap markets and for all markets. All the estimates in the text are for overlap markets.

36. This characterisation of the problem presumes that the errors from mis-measurement of the right hand variables were not correlated with the other regressors. If the errors were not random, the problem could better be characterised as one of omitted variables. Regardless of the appropriate technical characterisation of the misspecification in the study presented by the merging firms' expert, the FTC's expert tested for the problem in the best way possible: by correcting the measurement error and demonstrating that doing so changed the results significantly (in both an economic and a statistical sense).

37. Metropolitan area-wide pricing is plausible given that many advertising media reach the entire metropolitan area.

38. In a few cases, where the Staples price zone was larger than an MSA, the area-wide variable was based on the number of Office Depot stores within a Consolidated Metropolitan Statistical Area (CMSA).

39. While both kinds of variables contributed statistically to reflecting the intensity of Office Depot competition, the MSA-based competitor variables were more important than the concentric circle variables in the following sense: the FTC's econometric expert showed that the simulation results were not affected substantially by dropping the concentric circle variables so long as the MSA-based variables remained. The merging firms' expert conceded that it was reasonable for the FTC's expert to include the MSA-based variables. 5/23/97 Tr. at 64.

40. See 5/21/97 Tr. at 48-49. The most problematic exclusion involved fifteen or sixteen California stores. See 5/23/97 Tr. at 48-49, 71-88. The merging firms' expert offered three unconvincing justifications for dropping these stores from his pricing study. First, he described the excluded stores as rural, 5/23/97 Tr. at 48-49, although many were in the San Francisco, Los Angeles and San Diego metropolitan areas and others were in towns like Monterey and Santa Cruz. 5/23/97 Tr. at 79-80. Second, he said he identified the stores based on observing that less than four computer superstores could be found within 20 or 25 miles, 5/23/97 Tr. at 49, but did not use this criterion to separate rural from urban stores in non-California markets. 5/23/97 Tr. at 74-75. Finally, he testified that exclusion of these stores was justified because Staples executives told him that these stores behaved differently, 5/23/97 Tr. at 49, 71. Yet he did not adopt a consistent method of treating stores he thought behaved differently. When defendants' expert concluded that the remaining California stores behaved differently from the rest of the U.S., he chose to analyse them separately rather than exclude them altogether, 5/23/97 Tr. at 48. In addition, while he excluded these fifteen or sixteen stores when conducting pricing analyses, he did not exclude them from his analysis of Staples' price-cost margins. 5/23/97 Tr. at 77, 88.

41. The merging firms and their expert also argued that these simulations overstated the likely price increase from the merger because the regression models on which they were based did not account for the reactions of superstore and non-superstore rivals, particularly the likely repositioning (expansion of office supply product lines) by secondary rivals such as Wal-mart, Kmart, Sam's Club and Best Buy. Yet the regression results and the simulations derived from them in fact reflect the response of competitors as it was observed historically in the data. Consistent with this perspective, Judge Hogan concluded that the absence of expansion by secondary competitors to compete away high superstore prices in cities with only one superstore in the past suggests that such secondary competitors would not likely solve the competitive problem in the future by repositioning in response to the higher prices likely to result from the post-merger exercise of market power.Staples, 970 F. Supp. at 1088.

42. The simulated price increase from merger was 17.4 percent for the California locations and five percent for the rest of the U.S., leading to a weighted average 9.8 percent estimate for the nation as a whole.

43. Simulations based on cross-section models did not require out of sample predictions.

44. When large predicted effects result from this procedure, it is nevertheless reasonable to conclude that the merger would create a powerful incentive to raise price.

45. Defendants' expert did not include a variable reflecting the number of Staples stores near a given Staples store, while the FTC's expert did. The inclusion or exclusion of this variable made little difference to the simulation results.

46. The number of Staples stores and Office Depot stores near a given Staples location were treated as endogenous. The instruments were based on population of the MSA in which the store was found (a measure of the size of market), the number of outlets the superstore chain had in other MSAs in the state (a measure of geographic proximity to the superstore chain's existing locations), and interactions among these variables.

For another example where correcting for endogeneity in reduced form price equations raised the predicted price effect of increased concentration, see William Evans, Luke Froeb & Gregory Werden, Endogeneity in the Concentration Price Relationship: Causes, Consequences, and Cures, 41 J. Indus. Econ. 431 (1993).

47. Defendants' expert found that using store-specific time trends cut the estimated price effect nearly in half. But defendants did not offer any reason to suppose that omitted cost variables would vary over time, linearly, at a different rate from store to store - indeed, there was little reason to suppose that omitted cost variables played an important role in Staples pricing in any case. Hence, if adding store-specific time trends lower the predicted impact of the merger, it is likely that this would not reflect omitted variables but instead would result from exacerbating errors-in-variables bias.

48. Merger-specific efficiencies are cognizable under the Merger Guidelines, but efficiencies that would likely have been achieved absent the merger are not cognizable. Horizontal Merger Guidelines §4 (revised April 4, 1997).

49. Orley Ashenfelter, David Ashmore, Jonathan B. Baker & Signe-Mary McKernan, Identifying the Firm-Specific Cost Pass-Through Rate, FTC Bureau of Economics Working Paper No. 217 (January 1998).

50. Stock-keeping units are the finely specified product definitions chosen by a firm for internal inventory management uses. For example, a firm might use different stock keeping units for red ink and blue ink models of a particular brand and style of pens, and different skus for the medium and fine-point models.

51. Cost data was not available for most of the products sold by the firms. The data set we did use contained in excess of 200 000 observations. Defendants' expert had gone through a similar exercise of matching Staples and Office Depot skus for which cost data was available for a different purpose. When our model was reestimated on his product selections, the results were nearly identical: the Staples-specific pass-through rate was estimated at 17 percent rather than 15 percent. Defendants mainly criticised our study for what they saw as a small number and unrepresentative nature of the products in the sample. For example, the sample disproportionately included pens.

52. In some specifications of both models, right hand variables reflecting the presence of potential competitors (as employed in the pricing model) were also included. Doing so made virtually no difference to the coefficients of the cost variables, our primary concern.

53. Thus, our methodology does not turn on whether we correctly defined the scope of the product market. All that is required is that whatever the product market, both Staples and Office Depot sell within it.

54. See generally Concentration and Price, (Leonard Weiss, ed., 1989).

55. See generally Jonathan B. Baker, Unilateral Competitive Effects Theories in Merger Analysis, 11 Antitrust 21, 23 (1997) (box on mergers among sellers of differentiated products).

56. Cf. Daniel L. Rubinfeld, Reference Guide on Multiple Regression, in Reference Manual on Scientific Evidence 416, 441-43 (Federal Judicial Center 1994) (proposing questions a court should consider in evaluating the admissibility of statistical evidence).

57. Cleaning the data involves checking the raw data to see if there are any obvious anomalies (missing observations, prices less than zero, etc.) and correcting them.

58. During the Staples investigation, for example, when the merging firms' expert presented his econometric pricing study, the description of his study did not specify that he had interpolated missing values nor describe his methodology for doing so. It also did not indicate that he had normalised the price data for each store so that it began at the same index point (thus making his data unsuitable for comparisons of pricing across stores). Although these manipulations did not substantially affect the results obtained from estimating fixed effects regression models, they were time-consuming to uncover and understand.

59. Cf. Daniel L. Rubinfeld, Reference Guide on Multiple Regression, in Reference Manual on Scientific Evidence 416 441-42 (Federal Judicial Center 1994) (questions A2-A4) (proposing that courts require similar disclosures). A leading economics journal, the American Economic Review, also takes a similar view. The journal's policy is "to publish papers only if the data used in the analysis are clearly and precisely documented and are readily available to any researcher for purposes of replication. Details of the computations sufficient to permit replication must be provided."

60. For example, when the Staples/Office Depot merger was under review, we frequently discussed with those firms the relative merits of cross-section and fixed effects analyses of pricing data. Merging parties have multiple opportunities during the course of an investigation to highlight exculpatory evidence (including their own data analyses) and share their view of the evidence with staff and the Commission. This information-gathering process allows the Commission to make an informed judgment about whether it has reason to believe the antitrust laws are violated by the proposed transaction.

61. Commission staff try to inform the parties of our concerns with enough specificity (consistent with confidentiality requirements) to permit them to understand and respond to those concerns, but we do not allow the parties to conduct discovery before the Commission has determined whether to challenge the transaction. Staff analyses - from recommendation memos to econometric studies - are part of the Commission's deliberative process, and are privileged (both before and after a complaint is issued) in order to encourage staff to tell the Commission frankly what we think about the evidence. This process is not unfair to the firms: the parties are entitled to conduct discovery after the Commission votes out a complaint, and the staff must persuade a federal judge that a preliminary injunction should issue.

62. Although Judge Hogan made no specific findings of fact concerning appropriate econometric or simulation methodology, he concluded that the merger would likely lead to price increases consistent with the simulations conducted by the FTC's econometric expert and inconsistent with those offered by defendants' economic expert.

63. This observation is consistent with the view of the circuit courts that have interpreted the Supreme Court's decision in Bazemore v. Friday, 478 U.S. 385 (1986), to require that the party challenging a regression analysis for omitting a relevant variable make a showing (beyond mere conjecture or assertion of possible flaws) that including the variable weakens the proof of whatever the statistical study is offered to demonstrate. EEOC v. General Telephone Co., 885 F.2d 575, 579-83 (9th Cir. 1989), cert. denied, 498 U.S. 950 (1990); Sobel v. Yeshiva University, 839 F.2d 18, 34-35 (2d. Cir. 1988); Palmer v. Schultz, 815 F.2d 84, 101 (D.C. Cir. 1987); Catlett v. Missouri Highway and Transportation Commission, 828 F.2d 1260, 1266 (8th Cir.), cert. denied, 485 U.S. 1021 (1988). Similarly Michael Finkelstein proposed that when econometric studies are introduced into evidence in regulatory proceedings, that "a party objecting to an econometric model introduced by another party should demonstrate the numerical significance of his objections wherever possible." Michael O. Finkelstein, Regression Models in Administrative Proceedings in Quantitative Methods in Law 238 (1978).

AIDE-MEMOIRE OF THE DISCUSSION

by the Secretariat

The Chairman opened the roundtable by noting surprise at the high degree of interest in the topic – 17 submissions were received. Perhaps the reason for this is that with the exception perhaps of two countries, there has been a significant concentrating trend in retail sectors, hence an increased importance of large, multi-product retailers. This rapid change in the structure of the retail sector has created problems between manufacturers and distributors and between large and small-scale distributors. To underline the challenges raised by this issue, the Chairman offered two quotations. The first was attributed to Robert Steiner:

> By and large economics has not seriously tried to understand the process by which goods move from manufacturers through the wholesale/retail channels of distribution to household consumers. Worse still, the discipline has tended to ignore these downstream markets entirely by the tacit assumption that they are inert and perfectly competitive, so their omission from economic models does not bias the results.

Thus buyer power is largely uncharted territory.

The second of the Chairman's opening quotations was taken from the Australian submission:

> Competition agencies are having to rethink their strategies in dealing with situations where a buyer could misuse its market power against the companies that sell to it.

Even though we do not know much about the economics of buyer power we must, because of the changes in the retail sector, still pay attention to it.

With seventeen submissions to cover, the Chairman urged that delegates keep their presentations brief. He also mentioned that in some cases, he would simply make a passing reference to a submission without calling for a presentation.

The Chairman organised the roundtable into eight sub-topics.

1. Buyer Power: a view from the business community

Despite a considerable effort being made to invite retailers and manufacturers to the roundtable, none accepted though many expressed a high degree of interest. The Chairman expressed the hope that BIAC, being a neutral agency, would be able to provide a much needed and balanced business perspective.

In one BIAC delegate’s point of view the issue boiled down to tracing the effects of certain important developments, i.e. changing patterns of consumer behaviour, including:

- preference for car-based, reduced frequency one-stop-shopping; and

- consequent increased consumer store loyalty stimulated by more sophisticated retailer marketing.

These developments demand a new vigilance from competition authorities particularly in:

- determining the potential effects of proposed mergers and concentrations;
- reviewing the effects of buyer power and or buying alliances whether national, regional or global;
- preventing distortions in competition between brands and own label products through pricing, marketing tactics and of the use of customer purchasing information;
- though not necessarily required of the competition office, there is also a need to determine land development policies and practises and to review their social and environmental consequences.

BIAC found it helpful that the Background Paper concludes that "...sensitive application of prohibitions on horizontal arrangements, vertical restraints, and abuse of dominance, plus strict merger review... appear to be the best way to address buyer power problems." The paper, however, assumes that manufacturers are regularly complaining to competition authorities about adverse effects of retailer power. BIAC instead believed that specific complaints are very few, so discussion of the effects of buyer power must be largely based on educated guesswork.

As stated in the Background Paper (page 26), there have been very few cases where abuse of dominance provisions have been applied to curtail buyer power. However, the paper completely ignores the crucial fact that because of fears of reprisals, suppliers, large or small, will rarely bring complaints to the competition authorities. That may also explain why the CLP experienced difficulties obtaining individual invitees.

Competition policies regarding buyer power must take cognisance of recent developments in the sector and in particular should note:

- the circumstances in which consumers will shop in one outlet rather than another having regard to the increasing trend of segmentation in retail formats;
- the power exercised over consumers by retailers who dominate a local area;
- the financial and operating leverage available to retailers or groups of retailers over manufacturers who are dependent on them as customers for large proportions of turnover. As recognised in the Background Paper, incremental volume is critical for manufacturers to achieve acceptable returns on investment.

BIAC feels that the biggest problem in this area is not inadequate legal instruments available; rather it is the lack of concrete information. The Background Paper recognises that buyer power is a problem whose time has come and that "...one may seriously question assumptions that large-scale retailing is and will always remain inherently competitive". To address the problem, competition authorities need to use their powers to ascertain information about actual behaviour such as listing fees, use of manufacturers' confidential information, lookalikes etc., and the adverse effects of these behaviours on suppliers, large and small.

BIAC further stressed the necessity for competition authorities to take into account the following aspects: (1) the customer/competitor conflict, in particular the competitive advantage enjoyed by retailers who have access to manufacturers' advance information about promotions, new product launches etc.; and (2) the fact that private label products in general and lookalike's in particular, significantly reduce R & D based innovation which is the cornerstone of head-to-head competition in branded consumer goods markets -- for which a recent PIMS study provides evidence.

BIAC found it interesting that the European Commission's paper on vertical restraints proposed a different block exemption treatment for OEM [original equipment manufacturer] supplies and normal supplies and is curious to see how that proposal fares.

2. General analytical framework

The Chairman turned to the Secretariat for a short discussion of what is meant by buying or negotiating power.

In the Background Paper, which was confined to looking at multi-product retailers, 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 (harm or withheld benefit) which, were the threat carried out, would be significantly disproportionate to any resulting long-term opportunity cost to itself [editor - the version of the background paper included in this publication has been somewhat revised on this point]. Otherwise put, buyer power is defined as situations where there is a fundamental difference in negotiating power between the parties. This admittedly somewhat unorthodox definition of buyer power was chosen because it seems to lie at the root of problems many competition agencies are currently being asked to examine in the area of manufacturer/retailer relations. Such problems do not necessarily entail the application of classic monopsony power, nor do they always or automatically lead to discriminatory terms being applied to different retail buyers. In contrast with classic monopsony power, buyer power as used in the Background Paper does not necessarily entail an ability to reduce supplier prices below competitive levels, nor does it require that changes in supplier prices be linked to changes in unit costs occasioned by changes in total quantity sold. Instead, buyer power is intended to describe situations where in the long run suppliers are induced to lower their prices despite there being no decrease in their unit costs. This concept of buyer power is largely irrelevant unless suppliers enjoy some degree of seller power, i.e. their prices initially exceed competitive levels.

Another important implication of the Background Paper's definition of buyer power is that such power does not necessarily exist every time suppliers price discriminate in sales to competing retailers. This is a desirable property of the definition because there could be reasons for price discrimination which have little to do with what most people writing in the context of manufacturer/retailer relations appear to mean by buyer power.

In addition to focusing discussion on situations where retailers obtain lower prices and simultaneously purchase more rather than less from suppliers, and not being virtually equated with price discrimination, the Background Paper's definition of buyer power reflects what several countries laws on abuse of economic dependence seem to have in mind by "dependence".

The Secretariat could not claim that the Background Paper's definition of buyer power reflects a modicum of agreement across OECD countries as to what constitutes buyer power - even among countries which have abuse of economic dependence laws. It would also be incorrect to maintain that the classic definition of monopsony power (the ability to profitably set price below competitive levels) should be discarded. There could well be situations, most likely outside the retail domain, where the classic

definition would provide a good framework for investigating possible economic welfare losses occasioned by a firm enjoying a dominant position as a buyer. This is especially likely in cases arising in the agricultural sector where something close to monopsony power could produce a dead-weight loss in producers' surplus and perhaps even, if downstream markets are insufficiently competitive, some dead-weight loss as well in consumers' surplus.

The Background Paper links large-scale retail buyer power to the debatable fact that retailers having it often sell in what could loosely be referred to as the weekly one-stop-shop for common consumer goods (mainly groceries). Presuming that consumers do have a demand for such retail services, it is questionable that they would react to the de-listing of any one branded good in their preferred outlet by either increasing the number of weekly shopping trips, i.e. adding another outlet carrying the de-listed good, or deciding next week to patronise another retailer. It is believed more likely that the consumer will either drop the purchase altogether, or substitute something else. And if that is so, the consequence of de-listing is different for manufacturer and retailer. The manufacturer might lose up to the entire volume it used to sell through the de-listing outlet, but the retailer's profits might not change at all. A large scale retail chain typically accounts for a much larger share of any one manufacturer's sales than that manufacturer's goods make up of a retailer's total turnover. Being de-listed by a major retailer or retail chain could have a very drastic effect on a manufacturer's profitability.

The Secretariat concluded by underscoring that just because buyer power is real and could very definitely hurt manufacturers or other retailers does not automatically mean that it reduces consumer welfare. This point is well developed in the Background Paper.

The Chairman noted that the UK contribution is mainly focused on the theoretical analysis of the problem of buyer power and in particular on the effects on competition and efficiency of various types of strategic buyer behaviours. He asked the UK to present the different categories of practises and effects which its competition authorities had identified.

A United Kingdom delegate featured key points drawn from the UK's submission. First, on the definitional point, it is non-cost related discounts that are potentially the problem. Cost based discounts are efficiency based, hence not usually a difficulty with respect to buyer power. The UK submission paper started with a static framework where it was argued that monopsony is very similar to monopoly. The monopsonist gains from reducing output and there is an associated dead-weight loss of producers' surplus unless there are offsetting economies of scale or scope. If the final market where the monopsonist sells his goods is competitive then consumers still pay the same price.

Second, consider what might happen in the long term. Some argue that buyer power leads to low manufacturing profits and this could result in reduced manufacturing investment. That is possible, but on the other hand, we should remember that some suppliers might prefer to deal with a large buyer which can enter into a long term agreement - maybe even help with R & D. Furthermore, large buyers may not wish to earn a reputation for driving manufacturers out of business.

Moving on to potential problems - if a large buyer also has selling power, it may refrain from passing on lower purchase prices to consumers. It may also be able to distort competition via strategic buying behaviour, i.e. engaging in anticompetitive vertical restraints which may even be supported by suppliers. In the US Toys "R" Us case for example, as well as in the UK's own electrical goods distribution case, it could be argued that manufacturers and retailers were getting together to generate and share rents earned at the expense of consumers.

On balance, there are potentially adverse effects from buyer power where the buyers also have seller power, and this could be the usual situation. Nevertheless, competition authorities should not forget

that buyer power could also be associated with welfare enhancing effects. It follows that buyer power problems should be subject to a case by case analysis balancing anticompetitive effects against resulting efficiencies.

The Chairman noted a contrast in views between the UK and French contributions. The former tends to say that problems with buyer power are more likely to result where the buyers also have seller power, while the latter suggests that even when retailers lack seller power, there could still be some abuse of buyer power. The French contribution discusses why a retailer having only a modest market share could still have considerable buyer power, and details various anticompetitive effects perhaps linked to such power.

A French delegate, representing the DGCCRF, noted that a distributor need not have a large market share to have considerable buyer power since such power rests largely on what consumers will do in the case of a product being de-listed by a store. Consumer reaction is not self-evident if the de-listing store is offering substitute goods, and if the consumer faces real switching costs in changing retail supplier. Consumers would have to be particularly attached to a certain brand to be willing to switch stores because that brand is de-listed, hence a de-listed manufacturer will usually suffer a loss of turnover. This is corroborated by a recent INSEE study showing that for about 60 percent of consumers, the absence of a preferred brand simply results in a substitution of a stocked substitute. Only about 20 percent of consumers will go to another store to find the missing product. Lower manufacturer turnover could result in a serious loss of profits. In certain cases, the financial health of the supplier could be at stake. It is difficult to estimate the frequency of such a situation because many variables are involved. It could happen, however, that each distributor is a necessary but insufficient port of entry into the market. There is also likely a threshold number of absolutely necessary such ports, but this is again difficult to estimate.

Private brands play a fundamental role in negotiations between suppliers and distributors. They affect product differentiation by distributors and will equally affect product substitutabilities which in turn influence the strength of buyer power enjoyed by a distributor. In both cases, private brands favour distributors over suppliers.

The effects of buyer power are amplified by producer responses centred on offering a larger range of products in order to win more shelf space in the large scale distributors. For all distributors taken together, this strategy fails to reapportion shelf space. Instead, the strategy increases both the value of shelf space and the buyer power of large scale distributors.

In the short-term, buyer power may simply cause a transfer from producers to large-scale distributors. In the long-term, buyer power has negative effects on research and development activity, plus fosters greater upstream concentration and raises barriers to entry there. Buyer power therefore presents an industrial policy issue, one which competition authorities must address.

Another French delegate, this time from the “Conseil de la Concurrence”, provided a somewhat different point of view based on the experience of the Competition Council with abuse of economic dependence cases arising in the large scale distribution sector. In an opinion written for the government, the Council defined its criteria for analysing buyer power including: conditions under which negotiations are conducted and how buying is structured; characteristics of large-scale stores including size; consumer behaviour; the degree of development of private brands and how they relate to national brands; and the degree of vertical integration. The functioning of buying groups requires special attention. In general, a case by case analysis balancing efficiencies and anticompetitive effects is required when buyer power is involved. Some factors which would feature in such an analysis are: the relation between stores and brands; the question of listing processes and shelf space availability; the question of consumer loyalty and

means of affecting that; the degree of development of private brands and the position in the market; and the need to determine whether or not there is economic dependence.

3. Negotiating tactics used by powerful buyers vis-à-vis their suppliers: unfair or anticompetitive

The Chairman directed attention to the Japanese submission which listed a number of practises regarded as abuses of dominant bargaining power and assumed to impede free and fair competition. The Chairman wanted to know whether such practises are considered to be problematic under the AMA (Japanese competition statute) because they are unfair or unjust, or because they actually restrict competition.

The Japanese delegate noted that under the AMA buyer power is mainly dealt with from the viewpoint of abuse of dominant bargaining position, an unfair trade practise prohibited under section 19 of the AMA (Japanese competition statute). Abuse of dominant bargaining position occurs when an entrepreneur having a dominant bargaining position over another party exploits that position to impose an unfair disadvantage, with the result that fair competition is likely to be impeded. When a retailer makes use of its dominant position by imposing unjustly disadvantageous terms on a supplier this can affect competition at the retail level, especially where suppliers are coerced to: purchase from the retailer; grant overly broad rights to return unsold goods; lend employees to the retailer, etc.. Such conducts constitute abuses of dominant bargaining position if they are likely to impede fair competition among retailers and suppliers.

The Mitsukoshi and Lawson cases (see Japan’s submission) involved leading Japanese retailers. Both companies' suppliers were obliged to accept the retailer requests even though they were highly disadvantageous to them. For example, both Mitsukoshi and Lawson collected monetary contributions without there being a clear basis to determine these. Such retailer conduct is covered by Japan’s abuse of dominant bargaining position provisions because it unjustly imposes a disadvantage on the supplier which harms competition with other suppliers. It also grants retailers advantages sourced in something other than their ability to offer consumers superior price and quality. Consequently, fair competition was likely to be impeded among retailers and suppliers.

In calling upon the Korean delegation, the Chairman noted that Korea’s contribution discussed two interesting cases: the North Chulla Province Kimje City Supermarket Co-operatives case ("Supermarket case"); and the Grand Department Store's special unfair practise case ("Grand case"). In these cases, the Korean Fair Trade Commission (KFTC) apparently objected to practises such as pre-payment of end of the year settlements, pre-adjustment in prices, cancellation of contracts without prior notification, and slow payment of suppliers. The KFTC considered that those practises constituted abuse of dominant position distorting the market on the part of the large retailers. As with Japan, the Chairman wanted to know whether such practises are clearly proscribed in the competition law, and if so, is this because they are unfair or because they distort competition.

The Korean delegate stated that the two cited cases are interesting because, first of all, KFTC rules actually specify that the conducts they illustrate are prohibited as unfair competition. Concerning whether such conducts are illegal because they are unfair or because they are anticompetitive, these are believed to be directly related. There is a great imbalance between buyers and suppliers in Korean market partly because suppliers have very limited outlets for their brands. Small suppliers are especially vulnerable to abusive use of buyer power.

In the Supermarket case, a regional based approach was taken to market definition and it was found that in one city, one purchasing group held about 80 percent of the market. So it had enough power to control suppliers wishing to sell into that city. Also the purchasing group made use of some prohibited conducts.

The Chairman noted a contrast between the Japanese and Korean submissions on the one hand and the Mexican submission on the other. Under Mexican competition law, the bargaining power of buyers is not relevant in assessing the possible existence of anticompetitive practises. In addition, the Mexican submission stated that, "As a general rule, asymmetries in bargaining power between sellers and buyers are pervasive in commercial transactions and are in [themselves] not too worrying." The submission offers evidence in the form of a case in which supermarkets and department stores were alleged to impose abusively long-term payment on small suppliers, and also to abusively accept goods only on a consignment basis. The Mexican competition authority did not find that these practises violated the competition law. Furthermore the written submission states that discounts given by small suppliers to powerful buyers often correspond to promotion services, hence are not inherently anticompetitive. He called on the Mexican delegation to react to the Japanese and Korean presentations and explain why it has come to a different conclusion concerning practises prohibited in those countries.

The Mexican delegate started off by mentioning that CLP consideration of this issue was most timely for his country. On the very same day as the roundtable, a meeting was taking place between retail chains and producers in Mexico to discuss buyer power.

To establish that an illegal use of buyer power has occurred, the Mexican competition authority must prove that the buyer had substantial market power, i.e. the definition of buyer power is different than the one proposed in the Background Paper. Mexico also has some philosophical doubts concerning implications of buyer power on competition. The delegate queried - to what extent is the retailer dominant over the producer? Most situations encountered in Mexico featured very large producers, even multinational companies, which it is hard to imagine are at the mercy of even the large Mexican retail chains. Moreover, there is the issue of whether common commercial practises among retailers result from cartel behaviour or its direct opposite, pure competition. There is also the possibility that buying power exerted by a retail chain benefits consumers because price reductions may be passed on rather than simply increasing retailer profits. The exercise of buyer power is not like the pure case of a monopolist or monopsonist extracting an economic rent and thereby creating a consumer welfare loss. Finally, as also noted in the German contribution, there is the issue of who or what the competition law should protect, competitors or competition. The Mexican competition law has been built to protect competition, not competitors, but much of the discussion about buying power seems to have those goals reversed.

The Chairman commented that the Mexican and Spanish submissions were somewhat similar. The Spanish contribution ends on a sceptical note wondering whether buyer power truly harms consumers. The final sentence states, "... as we deal with dynamic markets, any intervention to change the correlation of forces between operators in the retailing sector can bring about perverse effects such as barriers to entry, barriers to exit and less efficiency." The Chairman was particularly interested in commentary on the notion that intervention could lead to barriers to entry and exit.

The Spanish delegate stated that Law 7/1996 applying to the regulation of retail trade ("retail trade law"), passed on the initiative of small merchants, is at the root of his comments. The Spanish competition authority did not regard this as the best solution to the buyer power problem because the retail trade law constrains businesses actions, i.e. limits their ability to negotiate, harms consumer interests especially as concerns business hours, and tries to protect small merchants against competition from the large-scale possibly more efficient stores. The competition authorities believe that a less intrusive solution could and should be found.

The Chairman turned to the Argentinian submission which also displayed a certain scepticism concerning abuse of buying power. The submission states that the standard used under competition law should include a consumer welfare test, thus effectively ignoring practises which merely alter the distribution of rents between manufacturers and distributors. The Argentinean submission also discusses a very interesting case and makes the point that allegations of predatory pricing practises, for example selling below costs by large distributors, are not necessarily competition problems. The submission illustrates this with the "Macro" case where a distributor sold below cost but the Argentinean competition agency determined this was not a competition problem. The Chairman asked for commentary on the case.

The Argentinean delegate expressed sympathy for the Mexican and Spanish views, speculating that all three countries share the view that economic efficiency is the proper target, not protection of the interests of competitors.

The Argentinean competition law has no *per se* prohibitions. Consequently, the "Macro" case was analysed under a rule of reason standard. The complaint here concerned a notebook pad offered for sale below the direct cost to the retailer. The competition agency applied the Joskow and Klevorick approach outlined in an article in the Yale Law Journal (1979), "A Framework for Analysing Predatory Pricing Policy". The first stage of the analysis required considering the market structure and possible barriers to entry. In Argentina there are no barriers to entry for supermarkets, and there are no regulations affecting supermarket entry. Macro had a 5 percent share of the supermarket market and just 1 percent of the market for notebook pads. So in this case, given the absence of barriers to entry, there was no need to apply the second stage of the Joskow/Klevorik approach which would have been to check to see whether prices were below average variable costs. The conclusion was that this was simply a back to school sale used as a publicity device. It may have damaged some particular interests, but general economic welfare was not harmed.

Before advancing to the next major topic, the Chairman flagged an interesting discussion in the US submission's regarding discriminatory concessions in favour of large buyers and how that related to laws against price discrimination.

4. Does the use of private brands by powerful retailers create a competition problem?

The Chairman noted that the French presentation, among others, had already mentioned this issue. In order to save time for general discussion, he decided to refer to a number of country submissions without calling on the countries concerned. He found somewhat different views among the contributions. Portugal, in its contribution states that the intensive use of private brands sold at low prices by large-scale distributors is, together with the extension of payment delays, an example of a practise engaged in by powerful buyers which, "... directly or not causes a reduction in competition on the economic actors operating in the distribution chain." The Swedish contribution provides a scenario suggesting that the development of private brands by the largest distributors could, but not necessarily would, harm competition at the manufacturing level. The submission also states that such conduct should be evaluated under a rule of reason approach. Finally, the Australian contribution also discusses extensively the issue of private brands and takes the view that they can cause competition problems because access to generic products is considered to be an essential input to grocery wholesaling in Australia.

Having covered a number of topics including the definition of buyer power, the scenarios under which they should be analysed, and the negotiating tactics or practises of distributors, the Chairman decided to open the floor to general discussion.

4.1 General Discussion

Italy opened with a comment related to the Background Paper. He recalled the European debate about employment and the conventional wisdom that European labour markets are too rigid. As regards buyer power, there appears to be another potentially damaging sort of rigidity espoused in the Background Paper if it is saying that once a large distributor begins to handle a product it cannot subsequently de-list it without running the risk of being charged with abusing its buyer power. If this is truly the case, then competition laws would be contributing to an undesirable lessening of flexibility which surely is not the objective of competition authorities. It is very difficult to say that mere de-listing amounts to a restriction of competition. This brings to mind the problems that would occur should the essential facility doctrine be applied to a non-dominant firm, i.e. a retailer with important market share but something short of dominance.

A French delegate commented on Italy's point about market rigidity, noting that France's competition council in buyer power cases carefully considers the relative concentration at the producer and retailer levels. Where concentration is relatively high at the producer level there appear to be little problems with buyer power - for example in the following sectors: small household appliances where the top four producers account for some 90 percent of output; bedding, 70 percent; single use of cameras, 74 percent; etc.. In contrast where upstream production is less concentrated than the retail sector, there appear to be greater problems with buyer power - for example, in shoes where the four largest producers have just 29 percent of the market, or in meat production where the same number is 16 percent.

The Korean delegate noted that the competition effects of buyer power depend on the power structure in the market. In Korea, there are switching costs involved in changing buyers, and there is limited number of large-scale distributors. The regulation to preserve fair competition is motivated by competition concerns.

A United States delegate found the Background Paper to be very thoughtful but questioned its definition of buyer power. That definition suggests that power exists where there is an imbalance between buyer and seller. Competition agencies would find it very hard to employ that sort of test in making judgements about whether something really is having an adverse impact on competition. Without some anchoring in objective criteria such as the Spanish, Mexican, and Argentinean delegates referred to, i.e. some notion of consumer welfare or ultimate impact on competition, there is a danger that competition agencies might err in stopping changes that should occur in a dynamic economy.

The Chairman stated that it was his understanding that the Background Paper does not recommend that competition remedies be applied whenever there is buyer power, but only where it is abused.

The German delegate added a reflection from the consumer point of view. There is a fundamental difference between buyer power and its opposite, seller power. Whereas buyer power generally has positive effects for the consumer because it tends to reduce final selling prices, seller power tends to raise those prices. So buyer power is generally favourable to consumers. There is however one precondition. There must be competition at the final seller level in order to ensure that lower negotiated prices are passed through to consumers. In Germany, competition authorities are not concerned about buyer power unless it is abused.

The Austrian delegate addressed the point about whether buyer power harms competition. It seems there is a direct link between market share and buying prices. An approximately 10 percent market share translates into about a 3 percent discount. The largest buyer therefore tends to have the lowest prices and this constitutes a new barrier to entry. There also appears to be evidence, at least in Austrian food

markets, that lower buying prices are not passed on to consumers. Since 1990, consumer prices of foodstuffs increased by some 19 percent while wholesale prices only went up about four percent. Furthermore, the Austrian competition authority believes that high degrees of buyer power tend to reduce the number of products available to the consumer.

A BIAC representative stated that though the Background Paper is comprehensive, it removes from the table the most relevant issue, i.e. monopsony power. Without such power, what are the consumer issues involved? In the examination of what may be called buyer power, the most recent comment on the issue of relativistic market structure by the United States is quite apt. Are we really talking about an abuse of the competitive process, or are we essentially talking about wealth transfers? If we are talking about wealth transfers are we really discussing something worth talking about? In the United States, the one firm most publicly recognised as having buyer power is Wal-Mart. But this firm has only recently acquired an important market share and this suggests that entry at the downstream level at least in United States is remarkably easy. Countering what another BIAC representative stated regarding a supposed trend towards one-stop shopping, in the United States grocery business at least the trend is in the other direction. Increasingly, consumers are shopping at four or five different store outlets per week. As far as relative concentration is concerned, one could look at various upstream grocery manufacturing sectors and find one, two or three firms selling through more than one, two, three, four or 5 retail outlet types. In short, concentration may not be a very relevant tool to use in this particular area, once one takes monopsony power off the table. The Background Paper should not be regarded as a blueprint for enforcement policy. Its very tentative conclusions and identification of issues underscore the fact that once one gets beyond the monopsony issue the whole question of buyer power probably is not one that should receive a great deal of attention from the enforcement bodies.

The Chairman stated that a few further steps are required in the discussion before we reach the conclusion just suggested by the BIAC representative.

A European Commission delegate noted the apparent difference of opinion among BIAC representatives and suggested it might be due to differences in their countries of origin. In the Netherlands, land is scare and there is a high population density; in the United States there are a lot of people and a lot of land. While one can understand the Dutch preference for one-stop shopping, one can also understand the high car usage in the United States and the habit of frequenting several stores. These differences have little to do with competition policy or in fact with any policy. There are very considerable geographical, cultural and regulatory differences between countries, including within the European Union, which go a long way to explaining differences in policy emphasis.

The Portuguese delegate clarified his country's point of view concerning private brands, in particular how the use of private brands can reduce competition among distributors. In fact, private brands sold at low prices are intensively used by the large-scale distributors as leverage in obtaining discriminatorily low purchase prices for trademarked products. It is difficult to say that the sale of private brands itself can be an unfair practise but there is no doubt that the linked low prices on trademarked goods causes great difficulties for other economic actors in the distribution chain. Consequently, private brands probably cause, directly or indirectly, a reduction in general competition.

The Chairman remarked that the Australian submission has a discussion of something bordering on essential facilities in wholesaling and retailing, and touches as well on private brands. He called on the Australian delegate to elaborate on these points.

The Australian delegate commented that in the course of some recent inquiries, the competition authority (ACCC) learned that some retailers consider access to generic products to be an essential input into grocery wholesaling. Probably what these retailers were getting at was that generic brands in

Australia are associated with low price products, and if the consumer goes to a retail outlet and finds only branded goods then he will consider that the store lacks a full range of goods, and especially goods at bargain prices.

5. Cases in which buyer power is used by large retailers to reduce horizontal competition

The Chairman opened this section of the roundtable by drawing attention to the United States submission and its discussion of the Toys "R" Us case. He noted that the United States considered this case to involve both vertical and horizontal anticompetitive effects. He invited further information on this point.

The United States delegate noted that the Toys "R" Us case involved a very successful retailer which now enjoys a multinational presence. Toys "R" Us became successful in the 1970s by offering a low-cost, high volume format. By the 1990s it had obtained a national share of approximately 20 percent of the US retail toy market. In local retail markets, its share was much closer to about 35 per cent. As a buyer, this company accounted for well over 30 per cent of purchases from major toy manufacturers. There is evidence in the case that manufacturers distributing through Toys “R” Us could not replace volumes they would lose if they lost access to that outlet.

About ten years ago, Toys “R” Us itself faced competition from a new still lower cost retail innovator, i.e. the warehouse clubs. These are warehouse stores emphasising bulk sales and low services, and charging a slight membership fee. They have low costs of operation and charge lower prices to consumers. In the late 1980s, toy manufacturers were anxious to be in that new channel of distribution because it gave them an opportunity to expand their sales and reduce dependence on Toys “R” Us.

Toys “R” Us had two reasons to be concerned about the warehouse club competition. First, it saw sales being diverted and profits being eroded by a low-cost competitor. Second, it saw its image as a low cost, price leader being eroded by a firm undercutting it on price. After extensive discussions and negotiations with manufacturers, Toys “R” Us adopted a policy of not buying from manufacturers any toys that they sold to warehouse clubs stores. It allowed manufacturers, however, to sell so-called combination packages to the warehouse clubs, e.g. a Barbie Doll with three or four extra dresses included. This had the advantage of raising prices that the club stores had to charge for their toys and it blunted direct price comparisons with Toys “R” Us. It also demanded the right to review any toys being sold by a manufacturer to the club stores, and it policed compliance with that policy.

The Federal Trade Commission (FTC) found that section 5 of the Federal Trade Commission Act, dealing with unfair methods of competition, had been violated. Toys “R” Us’ conduct was not unilateral. It had communicated assurances between the manufacturers themselves that each would abide by what amounted to a joint boycott in the sale of certain toys to the warehouse clubs. It also had, at the urging of the manufacturers themselves, co-ordinated that policy so that manufacturers could be sure of being treated equally in what amounted to a joint boycott in the sale of certain toys to the warehouse clubs. This was a hub and spoke conspiracy in which Toys “R” Us functioned as the central focus for communications concerning the implementation and policing of an agreed upon policy.

In response to the Chairman's question concerning horizontal and vertical effects, the FTC analysed this evidence in two different ways. First, Toys “R” Us orchestrated a horizontal boycott, which under US law is *per se* unlawful. However, to avoid a mechanistic application of the *per se* rule, the FTC took care to analyse whether or not this was an actual conspiracy involving an intent to exclude rivals. In addition to intent, the FTC considered market power both at the retailer and manufacturer level and found that there had been a serious effect on competition. Though the warehouse clubs had been a rapidly

expanding outlet for toys, their sales virtually stopped in their tracks after the boycott was organised, and toys as a per cent of their volume dramatically decreased. The FTC estimated the cost to consumers on sales of top toys alone at Toys "R" Us was as much as $55 million per year. Finally the FTC considered whether there might be some overwhelming business justification for the boycott, some efficiency justification that would warrant not applying a *per se* determination. It found none. The company claimed a free rider concern but the evidence showed this concern was absent at the time the policy was adopted. To the extent that Toys "R" Us provided additional services to manufacturers, those services were being compensated. In other words, simply invoking the term free rider is not enough. One must show that in fact one is offering a service that is not otherwise being compensated.

The FTC also looked at this case as a series of vertical agreements between a powerful retailer and a number of individual toy manufacturers and accordingly applied a somewhat more developed rule of reason analysis than was applied to the boycott aspects of the case. This led to the conclusion that the agreements were on balance unlawful, non-price vertical restraints that seriously affected competition.

One Commissioner agreed with the vertical analysis, but disagreed with the finding of a horizontal conspiracy.

The Commission's order, which is expected to be appealed, basically restricts Toys "R" Us from entering any agreements with manufacturers which would limit the latters' ability to sell to third parties and is further prohibited from demanding information from manufacturers regarding their sales to third parties.

The Chairman drew attention to the Carlton and United Brewing (CUB) and the Australian Safeway Stores cases contained in the Australian contribution. These cases involved large buyers trying to use their buying power either to prevent the development of competitors or to reduce competition from other retailers. He called on Australia for elaboration.

An Australian delegate began with the CUB case noting that it illustrated the use of market power in one market to affect an outcome in another. This case had its roots in the South Australia Brewing Company (SABC) agreeing to manufacture and supply a private brand beer to a small supermarket group. CUB, Australia's largest brewer contacted its smaller rival and asked it to withdraw from the agreement under threat that if it did not, CUB might review its purchases of beer cans from a SABC subsidiary. CUB was purchasing around 70 percent of its cans from SABC's subsidiary and those sales accounted for about 50 percent of the subsdidiary's total can sales. The outcome was that SABC stopped supplying private brand beer. In other words CUB used its buyer power in the can market to restrict competition in the beer market. CUB conceded the facts to the ACCC and penalties were imposed.

The Australian Safeway Stores case concerned an independent bread retailer. This retailer was discounting the price of bread it purchased from Tip Top bakeries. Tip Top pressured the independent retailer to stop discounting. In the course of, unsuccessfully, defending itself against a charge of retail price maintenance, Tip Top alleged that Safeway, a division of Australia's largest grocery retailer, Woolworths, had pressured it to put an end to the discount prices. Woolworths accounts for around one-third of branded packaged grocery sales. Since Safeway had its own in store bakeries as well as selling bread from Tip Top, the allegation was that Safewayhad used its market power as a buyer of bread to encourage Tip Top to impose retail price maintenance on a Safeway retail competitor. The ACCC is continuing action against Safeway.

Both these examples indicate how consumers are in fact disadvantaged by the use of buyer power.

The Chairman then called upon Sweden to describe a case where a retail buying group had apparently used its buyer power in a conflict with its supplier. The competition authority found that joint refusal from a large number of retailers to buy could lead to negative consequences for a supplier. The Chairman posed two questions. To what extent was competition as well as a particular supplier harmed in this case? And what would have happened if instead of having a large set of small retailers, the same refusal to purchase had been exercised by an integrated chain?

The Swedish delegate noted that the voluntarily chain in question is a combined wholesaler, distributor and retailer and is the biggest food retailer in Sweden. It enjoys a market share of approximately 45 percent. This chain can be said to have market power. An integrated chain with that market power would also have been subject to attention from the Swedish competition authority. No final assessment was reached in the case.

The delegate assumed that behind the Chairman's question was the fact that lower prices benefit consumers Of course this is probably true in the short-term, but in the long run there is a risk that a supplier suddenly losing almost half its sales will exit the market. The result could thus be a reduction in competition upstream and this is the point of the case.

6. Mergers in the retail sector

The Chairman noted that several contributions revealed that merger analysis in the retail sector poses difficult questions relating to market definition both at the purchasing and retail levels. Questions also arise in the application of concepts such as joint dominance, and there are difficulties in assessing the potential effects of retail mergers on wholesalers and manufacturers. He chose to begin with the German contribution which described four merger cases and requested more information about two of them where there were obvious disagreements between the Bundeskartellamt (BKA) and the courts on the issues of market definition and the applicability of the concept of oligopolistic market dominance.

A German delegate noted that in the 1980s the BKA used an approach to market definition based on the buyer's perspective. In the mergers mentioned by the Chairman, the retailer's buyer power arose from the quantities purchased and additional factors such as nation-wide distribution and central purchasing. Leading retailers such as Metro and Kaufhof constitute such an important sales potential for manufacturers that the majority of the latter could not afford to lose such outlets.

The BKA has not been very successful in taking action against buyer power through merger reviews. Its preferred market definition was rejected by the highest court in the process of rejecting the merger prohibitions urged by the BKA (i.e. in the Metro/Kaufhof and the Co-op/Wandmaker mergers). The court held that the market had to be defined from the perspective of the opposite side of the market, the food manufacturers. The court held also that in calculating the market volume and analysing the food manufacturers' possibilities of switching from one retailer to another, all distribution channels had to be included, e.g. wholesalers, retailers, restaurants, exports etc..

As for two mergers cleared just several weeks before the roundtable, Metro/Allkauf and Schikendanz/Karstadt, BKA examination showed that buyer power and supply market concentration had tended to increase but had not reached or exceeded the dominance threshold defined by the courts. In both cases, the BKA applied the market definition approach endorsed by the courts.. As for the relevant geographic market, the BKA defined a national supply market for the relevant product groups. No single firm or oligopolistic dominance on the demand side was found for any of the product groups examined. Two of the reasons for that were: the shares of the five leading retailers and the overall volume purchased were below 50 percent; and there is intense retail competition;

The Chairman observed that the position taken by the German court on the market definition is at odds with the practise of competition authorities in other jurisdictions where different retail channels or different ways of distributing a product are very often considered to be different markets. Perhaps this problem could be avoided through the production of appropriate empirical evidence. He referred in particular to Room Document #2 where the United States presents an interesting case relating to the blocking of the Office Depot/Staples merger.

A United States delegate noted that the Office Depot/Staples merger case presented a classic retail market definition question - is there a market for all retail sales of office supplies including all sizes of retailers plus mail order and electronic commerce, or was there a unique market consisting the three nation-wide chains. The evidence the FTC presented in court, see Room Documents #2 and #5, suggested that each of the three big chains considered the others to be their principal competition, i.e. to constitute a separate market. They adopted pricing philosophies indicating that they would lower price where they were in the retail market with each other, and created pricing zones to carry out that pricing philosophy. The evidence showed that on average, Staples charged prices 13 percent lower in retail markets where it faced competition from the other office supplies superstores. The FTC also showed that these differences persisted over time, and bolstered its price evidence with identical newspaper advertisements, except for the prices, run in two different cities, one having superstore competition and one lacking that. The parties asked the court to believe that the price differences arose for other reasons and presented their own econometric analysis. There were two problems with their counter-analysis: it directly contradicted the parties' marketing strategies and pricing philosophies; and the FTC was able to present an effective critique undermining the parties' alternative econometric analysis.

The Chairman then turned to Australia and in particular a merger case in which a wholesaler, i.e. Davids, undertook a series of mergers and acquisitions to better compete with the three major grocery retailers which together enjoyed a 77 percent share of branded packaged groceries sales. The ACCC did not oppose this merger. The Australian submission also discusses the Rank Commercial take-over bid for the Australian and New Zealand assets of Foodland Associated, the only independent grocery wholesaler operating in the state of Western Australia. In this case, the ACCC opposed the merger. The Chairman turned to Australia for insight into these cases.

An Australian delegate began by affirming that Australia has a very concentrated retail grocery sector which has grown considerably more so over the last 20 years. The three major retailers have expanded through acquisition and growth. In apparent response to that, a so-called fourth force was created through a series of mergers yielding a large independent grocery wholesaler to supply remaining independent retailers. The big issue was whether the merger of two major wholesalers selling to the independents was likely to substantially lessen competition. That seemed to turn on: whether there are effectively separate markets for groceries wholesaling and retailing; whether intense retail competition would constrain the new wholesaler's ability to raise price; and what would happen if one of the three big chains itself goes into wholesaling activities. Also lurking in the background was what the ACCC should say if manufacturers subsequently argue that they be allowed to merge since concentrated buyer power would constrain their ability to raise prices.

Davids argued that the independent retailers could only survive if they were part of a larger group, essentially based on a new national wholesaler, that could deliver the benefits of big business in terms of buying, marketing, merchandising, store design, information technology, etc.. Although the ACCC did not initially oppose the first of these acquisitions, that transaction was challenged in Court by the Attorney-General. The ACCC then received three proposals under its authorisation provisions. The ACCC took the view that strong competitive pressures from the integrated retail chains on all of the small stores would put sufficient pressure on the so-called monopoly wholesaler to stop it from using any monopoly power, or indeed from even having any monopoly power. Indeed, the result might be more

competition because the new wholesaler would achieve economies of scale permitting it to compete more seriously with the big chains.

In the written submission there is a discussion of market definition. Some people said that wholesaling is not a separate market -- there is instead one big retail market. Another view was that wholesaling was a separate activity and as long as one takes into account the competitive pressure on a wholesaler by virtue of competitive forces operating on the retail market, the analysis will be correct. There was also the geographic dimension, and here all the supply and demand analysis suggested that the market should be regarded as state based. The Australian Competition Tribunal, however, took the view that most of the decision-making was centralised nationally for the big chains and to a degree for the new wholesaler, and was made for the country as a whole even though there were some variations based in local circumstances. So for that and other reasons, the tribunal decided in favour of a national market. There was also some debate about so-called functional markets -- how inclusively should the big distribution chains be defined; should the wholesaling function be included or not? The predominant view was that wholesaling was better viewed as a separate activity no matter what competitive constraints operated on it.

The other case mentioned in the submission was one where one of the big three grocery chains, Coles, planned to take over the main wholesaler in Western Australia and would therefore have obtained a 70 per cent market share. The ACCC blocked that merger.

The Chairman next focused attention on the European Commission's submission which included a detailed consideration of why the Commission opposed the Kesko/Tuko merger in Finland. The Chairman was particularly interested in why the Commission believed that post-merger buyer power would have constituted an important barrier to entry.

A European Commission delegate noted that Community competition rules respecting agreements and abuse of dominance are applicable in principle to abuses of buying power. This may be difficult to do, however, hence the utility of intervening at the merger stage. The Merger Regulation prohibits concentrations which create or strengthen a dominant position with the consequence of significantly restraining competition in the common market. Based on this regulation, the commission opposed the planned take-over of Tuko by Kesko. The merger would have conferred a dominant position on Kesko (based on a 55 percent market share for the merged entity in the retail sales of everyday consumer goods, plus the effects of loyalty rebates and private brands), and inhibiting the normal functioning of the market.

Post merger, Kesko would have enjoyed considerable buyer power since it would have controlled access to at least 55 per cent of available shelf space in Finland. The augmented Kesko would have been in a position to obtain supply prices that its retail competitors would not be able to match. That would have tended to discourage price competition in the retail market. This situation would also have rendered new market entry more difficult at both the supplier and retail levels for everyday consumer goods.

The Chairman mentioned in passing that the Canadian submission discussed a proposed 1994 merger between SmithBooks and Coles. The submission stated, "... given the fact that SmithBooks and Coles are the two largest retail book chains in Canada, the Director monitored the merger for ...[a three year period]...especially with regards to the buying power of the merged entity relative to publishers." This seems to indicate that there is some concern also in Canada about buying power in merger cases. Having said that, he opened the floor to general discussion on anticompetitive behaviours of large retailers having buyer power

6.1 General Discussion

A German delegate began by noting that Germany has a limited number of large retailers and there is a strong ongoing concentration in the sector. This raises problems from both the political and competition policy viewpoints. The same is true for many manufacturing sectors where there is also a strong concentration process underway. There is at least one substantial difference, however, between the distribution and manufacturing sectors. In manufacturing, globalisation is helping to preserve competition, but the same is not yet true in the distribution sector despite the emergence of some international distribution chains.

The French delegate discussed a case where the Competition Council imposed a three million franc on a delisting firm. The offending "hypermarché" used delisting in an attempt to prevent its erstwhile supplier from entering the large scale retail distribution sector. In this case, an action on the supply market had an anticompetitive effect on a connected market.

The Austrian delegate referred to a several years old case in which a German retail group bought first one and then another Austrian retail group. Along the way it demanded that suppliers sell to it at the lower prices prevailing in Germany, threatening loss of sales through both its German and Austrian stores. As a result of such pressures, some seven food producers were either closed down, purchased or their business switched to an outlet in another country.

The Australian delegate noted that given existing high levels of retail concentration in his country, there is considerable political concern about buyer power. There are several standard criticisms and comments which have probably also been heard in a number of other countries. First, it is said that buyer power is being used to squeeze low prices in the farming sector as well as other sectors being deregulated, and the resulting low purchase prices are not being passed on. Second, political pressures and complaints of predatory pricing are emanating from smaller independents facing competition from big supermarkets in regions they previously had to themselves. Third, there are conglomerate issues when big retailers extend laterally into sectors such as banking, pharmacies, and magazine or gas distribution. Finally, there is the question of vigour of competition among the large scale distributors. There is likely to be an inquiry into all these issues and more, and small business will be watching closely.

The Dutch delegate reacted to the Australian comments by noting that in his country also there is a high level of concentration in the retail sector. This may not present a buyer power problem, however, because due to strong retail competition, the gains are being passed on to consumers. He wondered whether this was also true of Australia and, if not, whether the political pressures are coming from consumers as well as small business.

An Australian delegate said that he had been referring to the surge of complaints from small business interests, supplier interests, etc., rather than from consumers. He speculated that some of the charges that gains were not being passed on were simply due to retailers smoothing the effects of fluctuating farm prices. At the same time, he expressed doubts about the actual degree of competition among large-scale retailers.

The Austrian delegate noted that his country has one of the highest concentrations in Europe in the retail food sector and reminded delegates of evidence that declines in wholesale prices of foodstuffs materialising after Austria's entry into the European Union were not quickly passed on to consumers.

The Chairman noted that various European countries have experienced some of the political pressures the Australian delegate referred to, but these were likely based on a desire for protection from

competition as much as a desire to preserve competition. Political reactions have included passing new, perhaps ill-advised laws which will be touched on in the last part of the roundtable.

The United Kingdom delegate noted that in the examples presented of buyer power being used or abused to enhance selling power, the firms concerned already had such power. This begs the question - is buyer power only a problem when the buyer also has market power as a seller? The Chairman referred this question to the United States one of whose delegates agreed that the examples he had used did in fact beg that question. He added that the United States competition authorities tend to look for objective bases for finding market power i.e. one must find either monopoly or monopsony power, or both. These two forms of power are usually but not always found together.

The Swiss delegate believed that buyer power problems occurred primarily in relatively advanced economies after significant mistakes in competition policy or in economic regulation had been made. For example, a decade ago when concentration in retail trade started to progress rapidly in Switzerland the government adopted measures allowing small retailers and manufacturers to engage in cartel like behaviour through retail price maintenance etc.. This had exactly the opposite effect to what was expected. It weakened even further the small retailers and manufacturers, and allowed the big retailers to increase rapidly their market share. It was at that point that real problems with buyer power appeared. He wondered whether similar mistakes were made in other countries.

The Chairman commented that the Swiss delegate had raised a very important point and noted that France provided a further example. The French "Loi Royer" represented an attempt to prevent large-scale stores from harming small retailers but this law restricting the opening of such competitors has had the perverse effect of increasing concentration in the retail distribution sector and making the problem of buyer power more politically important. Various country contributions have shown that the same perverse results have been seen elsewhere. This is not the whole story however. United States experience argues that even in a relatively free and unrestricted environment, buyer power can lead to competition problems. So barriers to entry into distribution may not be the whole story.

7. Joint buying and selling groups

The Chairman introduced this topic by noting that some countries have reacted to the buyer power allegedly created through mergers of large distributors by showing various degrees of tolerance to purchasing agreements among small retailers designed to match the buyer power of their large competitors. He called upon Australia to lead off discussion of these issues.

An Australian delegate confirmed that his country was not too worried about co-operatives. There have been a number of legal issues about whether co-operatives are caught or not by various *per se* prohibitions on price fixing etc.. When a case involving a co-operative comes before the ACCC, the restrictions it imposes upon its members are examined for their possible anticompetitive effects including those potentially arising when members are prohibited from separately bargaining with manufacturers. The ACCC is also concerned to prevent unduly co-operative selling arrangements. The ACCC has sometimes encountered cases of disputes arising in co-operative arrangements where members pooled their buyer power and were later pressured to act in various anticompetitive ways, and has found that dispute resolution mechanisms can be helpful in dealing with such cases.

The Chairman then turned to examining Denmark’s block exemption for retailer buying groups which apply when the groups account for less than 25 percent of the turnover of the relevant product.

The Danish delegate explained that the block exemption consists of a white list, the allowed provisions, and a black list, the prohibited provisions. The white list allows retail groupings to develop a concept for a chain and covers things like common shop design, product assortment, maximum prices in joint advertising campaigns, employee training, trademarks, after sales services, administrative systems, trade cards etc.. It also permits non-competition clauses restricting share holding in competing chains, and collective advertising, for example TV commercials, and the use of maximum prices for goods involved in advertising campaigns. On the other side of the ledger, the block exemption does not apply if individual retailers are not allowed to supplement the standard chain assortment, or are blocked from running local advertising campaigns and setting prices on products not covered by joint advertising campaigns, or if applicants for membership at a certain location are refused on a non-objective basis. There is also a special rule regarding exit clauses -- members must be free to leave the chain within six months. Finally, there are provisions, rarely used, to withdraw the block exemption on a case by case basis.

Next the Chairman turned to Sweden's block exemption seeking a comparison with what is found in Denmark. The Swedish contribution also referred to an interesting debate about whether the block exemption is overly narrow.

The Swedish delegate began by referring to the Swedish competition act, closely modelled on European Union competition provisions, but supplemented with a special block exemption for voluntary chains. The block exemption only applies below certain market shares. For co-operating groups having less than 20 per cent of the Swedish market, the block exemption permits joint purchasing, joint advertising, fixing prices in joint advertising campaigns (but individual retailers must always been free to sell below fixed prices), common price calculation methods stopping short of fixing retail prices, requirements that jointly bought goods not be sold to retailers outside the co-operating group, plus co-operation in supplying financial administrative services and other services for store development and staff training. Between 20 percent and 25 percent market shares, there is less tolerance regarding price co-operation. For example, joint price setting in connection with joint advertising can only take place when the goods are jointly purchased and promoted basically on price.

Certain mandatory requirements must be met to benefit from the block exemption. Agreement between members must be in writing, and price co-operation connected to joint advertising may not be binding. If the co-operation includes other agreements which might be anticompetitive and are not covered by the block exemption, the chain must apply to the competition authority for an individual exemption.

Ever since the block exemption was adopted there have been pressures to widen its application because retail chains with fairly high market shares wish to benefit from it. They have also claimed that the narrow cast of the exemption hinders important co-operation that could increase their competitiveness with franchise and other multi-outlet chains. The block exemption has been further criticised because its market definition provisions do not correspond to the relevant market concept used in the general Competition Act and tends to underestimate chain market shares. An evaluation is currently underway by the Ministry of Industry and Commerce whose findings are expected before the end of 1998. Consideration will be given to abandoning the market share thresholds and perhaps modifying the other criteria which correspond to those found in the European Union competition rules. It seems reasonably certain that the market definition in the block exemption will be changed to correspond to the usual definition found in the Competition Act.

The Chairman pointed out that the United States contribution contained a discussion of co-operative buying groups and noted that collective price fixing has sometimes been permitted where a group lacks market power. He also pointed to an Italian case examining how purchasing group negotiations and the terms on which constituent parts could buy could affect both retail and supplier level competition. The

Italian competition authority applied a rule of reason approach and decided there was nothing wrong with the buying group practise.

8. Are specific abuse of economic dependence provisions useful in competition laws

The Chairman noted that this section covers what many members consider to be the real "horror stories". He was reflecting what he considered to be the general mood in the room, i.e. that it is not a good idea, despite the practise in certain countries, to have specific provisions treating buyer power as an abuse of economic dependence. There is a vivid account in the Italian contribution of the battle fought between the Centromarca on the one side and the competition authority plus the retailers association on the other. The battle concerned the adoption of specific legal provisions dealing with buyer power.

The Italian delegate referred to Parliament's lengthy discussion of a law on industrial suppliers which did not directly concern retailer/manufacturer relationships. It was focused instead on large manufacturers purchasing supplies from smaller manufacturers. Certain of these sub suppliers felt they had few if any alternatives to dealing with the large manufacturers and often felt forced to enter unwritten agreements incorporating long payment delays. The law debated in Parliament, in some ways a very "populistic" law, contained provisions having both good and bad impacts on competition. Two of the favourable or neutral provisions were: requiring written, enforceable contracts; and payment with 60 days.

There was considerable discussion about including abuse of economic dependence prohibitions in the law. It was felt that such provisions would be very much in line with what the law was all about and the proposal was to apply them to all suppliers, i.e. not just the sub-suppliers targeted in other parts of the law. The Italian delegate was not convinced that such measures were really needed given Italy's highly fragmented retail structure.

The competition authority urged that the provisions concerning abuse of economic dependence be specifically linked to market conditions, i.e. that they be a buyer's side version of the country's abuse of dominance prohibitions, or that such provisions could be dispensed with by merely clarifying that abuse of dominance prohibitions could apply to protect sellers as well as buyers. Unfortunately, the provisions passed in Parliament in June of 1998 make no reference to market impact. Since these provisions essentially dealt with contractual relations, the competition authority abandoned its earlier position that they should be included in the general competition statute. The abuse of economic dependence provisions are now being enforced through an arbitration procedure within the Chambers of Commerce. No cases have yet come to the attention of the competition authority.

The Chairman turned to Portugal which, perhaps due to local conditions, is particularly concerned about buyer power. Portugal's specific law on abusive buying practises includes *per se* prohibitions which the Chairman wished to learn more about.

A Portuguese delegate noted that the prohibition of abusive buying practises has been recently introduced in the Portuguese legislation that also targets other commercial practises affecting trade, prohibiting things such as price discrimination, refusal to sell, and sales below cost. These practises are prohibited *per se* which is appropriate given their mainly private nature and limited effects on competition, and previous difficulties experienced in bringing and proving cases of abuse of economic dependence before the Competition Council. The difficulties arose because of complainants' fears of reprisals plus the need to use a demand based market definition and to assess the lack of equivalent alternatives. Article 4(a) of the above mentioned legislation prohibits obtaining from a supplier exorbitant prices, payment conditions, selling conditions or commercial co-operation conditions. Another provision qualifies as "exorbitant" all selling and payment conditions, or prices which disproportionately benefit buyers taking

account of their share of the seller's sales and the value of buyer services supplied. In place of the Competition Council, enforcement of the abusive buying practises provisions is in the hands of the directorate general of trade competition.

Another Portuguese delegate added that the development referred to above reflects the need for competition agencies to rethink their policies concerning buyer power. Though the large majority of targeted conduct may affect largely individual interests, there are cases where competition is harmed yet cases are difficult to bring under general competition law. There is a real and growing power of distributors to impose aleatory conditions most of the time without compensation. In situations of unbalanced negotiating power, costs and burdens are transferred upstream negatively affecting the financial viability of affected firms. In order to restore balance, it was thought necessary to qualify certain conduct as abusive bargaining practises covered by prohibitions outside the competition legislation.

The Chairman noted that Spain also has specific provisions governing the exploitation of economic dependence as well as various retail trade regulations controlling this kind of behaviour. He turned to Spain for further detail about these provisions and their enforcement.

The Spanish delegate drew attention to its country's Unfair Act 3/1991 of 10th January. Its article 16.2 categorises exploitation of economic dependence as an unfair practise when suppliers or clients have no alternatives. This act is enforced by common civil courts of justice. In addition, Law 7/1996 on the Regulation of Retail Trade deals with payment terms, selling at a loss and business hours. The provisions relating to selling at a loss are again enforced by the common civil courts. Regional bodies enforce the provisions of Law 7/1996. The Tribunal for the Protection of Competition has to issue a non-binding report before the Regional Governments license a new hypermarket.

The Chairman stated that to the extent provisions regarding abuse of economic dependence or abuse of buying power are difficult to enforce under the competition law, for reasons outlined by both the Italian and Portuguese delegates, political pressure builds to convert them into *per se* prohibitions enforced by someone else. The Chairman believed that France is a good example of this. It now has abuse of dominant position and abuse of economic dependency prohibitions in its competition law, supplemented by another layer of *per se* prohibitions. He called upon France to further explain its system.

The French delegate noted that although the general competition law's abuse of dominance and abuse of economic dependence prohibitions could, in theory, be applied to buying power, in practise such application is highly problematic because it is difficult to demonstrate that the buyer has a dominant position and the seller lacks equivalent solutions. It was the lack of effective tools which resulted in new laws being passed in 1996. The objective was to reduce somewhat the vertical and horizontal power of large distributors. The first of the two new laws, concentrating on the vertical aspect, featured a prohibition of discriminatory practises and at the same time liberalised the refusal to sell regime. It also limited the conditions under which distributors could break commercial relations and introduced greater transparency by requiring all financial advantages to be set out in written form, and by clarifying billing rules.

Regarding horizontal competition between large scale distributors and smaller businesses, the situation is more complicated. In particular, a *per se* prohibition was introduced on abusively low prices having predatory effects. This applies to goods which are transformed or modified within a store, for example bread, where alleged low prices would be difficult to control using abuse of dominant position prohibitions. The new prohibition has not resulted in many cases. In parallel with prohibiting abusively low prices, the law has revived a freeze on the establishment of new large-scale stores. The objective is to protect smaller business. This law has had some quite unexpected effects. It has greatly increased the

value of existing large-scale distributors and fostered greater concentration in such distributors which in turn has tended to facilitate tacit collusion among them and increased their buyer power.

The Chairman turned finally to Germany which has amended its competition law in ways impacting on the exercise of buyer power.

A German delegate began by mentioning what is not in the recent German reform. The BKA had been under strong political pressure to make efforts in order to reverse the balance of power in the market, i.e. to reduce buyer power and to strengthen the market power of the seller side. The BKA refused to go down that path, so it remains true that buyer power as such is not a violation of German competition law. The reasons behind the BKA refusal are that buyer power cannot be abolished through merely adopting certain legal provisions, and in any case, buyer power often helps consumers. The BKA acknowledges, however, that there are many abuses of buyer power which competition law should seek to reduce. Germany has accordingly amended its competition law in two respects. A new provision was added concerning sales below cost which sharpens and improves what was already in the law. The prohibition on sales below cost only applies in cases where there is market power. The more interesting change was procedural in nature and was designed to encourage complainants to come forward. They will now be granted anonymity in filing their complaints. The BKA can even ask the court for permission to conduct a search without giving the name of a complainant.

The Chairman noted that there was another contribution, one from the Czech Republic, which had not been referred to. This submission posed a number of questions that the Czech competition authority hoped would be answered in the course of the roundtable.

BIAC stated that buyer power could have negative consequences on research and development, innovation and product differentiation. The Background Paper referred to this but expressed considerable scepticism. There has been a recent study concerning this which will be supplied to the OECD. This study supports the idea that abuse of buying power and the private brand phenomenon might initially benefit consumers but hurt them in the long run.

The Chairman expressed his personal scepticism about effects of buyer power on profitability, research and development, and innovation. In France**,** the main alleged victim of buying power, i.e. food manufacturers, seem to be very innovative. This is of course only a tiny piece of evidence which does unnecessarily contradict the study mentioned by BIAC.

9. Chairman's Summary

The Chairman noted that the roundtable had centred on a set of issues which may have more to do with fair than with efficient competition. Some buyer power abuses certainly belong to the category of unfair practises. In most cases there are no problems in the antitrust sense of the word, although delegates saw that buyer power could have indirect negative effects on competition. The British delegate raised a very important issue when he questioned whether buyer power could give rise to efficiency concerns if the buyer lacked seller power.

Irrespective of what competition authorities may think about buyer power, there is clearly an enormous amount of political pressure in certain jurisdictions to address the issue. The debate was quite interesting as regards the various choices offered. The competition authority can stay pure and refuse to deal with it, a bit as the Italian delegate described, but this does not prevent things from happening. Rather they happen in a different arena. The competition authority can try to bring some economic sense into the minds of politicians who vote the laws. This has been tried in France, where an effect on the market must

still be demonstrated in order to apply most prohibitions relating to buyer power. This may not prove satisfactory. When laws are passed which result in few or no cases being brought, the result is often a new law armed with *per se* prohibitions. In short, when competition authorities opt to remain primarily focused on economic efficiency, politicians may react by empowering other governmental bodies to adopt ill-advised measures. The result could be more harm to competition than what would occur if the competition agency had retained sole jurisdiction over buyer power but had agreed to step a little beyond an exclusive concern for economic efficiency.

AIDE-MÉMOIRE DE LA DISCUSSION

par le Secrétariat

Le Président ouvre la table ronde en faisant part de sa surprise quant au vif intérêt qu'a suscité le thème de celle-ci et dont témoignent les dix-sept rapports reçus. Sauf peut-être pour deux pays, il est possible d'expliquer cet intérêt, par une forte tendance à la concentration dans le secteur du commerce de détail, et par conséquent, par le rôle accru joué par les grands détaillants multiproduits. Le changement rapide de la structure de ce secteur a engendré des problèmes entre producteurs et distributeurs et entre grands et petits distributeurs. Pour mettre en évidence les défis que soulève cette question, le Président évoque deux citations. La première est attribuée à Robert Steiner :

> En règle générale, la science économique n'a pas sérieusement tenté de comprendre le processus par lequel les biens passent du fabricant aux ménages consommateurs au travers des circuits de distribution de gros ou de détail. Pire encore, cette discipline a eu tendance à se désintéresser totalement des marchés en aval en vertu de l'hypothèse tacite selon laquelle ils sont inertes et parfaitement concurrentiels, de sorte que leur omission des modèles économiques ne faussent pas les résultats.

La puissance d'achat est donc un domaine en grande partie inexploré

La seconde citation est tirée du rapport australien :

> Les organismes chargés de la concurrence doivent repenser leur stratégie face à des situations où l'acheteur pourrait utiliser son pouvoir de marché de manière abusive contre les sociétés qui sont ses fournisseurs.

Même si nos connaissances des aspects économiques de la puissance d'achat sont limitées, il est impératif, en raison des évolutions en cours dans le secteur du commerce de détail, de ne pas s'en désintéresser.

Compte tenu des dix-sept rapports soumis, le Président invite les délégués à être brefs dans leur présentation. Il indique également que, dans certains cas, il fera uniquement référence en passant à un rapport sans demander de présentation.

Le Président organise la table ronde autour de huit sous-thèmes.

1. La puissance d'achat : le point de vue de la communauté des entreprises

En dépit du gros effort déployé auprès des distributeurs et des fabricants, aucun n'a accepté l'invitation à participer à cette table ronde bien qu'ils aient été nombreux à témoigner un vif intérêt pour le sujet traité. Le Président espère que le BIAC, en tant qu'instance neutre, sera en mesure de présenter, ce qui serait très utile, une analyse pondérée des vues des entreprises.

De l'avis d'un délégué du BIAC**,** il s'agit en fait de déterminer les effets de certaines évolutions importantes, comme la modification des habitudes des consommateurs, notamment :

- la préférence pour des achats en voiture moins fréquents et à un seul point de vente, et

- la fidélité accrue du consommateur à une enseigne, stimulée par un marketing plus sophistiqué du détaillant.

Ces évolutions exigent de la part des autorités de la concurrence un regain de vigilance, en particulier :

- la mise en évidence des effets potentiels des projets de fusion ou de concentration ;

- l'examen des conséquences de la puissance d'achat ou des alliances en matière d'achats qu'elles soient nationales, régionales ou mondiales ;

- la prévention des distorsions introduites dans la concurrence entre les marques et les produits portant le label du distributeur, au moyen des prix, des stratégies de marketing ou de l'exploitation des informations sur les achats des consommateurs ;

- la nécessité, même si le service de la concurrence ne l'exige pas nécessairement, de définir des politiques et des pratiques d'aménagement du territoire et d'examiner leurs implications sociales et environnementales.

Le BIAC a estimé judicieuse la conclusion de la note de référence selon laquelle "…une certaine sensibilité dans l'application de l'interdiction des ententes horizontales, des restrictions verticales et d'abus de position dominante s'ajoutant à la rigueur dans l'examen des fusions… semble constituer la meilleure méthode pour traiter les problèmes de puissance d'achat." Toutefois, la note part du principe que les autorités de la concurrence sont régulièrement saisies de plaintes des fabricants concernant les effets négatifs du pouvoir détenu par les détaillants. Le BIAC pense plutôt que les plaintes précises sont très rares et donc que l'examen des effets de la puissance d'achat doit reposer, en grande partie, sur des conjectures et les éléments d'appréciation disponibles.

Comme l'indique la note de référence (page 31), il existe très peu d'affaires dans lesquelles des dispositions relatives à l'abus de position dominante ont été appliquées en vue de limiter la puissance d'achat. Toutefois, la note élude totalement le fait capital que les fournisseurs, petits ou grands, renoncent souvent, par crainte de représailles, à déposer plainte auprès des autorités de la concurrence. Cette crainte explique probablement aussi les difficultés auxquelles s'est heurté le CLP dans sa recherche d'invités indépendants.

Les politiques de la concurrence en matière de puissance d'achat doivent tenir compte des évolutions récentes du secteur et devraient s'intéresser en particulier

- au contexte dans lequel les consommateurs préfèrent une enseigne à une autre pour effectuer leurs achats, eu égard à l'accentuation de la tendance à la segmentation des formes de distribution ;

- au pouvoir qu'exercent sur les consommateurs les détaillants détenant une position dominante au plan local ;

- à l'influence financière et opérationnelle qu'exercent les détaillants ou les groupements de détaillants sur les fabricants qui dépendent d'eux, en tant que consommateurs, pour une part importante de leur production. Comme le reconnaît la note de référence, l'augmentation des

volumes est cruciale pour les fabricants qui doivent atteindre un retour sur investissement acceptable.

Le BIAC pense que le problème essentiel en la matière réside moins dans l'inadéquation des instruments juridiques disponibles que dans le manque d'informations concrètes. La note de référence précise que la puissance d'achat est un problème qui doit être traité et que "…on peut s'interroger sérieusement sur la validité des hypothèses selon lesquelles la grande distribution est et restera toujours par définition concurrentielle." Les autorités de la concurrence doivent user de leur pouvoir pour vérifier les informations concernant des pratiques comme les redevances de catalogue, l'utilisation d'informations confidentielles de fabricants, les imitations, etc., et les effets néfastes de ces pratiques sur les fournisseurs, qu'il s'agisse de grandes ou de petites entreprises.

Le BIAC insiste en outre sur la nécessité d'une prise en considération des aspects suivants par les autorités de la concurrence : (1) le conflit client/concurrent, en particulier l'avantage concurrentiel dont bénéficient les détaillants qui ont accès à des informations données à l'avance par les fabricants sur les promotions, le lancement de nouveaux produits, etc.; et 2) le fait que les produits de marques de distributeurs, en général, et les produits d'imitation, en particulier, réduisent considérablement l'innovation reposant sur la R-D qui est la pierre angulaire de la concurrence sur les marchés de biens de consommation des grandes marques – problème mis en évidence par une récente étude PIMS.

Le BIAC trouve intéressant que dans sa note sur les restrictions verticales, la Commission européenne propose un traitement différent des exemptions par catégorie pour les équipements OEM et les équipements courants. Il est curieux de connaître l'accueil réservé à cette proposition.

2. Cadre analytique général

Le Président se tourne vers le Secrétariat pour un examen rapide de la définition de la puissance d'achat et du pouvoir de négociation.

Dans la note de référence, qui se borne à examiner la situation des détaillants multiproduits, est défini comme détenant une puissance d'achat le détaillant qui, par rapport à un fournisseur au moins, peut menacer de manière crédible d'imposer un coût d'opportunité à long terme (préjudice ou un manque à gagner) qui, si la menace est mise à exécution, serait sensiblement disproportionné par rapport au coût d'opportunité à long terme qu'il s'imposerait à lui-même. Autrement dit, on entend par puissance d'achat des situations dans lesquelles il existe une différence essentielle de pouvoir de négociation entre les parties. Cette définition, certes, peu orthodoxe, de la puissance d'achat a été choisie car elle semble se situer à la base des problèmes que de nombreuses autorités de la concurrence sont actuellement amenées à examiner en ce qui concerne les relations entre fabricants et détaillants. Ces problèmes n'impliquent pas nécessairement qu'un pouvoir classique de monopsone soit exercé et n'entraînent pas non plus toujours ou automatiquement l'application de conditions discriminatoires envers les différents détaillants acheteurs. Contrairement au pouvoir classique de monopsone, la puissance d'achat telle qu'elle est entendue dans la note de référence n'implique pas nécessairement une aptitude à faire baisser les prix des fournisseurs au-dessous du niveau concurrentiel. Elle ne suppose pas non plus que la modification des prix des fournisseurs soit liée à des changements des coûts unitaires découlant de l'évolution du volume total des ventes. La puissance d'achat est en fait censée décrire des situations dans lesquelles à long terme les fournisseurs sont amenés à diminuer leurs prix sans qu'il y ait baisse de leurs coûts unitaires. Ce concept de puissance d'achat est difficilement envisageable, si les fournisseurs ne jouissent pas d'une certaine position de force, c'est-à-dire si leurs prix ne sont pas initialement supérieurs au niveau de pleine concurrence.

Une autre conséquence importante de la définition de la puissance d'achat donnée dans la note de référence est que cette puissance n'existe pas nécessairement chaque fois que les fournisseurs pratiquent des discriminations en termes de prix entre les distributeurs concurrents. Il s'agit là d'une propriété souhaitable de la définition dans la mesure où la discrimination affectant les prix peut être due à de nombreuses raisons qui n'ont pas grand chose à voir avec ce que la plupart des acteurs qui s'intéressent aux relations entre fabricants et détaillants semblent entendre par puissance d'achat.

Outre qu'elle appelle l'attention sur des situations dans lesquelles les détaillants obtiennent des prix plus bas et, simultanément, achètent plus plutôt que moins à leurs fournisseurs, situations qui ne peuvent pas être assimilées à des discriminations par les prix, la définition de la puissance d'achat de la note de référence correspond à ce que la législation sur l'abus de dépendance économique en vigueur dans plusieurs pays semble entendre par "dépendance".

Le Secrétariat ne peut pas prétendre que la définition de la puissance d'achat donnée dans la note de référence reflète un accord minimal entre les pays de l'OCDE – même entre les pays ayant une législation sur l'abus de dépendance économique. Il ne convient pas non plus de rejeter la définition classique du pouvoir de monopsone (la possibilité de fixer de manière rentable des prix au-dessous du niveau concurrentiel). Il existe sans doute des situations, très vraisemblablement en dehors du domaine du détail, dans lesquelles cette définition constitue un cadre adéquat pour étudier les pertes possibles de bien-être économique occasionnées par une entreprise jouissant d'une position dominante en tant qu'acheteur. C'est probable en particulier dans les affaires concernant le secteur agricole, où une situation proche du pouvoir de monopsone pourrait générer une perte sèche au niveau de l'excédent du producteur et peut-être même, si les marchés en aval sont insuffisamment concurrentiels, une perte sèche aussi au niveau de l'excédent du consommateur.

La note de référence établit une relation entre la puissance d'achat de la grande distribution et le fait, dont on peut débattre, que les détaillants qui la détiennent opèrent dans ce qu'on appellera schématiquement le magasin unique d'approvisionnement hebdomadaire en biens de consommation courante (essentiellement d'alimentation). Partant du principe qu'il existe bien une demande pour ce type de services de distribution, on peut s'interroger sur la manière dont le consommateur réagit au retrait d'une marque des linéaires de son enseigne préférée : accroît-il le nombre de ses achats dans la semaine et se rend-il dans un magasin qui propose l'article retiré des linéaires ou décide-t-il de choisir une autre enseigne pour son approvisionnement de la semaine suivante ? Le plus probable est que le consommateur renonce à son achat purement et simplement ou lui substitue un autre produit. Dans ce cas, l'incidence du retrait des linéaires est différente pour le fabricant et le distributeur. Le fabricant risque de perdre la totalité du volume de ventes habituellement réalisées avec l'enseigne qui le retire de ses linéaires mais il est peu probable que les bénéfices du distributeur changent. Le pourcentage des ventes réalisées par un fabricant avec une chaîne de grande distribution est en général beaucoup plus important que la part que représentent les biens du fabricant dans le chiffre d'affaires total du distributeur. Être retiré des linéaires d'un détaillant important ou d'une chaîne de distribution peut avoir de graves conséquences sur la rentabilité du fabricant.

Le Secrétariat conclut en soulignant que la seule existence d'une puissance d'achat susceptible de porter un coup fatal à des fabricants ou d'autres distributeurs n'implique pas automatiquement une réduction de bien-être pour le consommateur. Cet aspect est bien développé dans la note de référence.

Le Président indique que le rapport du Royaume-Uni est principalement consacré à l'analyse théorique du problème de la puissance d'achat et notamment aux effets de différents types de comportements stratégiques des acheteurs sur la concurrence et l'efficience. Il demande au Royaume-Uni de présenter les différentes catégories de pratiques et les effets mis en évidence par les autorités de la concurrence.

Un délégué du Royaume-Uni rappelle quelques points essentiels du rapport de son pays. Premièrement, s'agissant des définitions, les problèmes qui risquent de se poser concernent les rabais non liés à des coûts. Les rabais liés à des coûts reposent sur l'efficience et ne soulèvent donc aucun problème de puissance d'achat. Le rapport du Royaume-Uni dresse en premier lieu un bilan statique démontrant une grande similitude entre le monopsone et le monopole. Dans une situation de monopsone, des gains sont générés par une réduction de la production impliquant une perte sèche de l'excédent du producteur sauf s'il existe des économies de taille ou d'échelle compensatrices. Si le marché final sur lequel le vendeur en situation de monopsone opère est concurrentiel, le prix pour le consommateur reste le même.

Deuxièmement, il est nécessaire de prendre en considération les effets à long terme. Certains estiment que la puissance d'achat entraîne une réduction des bénéfices des fabriquants, ce qui risque d'avoir pour effet une baisse des investissements productifs. C'est possible mais d'un autre côté, il ne faudrait pas oublier que pour certains fournisseurs, il est peut-être préférable de traiter avec un grand acheteur à même de conclure un accord à long terme – et peut-être même de participer à l'activité de R-D. Ensuite, les grands acheteurs ne souhaitent sans doute pas avoir la réputation d'acculer les fabricants à la ruine.

S'agissant des problèmes potentiels, un acheteur important qui détient aussi une puissance de vente, peut s'abstenir de répercuter les réductions de prix d'achat obtenues sur les consommateurs. Il est aussi possible qu'il parvienne à créer des distorsions de concurrence par des comportements d'achat stratégiques, par exemple par des restrictions verticales anticoncurrentielles que les fournisseurs peuvent même appuyer. Dans l'affaire Toys "R" aux États-Unis, par exemple, comme dans l'affaire concernant la société de distribution d'équipement électrique au Royaume-Uni, on a pu avancer que les fabricants et les détaillants s'étaient regroupés pour générer et partager des rentes, au détriment des consommateurs.

En résumé, la puissance d'achat peut avoir des effets négatifs lorsque les acheteurs détiennent aussi une puissance de vente, et il se pourrait que ce soit la situation la plus courante. Néanmoins, les autorités de la concurrence ne devraient pas négliger le fait que la puissance d'achat peut aussi avoir des effets de renforcement du bien-être. Les problèmes de puissance d'achat appellent donc une analyse au cas par cas, faisant la part des choses entre les effets anticoncurrentiels et les conséquences en termes d'efficience.

Le Président remarque que les rapports britannique et français témoignent d'une divergence de vues. Le premier tend à démontrer qu'il y a plus de risque que la puissance d'achat pose problèmes lorsque les acheteurs détiennent également une puissance de vente, tandis que le second porte à penser que même en l'absence de puissance de vente, la puissance d'achat peut être exploitée abusivement. Le rapport français examine les raisons permettant à un détaillant ayant une part de marché modeste de détenir malgré tout une puissance d'achat considérable et expose de manière détaillée différents effets anticoncurrentiels susceptibles d'être liés à cette puissance.

Un délégué de la France, représentant la DGCCRF, indique qu'il n'est pas nécessaire qu'un distributeur ait une part de marché importante pour détenir une puissance d'achat considérable puisque celle-ci dépend essentiellement du comportement des consommateurs en cas de retrait de ses produits des linéaires d'une enseigne. La réaction du consommateur n'est pas systématique lorsque l'enseigne propose des produits substituables ou lorsque le changement de détaillant implique un coût réel pour le consommateur. Un attachement particulier du consommateur à une marque est nécessaire pour que l'absence de celle-ci des linéaires motive un changement d'enseigne, ce qui implique que le retrait d'un produit des linéaires a pour conséquence une perte de chiffre d'affaires pour le fabricant. Cette analyse est corroborée par une étude récente de l'INSEE qui montre qu'environ 60 pour cent des consommateurs remplacent simplement leur marque préférée absente des rayons par un produit substituable en stock. Seulement 20 pour cent environ des consommateurs se rendent dans un autre magasin pour trouver le

produit manquant. Du fait de la baisse de son chiffre d'affaires, le fabricant pourrait enregistrer une diminution sensible de ses bénéfices. Dans certains cas, sa santé financière peut être compromise. Il est difficile d'estimer la fréquence de ce type de situations puisque de nombreuses variables sont à prendre en considération. Il se pourrait, toutefois que chaque distributeur soit une porte d'entrée nécessaire, mais non suffisante, pour pénétrer sur le marché. Il est aussi probable qu'il existe un nombre minimal absolu indispensable de portes d'entrée, mais elle est difficile à estimer.

Les marques de distributeurs jouent un rôle essentiel dans les négociations entre fournisseurs et distributeurs. Elles influent sur la différenciation des produits par les distributeurs et parallèlement sur la substituabilité des produits dont dépend, à son tour, l'importance de la puissance d'achat détenue par le distributeur. Dans les deux cas, les marques de distributeurs constituent un avantage des distributeurs sur les fournisseurs.

Les effets de la puissance d'achat sont renforcés par les réactions des producteurs qui cherchent à élargir leur gamme de produits pour obtenir une part plus importante des linéaires des grandes surfaces. Tous les distributeurs appliquent cette stratégie, ils ne gagnent pas d'espace sur les linéaires les uns par rapport aux autres. Au contraire ils augmentent ainsi la valeur des linéaires et renforcent la puissance d'achat de la grande distribution.

A court terme, la puissance d'achat peut se manifester par un simple transfert monétaire des producteurs à la grande distribution. A long terme, elle a des effets négatifs sur l'activité de recherche-développement, encourage une plus grande concentration en amont et crée des obstacles à l'entrée sur le marché. Ainsi la puissance d'achat pose un problème de politique industrielle, qui ne peut qu'intéresser les autorités de la concurrence.

Un autre délégué français, appartenant cette fois au Conseil de la concurrence, expose un point de vue un peu différent fondé sur l'expérience du Conseil de la concurrence dans les affaires d'abus de dépendance économique dans le secteur de la grande distribution. Dans une note au gouvernement, le Conseil a défini ses critères d'analyse de la puissance d'achat, parmi lesquels les conditions de négociations, la structure des achats, les caractéristiques des enseignes notamment leur taille, le comportement des consommateurs, le développement des marques de distributeurs, la relation entre ces dernières et les marques nationales et le degré d'intégration verticale. Le fonctionnement des groupements d'achat requiert une attention particulière. Une analyse au cas par cas est nécessaire, en général, pour dresser un bilan des efficiences et des effets anticoncurrentiels lorsqu'est invoquée la puissance d'achat. Parmi les facteurs déterminants de cette analyse, il y a la relation entre les enseignes et les marques, la question des procédures d'acceptation et la disponibilité des linéaires, la question de la loyauté envers le consommateur et les moyens d'influence en la matière, le développement des marques de distributeurs et leur positionnement sur le marché ainsi que la nécessité de déterminer s'il existe ou non une dépendance économique.

3. Les manœuvres déloyales ou anticoncurrentielles utilisées par les acheteurs en position de force dans leurs négociations avec les fournisseurs

Le Président appelle l'attention sur le rapport japonais qui recense un certain nombre de pratiques considérées comme des cas d'abus de position dominante constituant a priori des entraves à une concurrence libre et loyale. Le Président souhaite savoir si au regard de l'AMA (loi japonaise sur la concurrence) ces pratiques sont considérées comme posant problème parce qu'elles sont déloyales et injustes ou parce qu'elles limitent réellement la concurrence.

Le délégué du Japon précise que l'AMA traite la question de la puissance d'achat essentiellement du point de vue de l'abus de position dominante, pratique commerciale déloyale interdite aux termes de l'article 19. L'abus de position dominante résulte de l'exploitation de la position de supériorité dont jouit un entrepreneur dans des négociations menées avec une autre partie en vue d'imposer à cette dernière des conditions désavantageuses, pouvant constituer une entrave à la concurrence loyale. Un détaillant utilisant sa position dominante pour imposer des conditions injustement défavorables à un fournisseur peut donc nuire à la concurrence au niveau de la distribution, notamment si les fournisseurs sont contraints de s'approvisionner auprès du détaillant, de concéder des droits trop larges en matière de retour des invendus, de prêter du personnel au détaillant, etc. Des conduites de ce type constituent des abus de position dominante dès lors qu'elles risquent de faire obstacle à une concurrence loyale entre détaillants ou fournisseurs.

Les affaires Mitsukoshi et Lawson (cf. rapport japonais) mettent en cause des grands détaillants japonais. Les fournisseurs des deux sociétés ont été contraints d'accepter les exigences du détaillant même si elles étaient fortement désavantageuses pour eux. Mitsukoshi et Lawson ont encaissé, par exemple, des contributions monétaires qui n'avaient pas de justification clairement définie. Les dispositions légales sur l'abus de position dominante en vigueur au Japon sont applicables à ce type de conduite car le détaillant impose injustement un désavantage à un fournisseur qui porte préjudice à la concurrence avec d'autres fournisseurs. Elle confère également au détaillant un avantage qui n'a rien à voir avec sa capacité de proposer aux consommateurs un meilleur prix ou une meilleure qualité. Il ne peut ainsi y avoir de la concurrence loyale entre détaillants et fournisseurs.

S'adressant à la délégation coréenne, le Président évoque deux affaires intéressantes examinées dans le rapport de la Corée : l'affaire des coopératives de supermarchés de la ville de Kimje dans la province du Nord du Chulla (l'affaire des "supermarchés") et l'affaire de pratiques déloyales particulières du Grand magasin ("l'affaire du Grand magasin"). Dans ces affaires, la Commission coréenne de contrôle des pratiques commerciales a apparemment dénoncé des pratiques telles que le pré-paiement de règlements de fin d'année, l'ajustement anticipé des prix, l'annulation de contrats sans préavis et l'allongement des délais de paiement des fournisseurs. La Commission a considéré que ces pratiques constituaient des abus de position dominante entraînant des distorsions de marché imputables aux grandes surfaces. Comme dans le cas du Japon, le Président souhaite savoir si ce type de pratiques est expressément interdit par la législation sur la concurrence et, dans l'affirmative, si cette interdiction tient au caractère déloyal de ces pratiques ou au fait qu'elles faussent la concurrence.

Le délégué de la Corée indique que les deux affaires coréennes sont intéressantes tout d'abord parce que les règles appliquées par la Commission coréenne de contrôle des pratiques commerciales prévoient l'interdiction des conduites citées car elles constituent de la concurrence déloyale. Quant à la question de savoir si ces conduites sont illégales en raison de leur caractère déloyal ou anticoncurrentiel, l'avis exprimé a été que les deux aspects sont directement liés. Les relations entre acheteurs et fournisseurs sont très déséquilibrées sur le marché coréen ce qui est dû en partie au fait que les fournisseurs ont un nombre très limité d'enseignes pour écouler leurs marques. Les petits fournisseurs sont particulièrement vulnérables en cas d'utilisation abusive de la puissance d'achat.

Dans l'affaire des supermarchés, une approche régionale a été adoptée pour définir le marché ; il a été conclu que, dans une seule ville, un groupement d'achat détenait environ 80 pour cent du marché. Ce groupement d'achat détenait ainsi un pouvoir suffisant pour contrôler les fournisseurs désireux de vendre leurs produits dans cette ville. Il recourait, par ailleurs, à certaines pratiques illicites.

Le Président fait état d'une divergence entre les rapports japonais et coréen, d'une part, et le rapport mexicain, d'autre part. Selon la législation mexicaine sur la concurrence, le pouvoir de négociation des acheteurs n'est pas un critère pertinent pour apprécier le risque de pratiques anticoncurrentielles. Par

ailleurs, le rapport mexicain précise que : “des asymétries dans le pouvoir de négociation des vendeurs et des acheteurs sont omniprésentes dans les opérations commerciales, en général, et ne sont pas tellement problématiques en soi.” Il cite l’exemple d’une affaire dans laquelle des supermarchés et des grands magasins ont, semble-t-il, imposé à de petits fournisseurs des délais de paiement excessifs, n’acceptant en outre les marchandises qu’en dépôt. L’organisme chargé de la concurrence n’a pas considéré que ces pratiques violaient la législation sur la concurrence. Qui plus est, le rapport indique que les rabais consentis par les petits fournisseurs aux acheteurs en position de force correspondent souvent à des promotions et ne sont donc pas, par définition, anticoncurrentiels. Le Président demande à la délégation mexicaine d’exprimer son point de vue sur les présentations japonaise et coréenne et d’expliquer pourquoi elle est parvenue à une autre conclusion sur les pratiques interdites dans ces deux pays.

Le délégué du Mexique souligne tout d’abord que l’examen de cette question par le CLP se tient à un moment particulièrement opportun pour son pays. Le jour même de la table ronde, les chaînes de distribution et les producteurs se réunissent à Mexico sur le thème de la puissance d’achat.

Pour déterminer l’existence d’une exploitation illicite de la puissance d’achat, l’organisme mexicain chargé de la concurrence doit prouver que l’acheteur détient un pouvoir de marché substantiel, ce qui implique une définition de la puissance d’achat différente de celle proposée dans la note de référence. Le Mexique émet aussi quelques doutes quant aux conséquences de la puissance d’achat sur la concurrence. Dans quelle mesure le détaillant est-il en position de force par rapport au producteur ? Au Mexique, dans la plupart des cas, on a affaire à de très grands producteurs, voire des sociétés multinationales, dont on peut difficilement imaginer qu’elles soient à la merci de chaînes, mêmes de grandes chaînes de distribution. En outre, on peut demander si les pratiques commerciales habituelles au niveau des détaillants sont le résultat de comportements de cartels ou, au contraire, d’une simple situation de concurrence. L’exploitation de la puissance d’achat par une chaîne de distribution peut aussi profiter aux consommateurs puisque les réductions de prix peuvent être répercutées au lieu de simplement servir à gonfler les bénéfices du détaillant. L’exercice de la puissance d’achat n’est pas comparable à une pure situation de monopole ou de monopsone dont il résulte une rente économique impliquant une perte de bien-être pour le consommateur. Enfin, comme le mentionne le rapport allemand, il s’agit de définir qui est protégé ou ce qui est protégé par la législation sur la concurrence : les concurrents ou la concurrence. La législation mexicaine sur la concurrence a été élaborée pour protéger la concurrence, et non les concurrents. Or, dans le débat sur la puissance d’achat, on semble avoir en de nombreux points inverser les objectifs.

Le Président constate que les rapports mexicain et espagnol présentent quelques similitudes. Dans la conclusion, le rapport espagnol se demande si la puissance d’achat porte véritablement préjudice aux consommateurs. La dernière phrase est ainsi libellée : “…face à des marchés dynamiques, toute intervention visant à modifier les rapports de force entre les opérateurs dans le secteur de la distribution peut entraîner des effets pervers tels que des barrières à l’entrée, des barrières de sortie ou une perte d’efficience.” Le Président voudrait notamment que soit commentée l’idée selon laquelle l’intervention peut favoriser l’émergence de barrières à l’entrée ou à la sortie.

Le délégué de l’Espagne rappelle pour commencer la Loi 7/1996 concernant la réglementation du commerce de détail (“Loi sur le commerce de détail”), qui a été adoptée à l’initiative des petits commerçants. L’organisme espagnol chargé de la concurrence considère que ce n’est pas la meilleure solution qui pouvait être apportée au problème de la puissance d’achat puisque la législation sur le commerce de détail impose des restrictions à l’activité des entreprises, notamment une limitation à la possibilité de négocier, qu’elle porte préjudice aux intérêts des consommateurs, en ce qui concerne notamment les heures d’ouverture, et qu’elle tente de protéger les petits commerçants de la concurrence des grandes surfaces qui sont peut-être plus efficaces. Les autorités de la concurrence pensent qu’une solution moins contraignante pouvait et doit être trouvée.

Le Président passe au rapport argentin qui manifeste un certain scepticisme au sujet de l'exploitation abusive de la puissance d'achat. Ce rapport indique que le critère utilisé en vertu de la législation sur la concurrence devrait être celui du bien-être du consommateur, sans tenir compte, en fait, des pratiques modifiant simplement la répartition des rentes entre les fabricants et les distributeurs. Le rapport argentin examine également un cas très intéressant et remarque que les allégations de prix prédateurs, notamment la vente par les grandes surfaces à des prix inférieurs au coût de revient, ne constituent pas nécessairement des problèmes de concurrence. Le rapport cite en exemple l'affaire "Macro" dans laquelle le fait que le distributeur vende au-dessous du prix de revient n'a pas été reconnu comme un problème de concurrence par l'organisme argentin chargé de la concurrence. Le Président demande un commentaire sur cette affaire.

Le délégué de l'Argentine fait part de sa convergence de vues avec le Mexique et l'Espagne, considérant que les trois pays partagent l'idée que l'efficacité économique est le véritable objectif et non la protection des intérêts des concurrents.

La législation argentine sur la concurrence ne prévoit aucune interdiction absolue. L'affaire "Macro" a donc été analysée sur la base du principe de la règle de raison. La plainte avait pour objet un bloc-notes proposé à la vente au-dessous du prix de revient du détaillant. L'organisme chargé de la concurrence a utilisé l'approche de Joskow et Klevorick exposée dans l'article du Yale Law Journal (1979), "A Framework for Analysing Predatory Pricing Policy". La première phase de l'analyse consiste à prendre en considération la structure du marché et les éventuelles barrières à l'entrée. En Argentine, il n'existe ni barrière à l'entrée pour les supermarchés ni réglementation à l'entrée sur le marché des grandes surfaces. Macro détenait une part de 5 pour cent du marché des supermarchés et seulement de 1 pour cent du marché des blocs-notes. Dans cette affaire, l'absence de barrières à l'entrée permettait de se dispenser de la deuxième phase de l'approche de Joskow et Klevorik qui aurait consisté à vérifier si les prix se situaient au-dessous des coûts variables moyens. La conclusion a été qu'il s'agissait simplement d'une vente de rentrée des classes utilisée à des fins publicitaires. Elle a pu causer du tort à des intérêts particuliers mais elle n'a pas porté préjudice au bien-être économique en général.

Avant de passer au point suivant, le Président mentionne une analyse intéressante du rapport des États-Unis sur les avantages discriminatoires accordés à des acheteurs importants et le lien avec la législation sanctionnant la discrimination par les prix.

4. L'utilisation de marques de distributeurs par des distributeurs en position de force constitue-t-elle un problème de concurrence ?

Le Président remarque que le rapport de la France, entre autres, évoque déjà cette question. Pour économiser du temps pour le débat général, il décide de faire référence à un certain nombre de rapports sans demander de commentaire aux pays concernés. Les opinions exprimées dans les rapports sont légèrement divergentes. Le Portugal indique que l'utilisation massive de marques de distributeurs vendues à bas prix par les grandes surfaces constitue, avec l'allongement des délais de paiement, un exemple des pratiques des acheteurs en position de force qui "… limitent, directement ou non, la concurrence aux acteurs économiques de la grande distribution." Le rapport suédois présente un scénario suggérant que le développement des marques de distributeurs dans la grande distribution peut porter préjudice, mais pas obligatoirement, à la concurrence au niveau de la fabrication. Le rapport considère également que ce type de comportement doit être évalué sur la base du principe de la règle de raison. Enfin, la contribution australienne examine aussi longuement la question des marques de distributeurs, car l'accès aux produits génériques est considéré comme un apport essentiel au commerce de gros alimentaire.

Un certain nombre de sujets ayant été examinés, en particulier la définition de la puissance d'achat, les scénarios d'analyse et les tactiques ou pratiques de négociation des distributeurs, le Président décide d'ouvrir le débat.

4.1 Débat général

L'Italie ouvre le débat par un commentaire sur la note de référence. Elle rappelle le débat européen sur l'emploi et le point de vue largement partagé selon lequel les marchés du travail européens sont trop rigides. Concernant la puissance d'achat, une autre forme de rigidité semble être prônée dans la note de référence dans la mesure où il est dit que dès qu'un grand distributeur commence à commercialiser un produit il ne peut pas le retirer du catalogue sans courir le risque d'être poursuivi pour utilisation abusive de sa puissance d'achat. Dans une telle optique, les législations de la concurrence favoriseraient une restriction peu souhaitable de la flexibilité, ce qui n'est certainement pas l'objectif vers lequel tendent les autorités de la concurrence. Il est difficile d'affirmer que le simple retrait des linéaires équivaut à une restriction de concurrence. On imagine alors les problèmes que se poseraient si la doctrine de la « facilité essentielle » était appliquée à une entreprise qui ne serait pas en position de force, un détaillant, par exemple, qui détiendrait une part de marché importante mais ne serait pas vraiment en position dominante.

Un délégué français commente le point soulevé par l'Italie sur la rigidité du marché, indiquant qu'en France le Conseil de la concurrence examine attentivement dans les affaires de puissance d'achat la concentration relative au niveau de la production et de la distribution. Lorsque la concentration est relativement importante au niveau de la production, il existe apparemment peu de problèmes de puissance d'achat. C'est le cas en particulier des secteurs du petit électroménager, où les quatre premiers producteurs représentent 90 pour cent de la production, de la literie, 70 pour cent, des appareils photo jetables, 74 pour cent ; etc.. En revanche, lorsque la concentration en amont est inférieure à la concentration en aval, il semble exister de gros problèmes de puissance d'achat – par exemple dans l'industrie de la chaussure où les quatre producteurs les plus importants ne représentent que 29 pour cent du marché, ou dans la production de la viande où les quatre plus grands producteurs représentent 16 pour cent du marché.

Le délégué de la Corée indique que les effets de la puissance d'achat sur la concurrence dépendent de la structure du pouvoir de marché. En Corée, le changement d'acheteurs implique un coût de transfert et le nombre de grands distributeurs est restreint. La réglementation visant à préserver une concurrence loyale est motivée par le souci de la concurrence.

Un délégué des États-Unis estime que la note de référence contient des idées intéressantes, mais remet en question sa définition de la puissance d'achat. Cette définition conduit à penser que cette puissance existe lorsqu'il y a un déséquilibre entre acheteur et vendeur. Les organismes chargés de la concurrence estimeront qu'il est très difficile d'utiliser ce type de critère pour apprécier qu'une action a réellement une incidence néfaste sur la concurrence. En l'absence de critères objectifs biens définis tels que ceux auxquels les délégués espagnol, mexicain et argentin ont fait référence, une notion de bien-être du consommateur ou d'impact ultime sur la concurrence, par exemple, les autorités de la concurrence prennent le risque de faire fausse route en bloquant des évolutions nécessaires dans une économie dynamique.

Le Président précise qu'à son avis la note de référence ne recommande pas qu'on applique des mesures de protection de la concurrence chaque fois qu'on se trouve en présence d'une puissance d'achat mais seulement en cas d'une exploitation abusive.

Le délégué allemand ajoute un élément qui tient compte du point de vue du consommateur. Il existe une différence essentielle entre la puissance d'achat et son contraire, la puissance de vente. Alors

que la puissance d'achat a généralement des effets positifs pour le consommateur puisqu'elle tend à réduire le prix de vente final, la puissance de vente tend à augmenter les prix. Ainsi, la puissance d'achat serait favorable aux consommateurs. Il existe toutefois une condition préalable. Il doit exister une concurrence au niveau du vendeur final afin que les réductions de prix négociées soient bien répercutées sur les consommateurs. En Allemagne, les autorités de la concurrence ne s'intéressent à la puissance d'achat que dans le cas d'exploitation abusive.

Le délégué autrichien soulève la question de savoir si la puissance d'achat porte préjudice à la concurrence. Il semble qu'il existe un lien direct entre la part de marché et les prix d'achat. Une part de marché de 10 pour cent environ se traduit par une remise de 3 pour cent environ. C'est pourquoi l'acheteur le plus important tend à bénéficier des prix les plus bas, ce qui constitue une nouvelle barrière à l'entrée. Il paraît évident aussi, du moins dans les supermarchés d'alimentation autrichiens, que les réductions sur les prix d'achat ne sont pas répercutées sur les consommateurs. Depuis 1990, les prix à la consommation des produits alimentaires se sont accrus de 19 pour cent environ, alors que les prix de gros n'ont augmenté que de 4 pour cent. En outre, l'organisme autrichien chargé de la concurrence pense qu'une forte puissance d'achat tend à réduire le nombre de produits disponibles pour le consommateur.

Un représentant du BIAC constate que, bien que la note de référence adopte une approche globale, elle laisse de côté la question la plus pertinente, à savoir le pouvoir de monopsone. Sans ce pouvoir, quels sont les problèmes qui se posent du point de vue des consommateurs ? Dans l'étude de ce qu'il est convenu d'appeler la puissance d'achat, un commentaire fait récemment aux États-Unis sur la question de la structure du marché paraît assez pertinent. Parlons-nous vraiment d'abus dans le processus concurrentiel ou s'agit-il principalement de transferts de richesses ? Si nous parlons de transferts de richesses, est-il vraiment utile de s'étendre sur le sujet ? Aux États-Unis, la seule société pour laquelle il est de notoriété publique qu'elle détient une puissance d'achat est Wal-Mart. Or cette société n'a conquis une importante part de marché que récemment ce qui amène à penser que l'entrée sur le marché en aval, aux États-Unis du moins, est très facile. Contrairement aux propos tenus par un autre représentant du BIAC concernant l'hypothèse selon laquelle le consommateur tend à faire ses achats dans un seul point de vente, une tendance inverse apparaît dans le secteur de l'alimentation aux États-Unis. De plus en plus, les consommateurs font leurs achats hebdomadaires dans quatre ou cinq magasins différents. En ce qui concerne la concentration relative, dans plusieurs secteurs de fabrication de produits alimentaires en amont, on peut trouver une, deux ou trois sociétés qui vendent leur production à plus d'une, deux, trois, quatre ou cinq enseignes de distribution. Bref, la concentration risque de ne pas être un critère très pertinent dans ce domaine particulier, dès lors que le pouvoir de monopsone est laissé de côté. La note de référence ne doit pas être considérée comme un document donnant des orientations pour la politique de mise en œuvre. Ses conclusions très provisoires et la définition des problèmes soulignent que si l'on passe outre la question du monopsone le problème de la puissance d'achat ne devrait vraisemblablement pas mobiliser l'attention des organes qui veillent à l'application des lois.

Le Président estime que quelques étapes supplémentaires doivent être franchies dans le débat avant de parvenir à la conclusion que vient de proposer le représentant du BIAC.

Un délégué de la Commission européenne relève la divergence apparente d'opinions entre les représentants du BIAC et formule l'hypothèse que cette divergence tient sans doute à leurs pays d'origine respectifs. Aux Pays-Bas, le territoire est limité et la densité de population élevée, alors que les États-Unis ont une population nombreuse sur un territoire très vaste. On peut comprendre la préférence des Néerlandais pour une concentration de leurs achats dans un même lieu, mais aussi l'utilisation intensive de la voiture aux États-Unis et l'habitude de fréquenter plusieurs enseignes. Ces différences n'ont pas grand chose à voir avec la politique de la concurrence, ni d'ailleurs avec aucune autre politique. Les différences très importantes existant au plan géographique, culturel ou réglementaire entre les pays, y compris au sein

de l'Union européenne, expliquent pour une large part les différences de priorités dans l'action des pouvoirs publics.

Le délégué du Portugal précise le point de vue de son pays sur les marques de distributeurs, concernant notamment les modalités selon lesquelles l'utilisation de marques privées peut limiter la concurrence entre les distributeurs. En fait, les marques de distributeurs à bas prix sont utilisées massivement pour obtenir des prix d'achat d'un niveau discriminatoire sur les produits de marque. Il est difficile d'affirmer que la vente de marques de distributeurs puisse être en soi une pratique déloyale mais il ne fait pas de doute que le bas niveau des prix des produits de marque qui lui est associé pose de gros problèmes à d'autres acteurs économiques de la chaîne de distribution. En conséquence, il est probable que les marques de distributeurs entraînent, directement ou indirectement, une diminution de la concurrence en général.

Le Président note que le rapport australien soulève un point intéressant les facilités essentielles dans le commerce de gros et de détail et concerne aussi les marques de distributeurs. Il demande au délégué australien de développer ces aspects.

Le délégué australien indique que des enquêtes récentes ont montré à l'organisme chargé de la concurrence (ACCC) que certains détaillants considèrent l'accès aux produits génériques comme un apport essentiel dans le commerce de gros alimentaire. Ces détaillants veulent probablement dire que les marques génériques en Australie sont associées à des produits à bas prix et que si le consommateur ne trouve dans un point de vente que des produits de marque il en déduira que beaucoup d'articles manquent dans ce magasin, notamment des articles à prix réduits

5. Affaires dans lesquelles des gros détaillants utilisent leur puissance d'achat pour limiter la concurrence horizontale

Le Président, présentant cette partie de la table ronde, évoque le rapport des États-Unis et l'examen de l'affaire Toys "R" Us. Il note que les États-Unis ont considéré que cette affaire présentait des implications anticoncurrentielles verticales et horizontales. Il souhaite que ce point soit développé.

Le délégué des États-Unis indique que l'affaire Toys "R" Us concerne un détaillant qui affiche aujourd'hui une belle réussite commerciale et un développement multinational. Toys "R" Us doit son succès dans les années 70 à la vente de jouets à bas prix dans de vastes points de vente. Dans les années 90, sa part de marché au niveau national a atteint environ 20 pour cent. Sur certains marchés locaux, sa part était plus proche de 35 pour cent. En tant qu'acheteur, cette société représentait plus de 30 pour cent du volume des achats auprès des grands fabricants de jouets. Il est évident dans ce cas que les fabricants qui distribuaient leurs produits par l'intermédiaire de Toys "R" Us n'avaient aucune possibilité de remplacer les volumes qui risquaient de leur échapper s'ils perdaient l'accès à ces points de vente.

Il y a dix ans environ, la société Toys "R" Us a été elle-même confrontée à la concurrence d'une nouvelle société innovante dans le secteur de la distribution, les "warehouse clubs" ou centrales d'achats pratiquant des prix encore plus bas. Ces centrales sont des détaillants recherchant de gros volumes de ventes avec un faible niveau de services et demandant à leurs adhérents une faible cotisation. Leurs coûts d'exploitation sont limités et les prix pour les consommateurs sont relativement bas. A la fin des années 80, les fabricants de jouets étaient prêts à entrer dans ce nouveau circuit de distribution qui leur offrait une possibilité d'augmenter leur chiffre d'affaires et de limiter leur dépendance à l'égard de Toys "R" Us.

Toys "R" Us avait deux raisons de redouter la concurrence des "warehouse clubs". Premièrement, ses ventes diminuaient et ses bénéfices se contractaient au profit d'un concurrent proposant des prix plus bas. Deuxièmement, son image de détaillant à bon marché se ternissait au profit d'une société pratiquant des

prix encore plus bas. Après de longues discussions et négociations avec les fabricants, Toys “R” Us adopta comme politique de ne plus acheter aux fabricants de jouets vendus aux centrales d’achat. Elle les autorisait, cependant à vendre à ces dernières des lots comportant, par exemple, une poupée Barbie et trois ou quatre robes. Ces lots avaient l’avantage d’augmenter les prix appliqués par les centrales et brouillaient les comparaisons directes de prix avec Toys “R” Us., qui exigeait également un droit de contrôle des jouets vendus par les fabricants aux centrales d’achat et veillait à l’application des mesures imposées.

La Commission fédérale du commerce (FTC) a estimé qu’il y avait eu violation de l’article 5 de la Loi sur la Commission fédérale du commerce concernant les pratiques de concurrence déloyales. La société Toys “R” Us n’a pas agi unilatéralement. Elle a fait passer entre les divers fabricants des assurances qu’ils se conformeraient tous à ce qui revenait à un boycott commun de la vente de certains jouets aux centrales d’achat. A la demande des fabricants eux-mêmes, elle a aussi coordonné cette politique de façon que les fabricants soient assurés de bénéficier du même traitement dans ce boycott commun de la vente de certains jouets aux centrales. Il s’est donc agi d’une conspiration organisée dans laquelle Toys “R” Us a joué un rôle central de liaison pour la mise en œuvre et l’ordonnancement d’une politique concertée.

En réponse à la question du Président sur les effets horizontaux et verticaux, il est précisé que la Commission fédérale du commerce a adopté deux méthodes d’analyse différentes. Premièrement, Toys “R” Us a orchestré un boycott horizontal qui selon la législation américaine, est, en soi, illicite. Toutefois, ne se contentant pas d’une application mécanique de la loi, la Commission fédérale du commerce a pris soin de déterminer la réalité de la conspiration impliquant une intention d’exclusion de la concurrence. Au-delà de l’intention, la Commission a analysé le pouvoir de marché du détaillant et du fabricant et a conclu que l’incidence sur la concurrence était importante. Les centrales d’achat, après avoir connu une croissance rapide, ont vu leur chiffre d’affaires se figer littéralement une fois le boycott mis en place et la part de leurs ventes réalisées dans le secteur du jouet a considérablement diminué. La Commission a estimé que le coût supporté par les consommateurs sur les ventes des principaux jouets commercialisés par Toys “R” Us s’élevait à pas moins de 55 millions de dollars par an. Enfin, elle s’est demandée s’il pouvait y avoir une justification économique majeure au boycott, une justification en termes d’efficience permettant de ne pas le considérer comme une fin en soi. Elle n’en a trouvé aucune. La société a invoqué un problème de "parasitage", mais les éléments d’information disponibles n’ont pas confirmé l’existence d’un tel problème au moment de la mise en place de la politique incriminée. Dans la mesure où Toys "R" Us fournissait des services supplémentaires aux fabricants, ces services avaient une contrepartie. Autrement dit, il ne suffisait pas d’invoquer le risque de parasitage. Il fallait démontrer que dans la pratique le service offert n’était pas compensé par ailleurs.

La Commission a aussi estimé que cette affaire pouvait être assimilée à un ensemble d’accords verticaux passés entre un détaillant en position de force et un certain nombre de fabricants de jouets et a par conséquent procédé à une analyse fondée sur la règle de raison, plus élaborée que celle utilisée pour examiner l’aspect de boycott de cette affaire. La conclusion de cette analyse a été que ces accords étaient finalement des restrictions verticales ne s’appliquant pas aux prix et qu’ils avaient de graves conséquences pour la concurrence..

Un membre de la Commission a approuvé l’analyse verticale, mais exprimé son désaccord sur la conclusion d’une conspiration horizontale.

La décision de la Commission, contre laquelle on attend un pourvoi en appel, impose à Toys “R” Us de ne pas conclure d’accords avec des fabricants susceptibles de limiter leur capacité de vente à des tiers et interdit à la société d’exiger des fabricants des informations sur leurs ventes à des tiers.

Le Président appelle l’attention sur les affaires Carlton and United Brewing (CUB) et Australian Safeway Stores citées dans le rapport australien. Ces affaires concernent de gros acheteurs tentant d’utiliser

leur puissance d'achat, soit pour empêcher le développement de leurs concurrents, soit pour réduire la concurrence d'autres détaillants. Il demande à l'Australie de développer ce sujet.

Un délégué australien présente tout d'abord l'affaire CUB en indiquant qu'elle constitue une illustration de l'exploitation d'une position dominante sur un marché dans le but d'influer sur une situation sur un autre marché. L'origine de cette affaire est un accord passé par la South Australia Brewing Company (SABC) en vue de la fabrication et de la livraison d'une bière sous une marque de distributeur à un petit groupement de supermarchés. En réaction, le plus gros brasseur d'Australie, a demandé à son concurrent de taille plus modeste de se rétracter de l'accord conclu, le menaçant, en cas de refus, de réexaminer son approvisionnement en canettes de bière auprès d'une filiale de la SABC. CUB achetait environ 70 pour cent de ses canettes à cette filiale pour qui ces ventes représentaient environ 50 pour cent du chiffre d'affaires total. Comme suite à cette action, la SABC a arrêté ses livraisons de bière sous marque de distributeur. CUB a ainsi utilisé sa puissance d'achat sur le marché des canettes pour diminuer la concurrence sur le marché de la bière. CUB a reconnu les faits devant l'ACC et a été condamnée à payer une amende.

L'affaire des Australian Safeway Stores concerne un détaillant de pain indépendant. Ce distributeur vendait à prix réduit du pain qu'il achetait aux boulangeries Tip Top. Tip Top a fait pression sur le détaillant indépendant pour qu'il cesse d'appliquer des prix réduits. Dans une vaine tentative de défense contre l'accusation de soutien des prix de détail, Tip Top a invoqué les pressions exercées sur lui par Safeway, un département du plus gros détaillant australien de produits alimentaires, Woolworths, pour qu'il fasse cesser l'application de prix réduits. Woolworths représente environ un tiers des ventes d'alimentation commercialisées sous marques de distributeurs. Étant donné que Safeway vendait des produits de boulangerie sous sa propre marque et du pain de Tip Top, Safeway a été accusé d'utiliser sa puissance d'achat en tant qu'acheteur pour encourager Tip Top à imposer des prix à un détaillant concurrent de Safeway. L'ACC poursuit la procédure engagée contre Safeway.

Ces deux exemples montrent comment l'utilisation de la puissance d'achat peut en fait désavantager le consommateur.

Le Président demande à la Suède de présenter l'affaire dans laquelle un groupement d'achat a apparemment utilisé sa puissance d'achat dans le cadre d'un conflit avec son fournisseur. L'organisme chargé de la concurrence a conclu qu'un refus d'achat concerté entre un grand nombre de détaillants peut avoir des conséquences négatives pour le fournisseur. Le Président pose deux questions. Quel a été le préjudice porté à la concurrence et à un fournisseur particulier dans cette affaire ? Quelle aurait été la situation si au lieu de provenir d'un grand nombre de petits détaillants, le même refus d'acheter avait été le fait d'une chaîne de distribution intégrée ?

Le délégué suédois indique que la chaîne en question associe sur la base d'un regroupement volontaire une activité de gros, de distribution et de détail et qu'elle est le plus gros distributeur de produits alimentaires en Suède. Sa part de marché est d'environ 45 pour cent. On peut dire que cette chaîne détient une puissance d'achat. Une chaîne intégrée détenant un tel pouvoir de marché susciterait d'ailleurs une attention particulière de la part de l'organisme suédois chargé de la concurrence. Aucune appréciation finale n'a encore été formulée dans cette affaire.

Le délégué pense que la question du Président sous-entendait que la diminution des prix profite au consommateur. C'est certainement juste à court terme bien sûr, mais à long terme il existe le risque de voir disparaître un fournisseur perdant brutalement presque la moitié de son chiffre d'affaires. La conséquence risquerait d'être une diminution de la concurrence en amont et c'est toute la question dans cette affaire.

6. Fusions dans le secteur du détail

Le Président remarque que plusieurs rapports font apparaître que l'analyse des fusions dans le secteur du détail se heurte à des difficultés concernant la définition du marché tant au niveau des achats que des ventes. L'application de certains concepts comme celui de position dominante commune soulève aussi certaines questions et l'évaluation des conséquences que peuvent entraîner, sur les grossistes et les fabricants, des fusions entre détaillants suscite des problèmes. Le Président décide d'examiner tout d'abord le rapport allemand qui présente quatre affaires de fusions et demande des informations complémentaires sur deux d'entre elles ayant fait apparaître un désaccord évident entre le Bundeskartellamt (BKA) et les tribunaux sur les questions de définition du marché et la possibilité d'appliquer le concept de domination oligopolistique d'un marché.

Un délégué de l'Allemagne indique que, dans les années 80, le BKA privilégiait une approche de la définition du marché qui correspondait au point de vue de l'acheteur. Dans les fusions citées par le Président, la puissance d'achat du détaillant est liée au volume des achats et à d'autres facteurs comme un réseau de distribution national ou une centralisation des achats. Les détaillants les mieux placés sur le marché, Metro et Kaufhof, constituent un tel potentiel de vente pour les fabricants que la plupart ne peuvent se permettre de perdre ces enseignes.

Le BKA n'a pas obtenu beaucoup de résultats dans les procédures de réexamen des fusions engagées pour s'attaquer à la puissance d'achat. La définition du marché qu'il privilégiait n'a pas été admise par la Cour suprême dans la procédure qui a conduit au rejet des interdictions de fusion qu'il préconisait (fusions Metro/Kaufhof et Co-op/Wandmaker, par exemple). La Cour a estimé que le marché devait être défini du point de vue du côté opposé du marché : celui des fabricants de produits alimentaires. Il a également estimé que pour évaluer le volume du marché et analyser les possibilités qu'ont les fabricants de passer d'un détaillant à un autre, il est nécessaire de prendre en compte tous les circuits de distribution : commerce en gros, commerce de détail, restauration, exportations, etc.

Concernant les deux fusions autorisées quelques semaines avant la table ronde, Metro/Allkauf et Schikendanz/Karstadt, l'analyse du BKA a montré que la puissance d'achat et la concentration du marché du côté de l'offre avaient tendance à augmenter mais sans atteindre ou dépasser les seuils définis par les tribunaux. Dans ces deux affaires, le BKA a adopté l'approche approuvée par les tribunaux dans la définition du marché. Pour ce qui est du marché géographique concerné, il a considéré que pour les groupes de produits en cause le marché de l'offre était national. Pour ce qui est de la demande, aucune entreprise ni aucun oligopole n'occupait une position dominante pour les groupes de produits examinés Deux des raisons étayant cette conclusion étaient que les parts de marché des cinq principaux détaillants et le volume total de leurs achats n'atteignaient pas 50 pour cent du marché et qu'il existait une forte concurrence dans le secteur du détail.

Le Président note que la position adoptée par le tribunal allemand concernant la définition du marché est en contradiction avec la pratique des autorités de la concurrence dans d'autres pays où les différents circuits de distribution ou les différentes méthodes de commercialisation d'un produit sont très souvent considérés comme des marchés différents. Ce problème pourrait peut-être être évité par la présentation de données empiriques pertinentes. Le Président fait référence notamment au document de séance n°2 dans lequel les États-Unis présentent un cas intéressant lié au blocage de la fusion Office Depot/Staples.

Un délégué des États-Unis remarque que l'affaire de la fusion Office Depot/Staples pose la question classique de la définition du marché de détail – y a-t-il un marché pour toutes les ventes au détail de fournitures de bureau, y compris les différentes tailles des détaillants, plus la vente par correspondance et le commerce électronique, ou existe-t-il un marché unique constitué de trois chaînes nationales. Les

éléments d'appréciation présentés au tribunal par la Commission fédérale du commerce (document de séance n°2 et n°5, portent à penser que chacune des trois grandes chaînes considère les autres chaînes comme ses principaux concurrents, c'est-à-dire qu'il y a bien un marché séparé. Ces chaînes ont opté pour des politiques de prix dans le cadre desquelles elles ont réduit les prix sur les marchés du détail où elles étaient en concurrence et ont défini des zones de prix pour l'application de cette politique. Les faits ont montré qu'en moyenne Staples réduisait ses prix de 13 pour cent sur les marchés de détail où elle était en concurrence avec les autres supermarchés de fournitures de bureau. La Commission fédérale du commerce a démontré que ces différences de prix perduraient et a étayé ses arguments en matière de prix en communiquant des publicités de journaux identiques, à l'exception des prix, diffusées dans deux villes différentes : dans l'une il y avait concurrence entre des supermarchés, mais pas dans l'autre. Les parties ont demandé au tribunal d'admettre que d'autres facteurs pouvaient expliquer les différences de prix et ont présenté leur propre analyse économétrique. Cette analyse posait deux problèmes. Elle contredisait directement les stratégies commerciales et les politiques de prix des parties, ce qui a permis à la Commission fédérale du commerce de présenter une argumentation efficace et de saper la défense opposée par les parties.

Le Président se tourne ensuite vers l'Australie et évoque en particulier une affaire de fusion dans laquelle un grossiste, Davids, s'est lancé dans une série de fusions et d'acquisitions afin de mieux concurrencer les trois principaux détaillants de produits d'épicerie qui représentaient ensemble 77 pour cent des ventes en épiceries sous des marques de distributeurs. L'ACCC ne s'est pas opposée à cette fusion. Le rapport australien examine également l'offre de rachat par Rank Commercial des actifs de Foodland Associated, le seul grossiste indépendant dans l'alimentation implanté dans l'État d'Australie Occidentale. Dans cette affaire, l'ACCC s'est opposée à la fusion. Le Président demande à l'Australie de donner plus de détail sur ces deux cas.

Un délégué australien confirme tout d'abord qu'il existe en Australie une forte concentration dans le secteur de la distribution des produits d'épicerie, qui s'est considérablement renforcée durant les vingt dernières années. Les trois principaux détaillants se sont développés par des acquisitions et grâce à la croissance de leur activité. En réaction apparemment à cette évolution, une quatrième "force" s'est constituée au travers d'une série de fusions, un grossiste indépendant assurant désormais l'approvisionnement des détaillants indépendants restants. Il s'agissait essentiellement de savoir si la fusion de deux grossistes importants approvisionnant les détaillants indépendants pouvait réduire sensiblement la concurrence et notamment s'il existait réellement des marchés séparés pour le commerce de gros et de détail des produits d'épicerie, si une forte concurrence au niveau du détail limitait la possibilité du nouveau grossiste d'augmenter les prix et quelles seraient les conséquences si une des trois grandes chaînes s'orientait vers une activité de gros. La question à laquelle on pensait aussi sans doute tenait à la position que l'ACCC devrait adopter si les fabricants faisaient ensuite valoir qu'ils devraient leur être permis de fusionner puisqu'une concentration de la puissance d'achat limiterait leur possibilité d'augmenter les prix.

Davids a défendu le point de vue que la seule possibilité de survie des détaillants indépendants était de faire partie d'un groupement plus important, reposant essentiellement sur un nouveau grossiste de dimension nationale pouvant apporter les mêmes avantages qu'une grande entreprise en termes d'achats, de marketing, de merchandising, d'agencement des point de vente, de technologie de l'information, etc. L'ACCC ne s'est pas opposée, au départ, à la première de ces acquisitions, mais l'opération a été contestée devant les tribunaux par le Procureur général. Trois propositions ont ensuite été soumises à l'ACCC dans le cadre du dispositif d'autorisation. L'ACCC a défendu le point de vue que la forte pression concurrentielle exercée par les chaînes de distribution intégrées sur l'ensemble des petits magasins gênerait suffisamment le grossiste soi-disant en situation de monopole pour l'empêcher d'utiliser, voire de détenir un pouvoir de monopole. En fait, la conséquence pourrait être le renforcement de la concurrence puisque le

nouveau grossiste réaliserait des économies d'échelle lui permettant de mieux concurrencer les grandes chaînes.

Le rapport examine la question de la définition du marché. Certains estiment que le commerce de gros ne constitue pas un marché séparé, mais qu'il existe un seul grand marché de détail. D'autres considèrent le commerce de gros comme une activité séparée et aussi longtemps qu'est prise en compte la pression concurrentielle sur le grossiste du fait du jeu de la concurrence s'exerçant sur le marché du détail, cette analyse se justifie. L'aspect géographique est mentionné également et toute l'analyse de l'offre et de la demande porte à penser que le marché devrait être considéré à l'échelle des États. Le Tribunal australien de la concurrence a adopté, toutefois, un autre point de vue, considérant que les grandes décisions étaient prises de manière centralisée au niveau national par les grandes chaînes et, dans une certaine mesure, par le nouveau grossiste et qu'elles s'appliquaient à l'ensemble du territoire national même s'il existait des variantes liées aux circonstances locales. Ainsi, il a opté, pour ces raisons entre autres, en faveur de l'existence d'un marché national. Un débat s'est aussi engagé sur les marchés fonctionnels, posant la question de l'étendue de la définition des grandes chaînes de distribution ou encore de la prise en compte ou non de la fonction du gros. L'opinion qui a prévalu est qu'il est préférable de considérer le commerce de gros comme une activité séparée, indépendamment des pressions concurrentielles s'exerçant sur ce secteur.

Une autre affaire citée dans le rapport concernait une des trois grandes chaînes de l'alimentation, Coles, qui envisageait de reprendre le principal grossiste en Australie occidentale et aurait ainsi détenu une part de marché de 70 pour cent. L'ACCC a empêché la fusion.

Le Président appelle ensuite l'attention sur le rapport de la Commission européenne qui comporte une présentation détaillée des motifs de l'opposition de la Commission à la fusion Kesko/Tuko en Finlande. Le Président s'intéresse, en particulier, aux raisons qui ont incité la Commission à penser que la puissance d'achat après la fusion aurait constitué une importante barrière à l'entrée.

Un délégué de la Commission européenne indique que les règles de concurrence de la Communauté en matière d'ententes et d'abus de position dominante sont normalement applicables à l'exploitation abusive de la puissance d'achat. Toutefois, l'application de ces règles risque de poser des difficultés, d'où l'utilité d'intervenir au niveau des fusions. La réglementation en matière de fusions interdit les concentrations qui créent ou renforcent une position dominante, ayant pour conséquence de limiter de manière significative la concurrence dans le marché commun. En vertu de cette réglementation, la Commission s'est opposée à la reprise prévue de Tuko par Kesko. La fusion aurait conféré une position dominante à Kesko (sur la base d'une part de marché de l'entité née de la fusion de 55 pour cent des ventes au détail de biens de consommation courante, plus les effets des ristournes de fidélité et des marques de distributeurs) et aurait empêché un fonctionnement normal du marché.

Après la fusion, Kesko aurait détenu une puissance d'achat considérable, contrôlant l'accès à 55 pour cent au moins des linéaires en Finlande. Agrandie, Kesko aurait été en position d'obtenir des prix auprès de ses fournisseurs ne permettant plus à ses concurrents de s'aligner. Cela aurait eu tendance à décourager la concurrence par les prix sur le marché du détail. Cette situation aurait également rendu plus difficile toute nouvelle entrée sur le marché tant au niveau des fournisseurs qu'à celui de la distribution de biens de consommation courante.

Le Président mentionne au passage le rapport canadien, qui examine un projet de fusion entre SmithBooks et Coles datant de 1994. Le rapport indique : "…étant donné que SmithBooks et Coles sont les deux principales chaînes de distribution de livres au Canada, le Directeur a surveillé la fusion pendant …[une période de trois ans] … notamment en ce qui concerne la puissance d'achat de l'entité née de la fusion par rapport aux éditeurs." Cela semble indiquer qu'on se préoccupe aussi au Canada de la question

de la puissance d'achat dans les affaires de fusion. Après ce commentaire, le Président ouvre le débat sur les comportements anticoncurrentiels des gros détaillants détenant une puissance d'achat.

6.1 Débat général

Un délégué allemand engage la discussion en notant qu'il y a en Allemagne un nombre limité de gros détaillants et qu'une forte concentration est en cours dans ce secteur. Celle-ci soulève des problèmes du point de vue politique et du point de vue de la politique de la concurrence. Il en va de même dans de nombreux secteurs manufacturiers où un processus soutenu de concentration est en cours. Toutefois, au moins une différence importante distingue les secteurs de la distribution et de la production. La mondialisation contribue à préserver la concurrence dans l'industrie manufacturière, mais la même conclusion ne s'applique pas au secteur de la distribution en dépit de l'émergence de quelques chaînes de distribution internationales.

Le délégué français évoque une affaire dans laquelle le Conseil de la concurrence a infligé une amende de trois millions de francs à une entreprise pour un retrait de linéaires. L'hypermarché en infraction utilisait le retrait de linéaires pour tenter d'éviter que son fournisseur n'entre dans le secteur de la grande distribution. Dans cette affaire, l'action sur le marché de l'approvisionnement a eu un effet anticoncurrentiel sur un marché connexe.

Le délégué autrichien évoque une ancienne affaire remontant à quelques années dans laquelle un groupe allemand de la distribution a d'abord acheté un groupe de distribution autrichien puis un autre. Il exigeait parallèlement des fournisseurs qu'ils lui vendent leurs produits aux prix plus bas pratiqués en Allemagne, en les menaçant de perdre leurs ventes à la fois dans ses magasins allemands et autrichiens. Ce type de pressions a eu pour conséquence la fermeture, le rachat ou la réorientation de l'activité vers un autre pays producteur de produits alimentaires.

Le délégué australien remarque qu'en raison de la forte concentration actuelle de la distribution dans son pays, un intérêt considérable est porté, au plan politique, à la question de la puissance d'achat. On entend probablement les mêmes critiques ou commentaires que ceux formulés dans d'autres pays. Premièrement, il est dit que la puissance d'achat est utilisée pour maintenir des prix bas dans le secteur de l'agriculture et dans d'autres secteurs en cours de déréglementation, les prix bas obtenus à l'achat n'étant pas répercutés au niveau du consommateur. Deuxièmement, des pressions politiques et des plaintes contre la pratique de prix d'éviction émanent de détaillants indépendants de taille modeste confrontés à la concurrence des grandes surfaces dans des régions où ils étaient seuls autrefois. Troisièmement, on rencontre des problèmes de conglomérats lorsque de grands détaillants développent leur activité dans des secteurs voisins comme la banque, la pharmacie, la distribution de magazines ou d'essence. Enfin, se pose la question de la vigueur de la concurrence dans la grande distribution. Il est probable que toutes ces questions, et d'autres, feront l'objet d'études et susciteront une grande attention de la part des petites entreprises.

Le délégué des Pays-Bas réagit aux commentaires australiens en notant que dans son pays également il existe un degré de concentration important dans le secteur du détail. Il se peut toutefois que cette concentration ne pose pas de problème de puissance d'achat du fait que la forte concurrence entre les détaillants génère des gains répercutés au niveau des consommateurs. Le délégué se demande si c'est aussi le cas en Australie ou si, dans la négative, des pressions politiques sont exercées par les consommateurs ou les petites entreprises.

Un délégué australien rappelle qu'il a évoqué la multiplication des plaintes émanant de petites entreprises ou de fournisseurs plutôt que de consommateurs. Il pense que certaines des accusations de non-

répercussion des gains sont simplement dues au fait que les détaillants nivellent les effets des fluctuations des prix agricoles. En même temps, il exprime des doutes quant au degré de concurrence réel dans la grande distribution.

Le délégué autrichien remarque que la concentration dans son pays est l'une des plus fortes en Europe dans le secteur de l'alimentation de détail et constate qu'il est clair que les baisses de prix de gros dans l'alimentation qui ont suivi l'entrée de l'Autriche dans l'Union européenne n'ont pas été répercutées rapidement sur le consommateur.

Le Président note que les pressions politiques auxquelles le délégué australien fait référence s'exercent dans différents pays européens mais qu'elles découlent probablement autant d'un désir de protection contre la concurrence que de préservation de la concurrence. Certaines réactions politiques ont impliqué l'adoption de nouvelles lois, peut-être mal avisées, qui seront évoquées dans la dernière partie de la table ronde.

Le délégué du Royaume-Uni note que dans les exemples de puissance d'achat présentés, où celle-ci est exploitée, abusivement ou non, pour renforcer le pouvoir de vente, les entreprises concernées détiennent déjà un tel pouvoir. Cette remarque amène à se poser la question suivante : la puissance d'achat pose-t-elle seulement problème lorsque l'acheteur détient aussi un pouvoir de marché en tant que vendeur ? Le Président soumet la question aux États-Unis dont un des délégués reconnaît que les exemples qu'il a utilisés amène effectivement à se poser cette question. Il ajoute que les autorités de la concurrence aux États-Unis tendent à rechercher un fondement objectif pour déterminer l'existence d'un pouvoir de marché, c'est-à-dire qu'il faut prouver un pouvoir de monopole ou un pouvoir de monopsone, ou les deux. Ces deux formes de pouvoir sont souvent, mais pas toujours, associées.

Le délégué de la Suisse estime que les problèmes de puissance d'achat surviennent principalement dans des économies relativement développées, comme suite à des erreurs importantes commises dans la politique de la concurrence ou la régulation de l'économie. Il y a une décennie, par exemple, lorsque la concentration du commerce de détail a commencé à progresser rapidement en Suisse le gouvernement a mis en œuvre des mesures permettant aux petits détaillants et fabricants d'adopter un comportement similaire à celui des cartels visant à imposer des prix de détail, etc. Ces mesures ont eu un effet exactement contraire à celui escompté. Elles ont fragilisé encore plus les petits détaillants et fabricants et permis à la grande distribution d'accroître rapidement ses parts de marché. L'évolution a été telle que de réels problèmes de puissance d'achat sont apparus. Le délégué se pose la question de savoir si des erreurs comparables ont été commises dans d'autres pays.

Le Président souligne que le délégué suisse a soulevé un point très important et note que la France a fourni un autre exemple. La Loi Royer en France a été une tentative visant à empêcher les grandes surfaces de porter préjudice aux petits détaillants, mais cette loi limitant les ouvertures de grandes surfaces a eu comme effet pervers d'accroître la concentration dans le secteur de la distribution de détail et d'accentuer l'aspect politique du problème de la puissance d'achat. Différents rapports nationaux montrent que les mêmes effets pervers ont été constatés ailleurs. Mais ce n'est qu'un aspect. L'expérience des États-Unis témoigne que, même dans un contexte de relative liberté et d'absence de restrictions, la puissance d'achat peut entraîner des problèmes de concurrence. Ainsi, les barrières à l'entrée dans la distribution n'expliquent peut-être pas tout.

7. Les groupements d'achat et de vente

Le Président présente le sujet en notant que, face à la puissance d'achat que sont censées créer les fusions dans la grande distribution, certains pays ont fait preuve, à des degrés divers, d'une certaine

tolérance concernant les accords d'approvisionnement conclus entre petits détaillants pour s'aligner sur la puissance d'achat de leurs grands concurrents. Il demande à l'Australie de commencer l'examen de ces questions.

Un délégué australien confirme que son pays n'est pas trop préoccupé par les coopératives. Plusieurs problèmes juridiques ont été posés concernant l'application aux coopératives de différentes interdictions absolues (per se) relatives à la fixations des prix, etc. Lorsque l'ACCC est saisie d'une affaire concernant une coopérative, les restrictions imposées aux adhérents sont examinées du point de vue de leurs effets concurrentiels éventuels, notamment ceux pouvant résulter du fait que les adhérents ne sont pas autorisés à négocier séparément avec les fabricants. L'ACCC a également le souci d'empêcher que soient conclues des ententes illicites de vente en coopératives. Il a parfois eu à connaître des différends liés à des accords de coopératives dans lesquels les membres regroupaient leur puissance d'achat et étaient ensuite obligés d'adopter des comportements anticoncurrentiels ; il a constaté que les dispositifs de règlement des différends peuvent être utiles dans ce type d'affaires.

Le Président passe ensuite à l'examen de l'exemption par catégorie appliquée par le Danemark aux groupements d'achat de détaillants lorsque ces groupements représentent moins de 25 pour cent du chiffre d'affaires du produit concerné.

Le délégué danois explique que l'exemption par catégorie se compose d'une liste blanche, les autorisations, et d'une liste noire, les interdictions. La liste blanche autorise les groupements de détaillants à des fins de création de concepts de chaîne de magasins et couvre des aspects comme l'agencement des magasins, l'assortiment de produits, les prix maximaux dans les campagnes de publicité communes, la formation du personnel, les marques de fabrique, les services après-vente, les systèmes administratifs, les cartes commerciales, etc. Elle autorise aussi les clauses de non-concurrence limitant les prises de participation dans des chaînes concurrentes ; les campagnes de publicité, par exemple à la télévision, et l'application de prix maximaux pour les biens faisant l'objet de campagnes publicitaires. A l'inverse, l'exemption par catégorie ne s'applique pas si les détaillants ne sont pas autorisés à élargir l'assortiment de produits standard d'une chaîne, n'ont pas le droit de faire des campagnes de publicité locales ou de fixer les prix de produits ne faisant pas partie des campagnes de publicité communes. Elle ne s'applique pas non plus si des candidats à l'adhésion au niveau local se voient opposer un refus pour des raisons non objectives. Il existe aussi une règle particulière concernant les clauses de sortie – les membres doivent être libres de quitter la chaîne dans un délai de six mois. Enfin, des dispositions, rarement appliquées, concernent le retrait au cas par cas de l'exemption par catégorie.

Le Président examine ensuite l'exemption par catégorie de la Suède, la comparant au dispositif existant au Danemark. Le rapport suédois fait aussi référence à un débat intéressant sur la question de savoir si l'exemption par catégorie n'est pas trop étroite.

Le délégué suédois évoque tout d'abord la législation suédoise sur la concurrence, qui s'inspire étroitement des dispositions de l'Union européenne sur la concurrence mais prévoit en outre une exemption par catégorie pour les chaînes reposant sur un engagement volontaire. Cette exemption n'est applicable qu'en dessous de certaines parts de marché. Concernant les regroupements dans le cadre de coopératives ayant une part de marché inférieure à 20 pour cent du marché suédois, l'exemption par catégorie autorise le groupement des achats, la publicité commune, la fixation de prix dans des campagnes de publicité communes (mais les détaillants doivent toujours rester libres de vendre à des prix inférieurs aux prix fixés), les méthodes communes de calcul des prix n'allant pas jusqu'à la fixation de prix de détail, l'obligation de ne pas revendre des biens achetés en commun à des détaillants extérieurs à la coopérative et la collaboration au niveau de la fourniture de services administratifs et financiers ou d'autres services pour l'aménagement des magasins ou la formation du personnel. Si les parts de marché se situent entre 20 et 25 pour cent, la tolérance en matière de coopération au niveau des prix est moins importante. Par exemple,

la fixation conjointe de prix dans le cadre de campagnes publicitaires communes ne peut avoir lieu que lorsque les biens sont achetés en commun et que la promotion repose essentiellement sur les prix.

Certaines conditions doivent être obligatoirement remplies pour bénéficier de l'exemption par catégorie. L'accord entre membres doit être écrit et la coopération en matière de prix dans le cadre de publicités communes n'est pas irrévocable. Si la coopération comprend d'autres accords susceptibles d'être anticoncurrentiels et non couverts par l'exemption par catégorie, la chaîne est tenue de saisir l'organisme chargé de la concurrence pour obtenir une exemption individuelle.

Depuis que l'exemption par catégorie a été introduite, des pressions se sont exercées en faveur d'une extension de son application, les chaînes de distribution détenant une part de marché relativement importante souhaitant en bénéficier. Ces chaînes ont aussi déclaré que le cadre étroit de l'exemption empêche une coopération importante qui pourrait augmenter leur compétitivité dans le cadre d'une franchise ou d'autres chaînes de points de vente multiples. L'exemption par catégorie a aussi été critiquée par sa définition du marché qui ne correspond pas au concept de marché utilisé dans la législation générale sur la concurrence et tend à sous-estimer les parts de marché des chaînes. Une évaluation est actuellement en cours au ministère de l'Industrie et du Commerce dont les conclusions sont attendues avant la fin de 1998. On étudiera la possibilité d'abandonner les seuils de part de marché et peut-être de modifier d'autres critères issus des règles de la concurrence de l'Union européenne. Il semble raisonnablement certain que la définition du marché sera modifiée pour l'aligner sur la définition habituelle énoncée dans la Loi sur la concurrence.

Le Président souligne que le rapport des États-Unis contient un examen des groupements d'achat coopératifs et note que la fixation collective des prix a parfois été autorisée lorsqu'un groupement ne détient pas de pouvoir de marché. Il cite également une affaire en Italie mettant en évidence la façon dont les négociations menées par un groupement d'achat et les conditions auxquelles les parties prenantes peuvent effectuer des achats influe sur la concurrence au niveau des fournisseurs et des détaillants. L'organisme italien chargé de la concurrence a adopté une approche fondée sur la règle de raison et a décidé que rien ne s'opposait à la pratique des groupements d'achat.

8. Des dispositions spécifiques relatives à l'abus de dépendance économique sont-elles utiles dans la législation sur la concurrence ?

Le Président remarque que cette section a trait à des questions qui, pour de nombreux membres, constituent de véritables casse-tête. A son avis, le sentiment général des participants est qu'il n'est pas souhaitable, en dépit des pratiques de certains pays, que des dispositions spécifiques traitent de la puissance d'achat comme d'un abus de dépendance économique. Le rapport italien comporte un récit très vivant de la bataille que se sont livrés Centromarca, d'un côté, et l'organisme chargé de la concurrence et l'association des détaillants, de l'autre. Cette bataille concernait l'adoption de dispositions juridiques spécifiques traitant de la puissance d'achat.

Le délégué italien fait référence au long débat engagé au Parlement sur une loi relative aux fournisseurs industriels. Ce débat n'a pas porté directement sur les relations entre détaillants et fabricants, mais a été davantage axé sur les relations entre des grands fabricants s'approvisionnant auprès de fabricants plus petits. Certains de ces sous-traitants des fournisseurs ont estimé qu'ils n'ont guère d'autres possibilités que de traiter avec les grands fabricants et se sentent souvent contraints de conclure des accords tacites impliquant de longs délais de paiement. La loi débattue au Parlement, un texte très "populiste" à certains égards, comporte des dispositions ayant des conséquences négatives et positives sur la concurrence. Deux dispositions favorables ou neutres sont les suivantes : exiger des accords écrits ayant force exécutoire et fixer les paiements à 60 jours d'échéance.

L'introduction dans la loi d'interdictions relatives aux abus de dépendance économique a été longuement débattue. Il a été considéré que ce type de dispositions serait absolument en phase avec le contenu de la loi et il a été proposé de les appliquer à l'ensemble des fournisseurs, pas seulement aux sous-traitants des fournisseurs visés dans les autres parties de la loi. Le délégué italien n'est pas convaincu que de telles mesures soient réellement nécessaires étant donné la structure très fragmentée du commerce de détail en Italie.

Les autorités de la concurrence ont instamment demandé que les dispositions relatives à l'abus de dépendance économique soient expressément liées aux conditions de marché, c'est-à-dire qu'elles constituent la version du point de vue de l'acheteur des interdictions en matière d'abus de position dominante, ou que l'on se passe de ces dispositions en précisant simplement que les interdictions d'abus de position dominante visent à protéger les vendeurs comme les acheteurs. Malheureusement, les dispositions adoptées par le Parlement en juin 1998 ne font pas référence à l'incidence sur le marché. Étant donné que ces dispositions concernent principalement des relations contractuelles, l'organisme chargé de la concurrence a renoncé à son souhait antérieur de les voir inclure dans la législation générale sur la concurrence. Les dispositions relatives à l'abus de dépendance économique sont maintenant applicables dans le cadre d'une procédure d'arbitrage au sein des Chambres de commerce. Aucune affaire n'a encore retenu l'attention des autorités de la concurrence.

Le Président se tourne vers le Portugal qui, peut-être pour des raisons de contexte local, est particulièrement intéressé par la question de la puissance d'achat. La législation spécifique du Portugal en matière de pratiques d'achats abusives comporte des interdictions absolues (per se) que le Président souhaite connaître plus en détail.

Un délégué portugais précise que l'interdiction des pratiques d'achat abusives a été introduite récemment dans la législation portugaise qui vise également d'autres pratiques commerciales et interdit, entre autres, la discrimination par les prix, le refus de vendre et les ventes au-dessous du prix de revient. Ces pratiques sont à juste titre jugées illégales *per se* étant donné leur caractère essentiellement privé, leur incidence limitée sur la concurrence et les difficultés rencontrées antérieurement pour saisir le Conseil de la concurrence d'affaires concernant un abus de dépendance économique et apporter des preuves. Ces difficultés étaient dues au fait que les plaignants craignaient des représailles ainsi qu'à la nécessité de recourir à une définition du marché reposant sur la demande ou d'évaluer l'absence d'options équivalentes. L'article 4(a) de la loi susmentionnée interdit d'obtenir d'un fournisseur des conditions exorbitantes en matière de prix, de modalités de vente ou de coopération commerciale. Une autre disposition qualifie "d'exorbitants" toutes les conditions de vente et de paiement ou tous les niveaux de prix qui bénéficient de manière disproportionnée aux acheteurs compte tenu de leur part dans le chiffre d'affaires du vendeur et de la valeur des services liés aux achats. L'application des dispositions relatives aux pratiques d'achat abusives est confiée à la Direction générale de la concurrence commerciale qui remplace le Conseil de la concurrence.

Un autre délégué portugais ajoute que l'évolution à laquelle il a été fait référence précédemment témoigne de la nécessité pour les autorités de la concurrence de repenser leur politique en matière de puissance d'achat. Même si la grande majorité des conduites visées concernent des intérêts privés, dans certains cas il est porté atteinte à la concurrence, mais il est difficile d'introduire ces affaires dans le champ d'application de la législation générale sur la concurrence. Il existe réellement un renforcement du pouvoir des distributeurs qui imposent des conditions aléatoires la plupart du temps sans compensation. Dans des situations où le pouvoir de négociation est déséquilibré, les coûts et les charges sont transférés en amont ce qui a une incidence négative sur la viabilité financière des entreprises concernées. Afin de restaurer l'équilibre, il a été jugé nécessaire de qualifier certaines conduites de pratiques de négociation abusives et de les sanctionner par des interdictions qui ne font pas partie de la législation sur la concurrence.

Le Président note que l'Espagne a également des dispositions spécifiques concernant l'abus de dépendance économique et d'autres réglementations du commerce de détail visant à contrôler ce type de comportement. Il demande à l'Espagne plus de détails sur ces dispositions et sur leur application.

Le délégué espagnol attire l'attention sur la Loi 3/1991 du 10 janvier visant les pratiques déloyales. L'article 16.2 qualifie l'abus de dépendance économique de pratique déloyale lorsque les fournisseurs ou les clients n'ont pas d'autres options. Cette loi est appliquée par les tribunaux civils. En outre, la Loi 7/1996 sur la réglementation du commerce de détail concerne les conditions de paiement, les ventes à perte et les heures d'ouverture. Les dispositions relatives à la vente à perte sont appliquées elles aussi par les tribunaux civils. Des instances régionales font respecter les dispositions de la Loi 7/1996. Le Tribunal pour la protection de la concurrence doit présenter un rapport, qui n'a pas un caractère exécutoire, avant que les administrations régionales n'autorisent l'implantation d'un nouvel hypermarché.

Le Président déclare qu'étant donné que les dispositions relatives à l'abus de dépendance économique ou l'abus de puissance d'achat sont difficiles à appliquer aux termes de la législation sur la concurrence, pour les raisons qui ont été exposées par les délégués italien et portugais, la pression politique pousse à en faire des interdictions absolues appliquées par d'autres instances. Il estime que la France constitue un bon exemple en la matière. Ce pays a désormais introduit des interdictions relatives à l'abus de position dominante et l'abus de dépendance économique dans sa loi sur la concurrence, qui sont complétées par une série d'interdictions absolues. Le Président demande à la France une présentation plus détaillée de son dispositif.

Le délégué français indique que bien que les interdictions d'abus de position dominante et d'abus de dépendance économique prévues par la législation générale sur la concurrence puissent théoriquement être appliquées à la puissance d'achat, leur application dans la pratique pose de gros problèmes car il est difficile de démontrer que l'acheteur a une position dominante et que le vendeur ne dispose pas de solutions équivalentes. C'est le manque d'efficacité des instruments qui a conduit à l'adoption de nouvelles lois en 1996. L'objectif était de réduire quelque peu le pouvoir vertical et horizontal de la grande distribution. La première des deux nouvelles lois, centrée sur l'aspect vertical, interdit les pratiques discriminatoires et en même temps libéralise le régime du refus de vendre. Elle limite également les conditions dans lesquelles les distributeurs peuvent rompre des relations commerciales et introduit une plus grande transparence en exigeant que tous les avantages financiers soient formulés par écrit et en clarifiant les conditions de facturation.

En ce qui concerne la concurrence horizontale entre la grande distribution et les petits commerces, la situation est plus compliquée. En particulier, une interdiction absolue a été adoptée concernant les prix abusivement bas ayant des effets d'éviction. Cette interdiction s'applique à des biens qui sont transformés ou modifiés par le magasin, par exemple le pain, pour lesquels il serait difficile de contrôler des prix prétendument bas à l'aide d'interdictions d'abus de position dominante. Elle n'a pas conduit à la mise en évidence de nombreuses affaires. Parallèlement à l'interdiction de réduction abusive des prix, la loi a renouvelé le gel sur l'implantation de nouvelles grandes surfaces. L'objectif est de protéger le petit commerce. Cette loi a eu quelques effets relativement inattendus. Elle a fortement augmenté la valeur des grandes surfaces existantes et encouragé une plus grande concentration entre ces distributeurs, qui, à son tour, a eu tendance à faciliter la collusion tacite entre eux et à accroître leur puissance d'achat.

Le Président se tourne enfin vers l'Allemagne qui a modifié sa législation sur la concurrence de manière à influer sur l'exercice de la puissance d'achat.

Un délégué allemand précise tout d'abord ce qui n'entre pas dans la réforme allemande. Le BKA a été fortement incité par les milieux politiques à redoubler d'efforts pour inverser l'équilibre des forces

sur le marché, c'est-à-dire réduire la puissance d'achat et considérer le pouvoir de marché des vendeurs. Le BKA a refusé de suivre cette voie, de sorte que la puissance d'achat n'est pas en soi une violation de la législation allemande sur la concurrence. Les raisons du refus du BKA sont que la puissance d'achat ne peut pas être éliminée par la simple adoption de dispositions juridiques et qu'en tout état de cause, la puissance d'achat profite souvent au consommateur. Toutefois, le BKA reconnaît qu'il existe de nombreux abus de la puissance d'achat que la législation sur la concurrence devrait chercher à limiter. L'Allemagne a donc modifié sa législation sur la concurrence dans deux domaines. Une nouvelle disposition a été ajoutée concernant les ventes au-dessous du prix de revient, qui accentue et améliore les dispositions déjà contenues dans la loi. L'interdiction de vendre au-dessous du prix de revient ne s'applique qu'aux cas où il existe un pouvoir de marché. Le changement le plus intéressant concerne la procédure et est destiné à encourager les plaignants afin que leur action aboutisse. Ceux-ci ont désormais l'assurance de pouvoir garder l'anonymat lors du dépôt de plainte. Le BKA peut même demander au tribunal une autorisation de perquisition sans citer le nom du plaignant.

Le Président précise qu'il existe un autre rapport auquel il n'a pas été fait référence, celui de la République tchèque. Ce rapport pose un certain nombre de questions auxquelles l'organisme tchèque chargé de la concurrence espère que la table ronde apportera une réponse.

Le BIAC indique que la puissance d'achat peut avoir des conséquences négatives sur la recherche-développement, l'innovation et la différenciation de produits. La note de référence évoque ces questions mais avec un grand scepticisme. Une étude a été récemment réalisée sur le sujet qui sera communiquée à l'OCDE. Cette étude défend l'idée que l'abus de puissance d'achat et le phénomène des marques de distributeurs peuvent dans un premier temps présenter un avantage pour le consommateur mais lui être préjudiciables à long terme.

Le Président se déclare, pour sa part, sceptique quant aux effets de la puissance d'achat sur la rentabilité, la recherche-développement et l'innovation. En France, la principale victime présumée de la puissance d'achat, les fabricants de produits alimentaires, constitue apparemment un secteur très innovant. Ce n'est évidemment qu'un petit élément de preuve qui ne contredit pas obligatoirement l'étude citée par le BIAC.

9. Résumé du Président

Le Président note que la table ronde a porté sur un ensemble de questions concernant probablement davantage la loyauté que l'efficacité de la concurrence. Certains abus de la puissance d'achat entrent certainement dans la catégorie des pratiques déloyales. Dans la plupart des affaires, les problèmes ne relèvent pas de l'action antitrust même si les délégués estiment que la puissance d'achat peut avoir des effets négatifs indirects sur la concurrence. Le délégué britannique a soulevé une question très importante lorsqu'il s'est interrogé sur le point de savoir si la puissance d'achat peut compromettre l'efficacité lorsque l'acheteur ne détient pas de puissance de vente.

Indépendamment de l'idée que les autorités de la concurrence peuvent avoir de la puissance d'achat, il est évident que d'énormes pressions politiques s'exercent dans certaines juridictions pour que la question soit abordée. Le débat a été très intéressant en ce qui concerne la diversité des options possibles. Les autorités de la concurrence peuvent rester à l'écart et ne pas s'en préoccuper, un peu comme le délégué italien l'a précisé, mais ce n'est pas une manière d'éviter que les problèmes se posent. Ils surviennent alors dans un autre domaine. Elles peuvent aussi essayer d'introduire une certaine logique économique dans le raisonnement des hommes politiques qui votent les lois. C'est ce qui a été tenté en France, où il faut encore démontrer une incidence sur le marché pour que la plupart des interdictions liées à la puissance d'achat soient applicables. Il n'est pas certain que cela soit satisfaisant. Lorsque les lois adoptées ne permettent,

dans le meilleur des cas, la mise en évidence que de peu d'affaires, une nouvelle loi est introduite prévoyant des interdictions absolues. En bref, lorsque les autorités de la concurrence choisissent de rester principalement centrées sur l'efficacité économique, les hommes politiques peuvent réagir en habilitant d'autres instances gouvernementales à prendre des mesures, parfois mal avisées. La concurrence peut ainsi souffrir davantage que si l'organisme chargé de la concurrence reste la seule juridiction chargée des questions de puissance d'achat, en acceptant toutefois de se placer un peu en dehors du cadre strict du problème de l'efficience économique.